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Implication of Survivorship in Contingent Gifts to a Class - Reese v. Reese Evans v. Safe Deposit and Trust Co.

IMPLICATION OF SURVIVORSHIP IN CONTINGENT GIFTS TO A CLASS

Reese v. Reese[1]

Evans v. Safe Deposit and Trust Co.[2]

The above recent Maryland cases present an interesting problem of construction in connection with gifts to a class as distinguished from gifts to individuals. An examination of the Court's construction in each case, as concerned with class gifts and an implied condition precedent of survivorship, raises the question why such an implied condition is held to be a hard and fast rule when there is a contingent gift to a class and not when the gift is to an individual.

In the *Reese* case, the will, executed October 19, 1889, devised to the testator's unmarried son, John B. Reese, a life estate in his farm (with certain conditions not here important). The will then contained the following provision: "In case of the death of Mary L. Reese [testator's daughter], John B. Reese, and the wife of John B. Reese, then the whole of said property to go to the children of John B. Reese and wife, if any, and if no children, then the said property to revert to my grandchildren, the issue of both of my sons, Charles A. Reese and Francis D. Reese, as tenants in common, the issue of said sons to take same per capita."

Under the provision, creating an alternative contingent remainder in the grandchildren of the testator, there were two possible constructions before the Court. First, it could be construed as a gift to a class, *i.e.*, a contingent gift to a class consisting of the grandchildren of the testator, dependent upon John dying without children surviving. As the Court pointed out in its opinion "the cardinal rule for testamentary construction is that the intention of the testa-

[1] 58 A. (2d) 643 (Md. 1948).
[2] 58 A. (2d) 649 (Md. 1948).

tor must be gathered from the language of the entire instrument, read in the light of the surrounding circumstances at the time when the will was made." The testator used the term "grandchildren", which could very well be a class designation. It could be said that he intended all of his grandchildren, the issue of both of his sons Charles and Francis, to share in the gift. The difficulty arises because the Court is dealing with intention and must gather that intention from the words used and surrounding circumstances. Even under the accepted Maryland definition of class gifts the Court could very well have construed the remainder as a gift to a class. Maryland has consistently applied Jarman's definition of a class gift as a "gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons".[3]

However, the Court was influenced by certain other factors. If the gift has been construed as a gift to a class, then the Court would have been faced with the rule laid down in *Demil v. Reid*[4] that "in a case . . . where there is an ultimate limitation upon a contingency, to a class of persons plainly described, and there are persons answering that description *in esse* when the contingency happens, they alone can take".[4a] Under this rule, the Court implies as a condition precedent that the remaindermen must survive until the happening of the contingency. Therefore, Donald B. Reese, son of Francis D. Reese, being born after the death of the Testator, could enter the class and participate in the gift, whereas Rev. Clarence Reese son of Charles A. Reese, having died before John, could not be a member of the class.

The second possible construction, which is the one the Court took, is that it was a gift to individuals, contingent upon John's dying without children. Under such a construction, several Maryland cases have stated that "it is settled that all contingent estates of inheritance, as well as springing and executory uses, and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assign-

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[3] JARMAN, WILLS (6th Ed.) 232; Dulaney v. Middleton, 72 Md. 67, 19 A. 146 (1890); Stahl v. Emery, 147 Md. 123, 126, 127 A. 760 (1925); Reese v. Reese, *supra*, n. 1; MILLER, CONSTRUCTION OF WILLS (1927) Sec. 67.

[4] 71 Md. 175, 17 A. 1014 (1889).

[4a] *Ibid*, 191.

able".[5] There would be no condition precedent of survival to the time of John's death without issue. Donald B. Reese, having been born after the testator's death would be excluded. Appellant, however, as widow of Rev. Clarence Reese would participate because on his death his contingent interest passed to the Appellant as his sole legatee.

The Court in construing the gift as a contingent gift to individuals rather than as a gift to a class, was influenced by the possible effect of the Rule against Perpetuities and the use of the word "revert". The Court stated that "if it were held in this case that the estate does not vest until the time for possession and enjoyment, the limitation would be within the Rule against Perpetuities, for it might have been possible that John B. Reese would marry a woman not yet born at the time of the testator's death and she might live longer than 21 years after John's death". However, this is not true, for under the limitation, the property would vest in interest in the grandchildren on the death of John without issue, subject only to the postponement of enjoyment during the life estate in his wife if she survived him, or during the life estate of Mary, if she survived him. The Rule does not require the vesting in possession or enjoyment within the maximum period, but only the vesting in interest.[5a] Here the interest must vest, if at all, on the death of John, the measuring life. By the terms of the will, on his death without children, the final remainder was to "revert to" the grandchildren at that point. In case John should die leaving a widow, "then the widow shall have what remains from the income after sufficient is taken out for the support of Mary." In any event, on the death of John, the remainder became vested in interest, although the vesting in possession or enjoyment might have been postponed for a longer time to let in the life estate of either Mary or John's widow, in the event either survived John. However, under either alternative construction, the remainder would vest in interest immediately on John's death and thus could not violate the Rule against Perpetuities.

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[5] 4 KENT, COMMENTARIES, 261; Snively v. Beavans, 1 Md. 208 (1851); Hambleton v. Darrington, 36 Md. 434 (1872); Buck v. Lantz, 49 Md. 439 (1878); Fisher v. Wagner, 109 Md. 243, 249, 71 A. 999 (1909); Safe Deposit and Trust Company v. Bouse, 181 Md. 351, 357, 29 A. (2d) 906 (1942); Hammond v. Piper, 185 Md. 314, 318, 44 A. (2d) 756 (1945).

[5a] GRAY, RULE AGAINST PERPETUITIES (4th Ed.) Sec. 118; Curtis v. Baptist Union Ass'n, 176 Md. 430, 438, 5 A. (2d) 836 (1939); Safe Deposit & Trust Co. v. Sheehan, 169 Md. 93, 107, 179 A. 536 (1935).

The Court was equally influenced by the words "to revert" to the grandchildren, which the Court held suggested the idea that the estate was to return to designated persons who might inherit if the testator had no grandchildren through John, *i.e.*, that "revert" means to return to designated persons and not to go to a future class. It might be added also that the Restatement of Property requires for a class gift that the creator of the gift be "group-minded".[6] Here the testator did not bequeath the gift to all of his grandchildren, but singled out the issue of his sons Charles and Francis, without mentioning his daughter Mary. Perhaps it could be argued that the testator lacked the requisite "group-mindedness", and that in truth it was a gift to individuals.

In the *Evans* case the father by deed granted unto Henrietta, her heirs and assigns, a described piece of ground in Baltimore, in trust for Julia Rogers for life, then to her children, but if she should die "without issue living" then to the children of Samuel Scribner, the settlor, the children of a deceased child to take their parent's share. Later the settlor executed his will disposing of all of his property remaining after the execution of the deed. At the time the deed was executed, the settlor had two living children, Henrietta and Mary, in addition to Julia Rogers, who was a child of a deceased daughter. Henrietta died unmarried in 1906, leaving her estate to Julia Rogers. Mary died in 1899 leaving four children, all of whom died before the life tenant, Julia Rogers, who died in 1944 without issue. Appellees are the persons who would be entitled to any interest passing under the testator's will or any interest in the two children Henrietta and Mary which would be transmissible on their deaths. Appellants are the heirs of the settlor as of 1944, when Julia Rogers died.

Again the Court had before it two possible constructions. It could construe the deed as creating an alternative contingent remainder to a class consisting of the settlor's children or their descendants, if Julia died without issue. Under such a construction, the *Demil v. Reid* rule would again be in focus and since neither Henrietta nor Mary nor their descendants survived until the death of Julia without issue, the alternative contingent remainder to the settlor's children would fail. Appellants argued for this construction and they contended that this left the settlor a possibility of reverter rather than a reversion and such an interest was not devisable and vested in the settlor's

[6] RESTATEMENT, PROPERTY (1940) Sec. 279.

heirs as of 1944, when Julia died. The Court could possibly construe the gift as one to individuals, for at the time of the execution of the deed, the settlor had only two living children, Henrietta and Mary. Under such a construction, both Henrietta and Mary would take a transmissible interest in a contingent remainder, as held in the *Reese* case, so that the Appellees would be entitled to their shares as the heirs and devises of Henrietta and Mary. The Court refused to construe it as a gift to individuals but held "It is sufficient to assume, without deciding, that the deed did make a class gift to 'children', conditioned upon survival".[6a] Thus acting under the impact of the rule laid down in *Demil v. Reid* the Court assumed that survival up until Julia's death without children in 1944 was a condition precedent. Since Henrietta and Mary both predeceased Julia, the Appellees claiming under them would be excluded. However, the Court held that the settlor retained a reversion and not a possibility of reverter and that such interest passed by the settlor's will to the Appellees. Thus the Appellees acquired the property under another legal construction other than the one under consideration.

In comparing these two cases, it is noted that the Court had before it in both the problem of construction as to whether there was a contingent gift to a class or to individuals, and the resulting ramifications of the *Demil v. Reid* rule. The facts of the two cases, the use of group descriptions, put the cases somewhat on equal parity. In the *Reese* case the Court held that it was a gift to individuals and thus there was no implication of survivorship as a condition precedent. In the *Evans* case, the Court held that it was a gift to a class and thus contingent upon survivorship. Such a comparison immediately raises the question, why the implication of survivorship is the one case, when it is a gift to a class, and not when it is a gift to individuals?

One writer contends that there should be no fixed rule of law that a contingent class gift cannot be so created that, if a member of a class dies before the contingency happens, his interest will pass to his executors, administrators, heirs, or devisees.[7] In reading the cases it is often difficult to determine just how the courts approach the problem; whether the courts are influenced by the rule in determining whether it is a class gift, or whether, forgetting the implication of survivorship, they construe the

[6a] *Supra*, n. 2, 654.

[7] 2 SIMES, FUTURE INTEREST (1936) Sec. 391.

limitation as being to a class or to individuals, and then apply the *Demil v. Reid* rule if it is a gift to a class. Clearly, if the testator expressly provides for survival, then the members must survive the contingency. In most cases it is a problem of construction, in which the courts are influenced by the general tenor of the entire instrument, in the light of the surrounding circumstances. However, it is urged by Simes that there should be no fixed rule of law as seems to be the rule of *Demil v. Reid.* He points out that "it is believed that such authority as there is to the contrary is due to one of two things:

> "1. It may be a result of a failure to distinguish between contingent, meaning subject to the particular condition precedent that the donee survive the period of distribution. The courts tend to reason thus; this interest is clearly contingent, being subject to a condition precedent. It being contingent, the donee must survive the period of distribution. . . . 2. May in part be due to a tendency to assume that a class gift is contingent, so long as the class may still increase".[8]

Under the rule of *Demil v. Reid,* two contingencies are applied where the creator only imposed one. For example, in the *Evans* case the testator imposed the contingency that Julia die without issue living, if so, then the class takes. The Court superimposes the second contingency that the members of the class survive and that only those persons answering the description *in esse* when the contingency happens can take. Why should the Court imply what the settlor could very easily have expressed had that been his intent? If we would strike down the first contingency, then the remainder would be a vested one and the rule that the law favors the early vesting of estates comes into play, and the requirement of survival to the time of vesting in possession would not be implied, so that the children would have a transmissible interest.[9] This suggests that the second contingency should not be implied. As one writer so aptly put it, "when a testator has a real intention, it is not once in a hundred times that he fails to make his

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[8] *Ibid,* Sec. 391.

[9] MILLER, CONSTRUCTION OF WILLS (1927) Sec. 222; Tayloe v. Mosher, 29 Md. 443 (1868); Lewis v. Payne, 113 Md. 127, 77 A. 321 (1910); Wilson v. Pichon, 162 Md. 199, 159 A. 766 (1932); Plitt v. Peppler, 167 Md. 252, 173 A. 35 (1934); Cole v. Safe Deposit & Trust Co., 143 Md. 90, 95, 121 A. 911 (1923); Curtis v. Baptist Union Ass'n., 176 Md. 430, 5 A. (2d) 836 (1939).

meaning clear. . . . When the judges say that they are interpreting the intention of the testator, what they are doing ninety-nine times out of a hundred is deciding what shall be done with his property on contingencies that he did not have in contemplation".[10] The Court itself in the *Evans* case cited Miller to the effect that the result of the rule sometimes is that children of deceased children are excluded from their parents' share, "an unfortunate result, based upon a very technical rule"[11] It is logical to assume that the testator in making the gift to "children" or "nephews", and the like, had in mind living persons whom he intended should share his bounty in the event the first taker failed to have issue. This logical assumption is strengthened by the fact that normally the desire of the testator is to give his property to those he knows.

On the other hand, using a group designation is an indication of an intent to benefit as many as possible. Applying both intentions, it becomes sound to allow those members of the class in existence when the testator died to take a transmissible interest rather than to refuse to open the class until the happening of the contingency and then immediately close it, as is the rule under *Demil v. Reid*, where the gift is otherwise contingent. If we allow those members of the class in existence at the date of the testator's death to share and those born thereafter, we give effect to testator's intent to benefit those he knew and was acquainted with, and also effect to the argument that a group designation is indicative of an intention to benefit as many members of the class as possible. The rule of *Demil v. Reid* defeats both intentions.

Furthermore, as pointed out, Maryland has adopted Jarman's definition of a class gift. It states that it is "a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift". Under the *Demil v. Reid* rule, as applied to contingent gifts to a class, the time of the gift is on the death of the life tenant. If so, then the members are not uncertain at the time of the gift, the death of the life tenant, but rather, since only those *in esse* then can take, they are fixed and determined individuals. "If it [Jarman's rule] means the time when the

[10] GRAY, NATURE AND SOURCES OF THE LAW, Sec. 702; see also Howard, *Remainders "From and After" Life Estates in Maryland* (1943) 8 Md. L. Rev. 269, where the author states that "It is the thesis of this article, in general, that the Maryland Court of Appeals has overburdened itself by excessive insistence on 'construction of wills', and that having committed itself to one construction, it has reemphasized it in other will cases to the detriment of other Testator's purposes".

[11] MILLER, CONSTRUCTION OF WILLS (1927) 676, n. 4.

gift takes effect, there can never be a class, for the persons to take are always determined and certain in number."[12] Thus the rule seems to conflict even with Jarman's definition which Maryland purports to adopt. A contrary rule, that is, that all of the members whether they survive to the happening of the contingency or not, should take transmissible interests is better adapted to the purpose of class descriptions. If we let in those the testator probably had in mind, along with those who are born prior to the happening of the contingency, we have a true class gift under Jarman's definition.

In the event that there are no members of the class in existence on the happening of the contingency, though there were members of the class when the testator died, there would be intestacy in many cases as in the *Evans* case under this rule. Such a construction is repugnant to the intention of the testator as gathered from the four corners of the will. It is evident that the testator did not intend intestacy, for he made a will. "It is an accepted rule that where there are two possible constructions, either of which can be adopted without straining the language of the will, the court will adopt that construction which disposes of the entire estate, rather than one which results in total or partial intestacy".[13] This well settled principle is violated in those cases where intestacy would result from a failure of any members of the class to survive the contingency.

As one writer points out, "Our Court of Appeals has never explained the reason for the rule *(Demil v. Reid)*. Possibly the rule resulted from the failure of the courts to distinguish between the terms 'contingent' and 'transmissible', . . . yet we have clear cut decisions in Maryland that a contingent remainder to a designated individual is transmissible".[14] That author is also of the opinion that the *Demil v. Reid* rule is without reason, and is an "arbitrary construction by the courts of the testator's intent".[15]

The Restatement of Property is also opposed to the rule. It provides: "From the fact that a class can increase in

[12] Cooley, *What Constitutes a Gift to a Class* (1936) 49 Harvard L. Rev. 903, 927, n. 80, where the author criticizes Jarman's rule.

[13] 2 JARMAN, WILLS (5th Am. Ed. 1880) Ch. 25, Sec. 1-7; Dulany v. Middleton, *supra*, n. 3, 75-76; Welsh v. Gist, 101 Md. 606, 61 A. 665 (1905); Lavender v. Rosenheim, 110 Md. 150, 72 A. 669 (1909); Phillips v. Taylor, 148 Md. 157, 129 A. 18 (1925); Gosnell v. Leibman, 162 Md. 542, 160 A. 277 (1932).

[14] Reno, *Alienability and Transmissibility of Future Interests in Maryland* (1938) 2 Md. L. Rev. 89, 118.

[15] *Ibid*, 118.

membership until a certain future date, no inference should be made that only such members of the class as survive to such future date become distributees."[16] In the comment to the above section it is stated that "under the rule stated in sub-section 2, no requirement of survival to the time of distribution is properly inferable from the fact that the limitation creates in the members of the class, interests which are subject to be diminished in size by the birth of future persons fitting the group description found in the limitation".[17] Further opposition to the rule is manifested in another section which provided "In the limitation purporting to create a remainder, or an executory interest, the presence of a condition precedent, or of a defeasibility dependent on other facts is not a material factor in determining the existence of the requirement of survival to the time of the fulfillment or elimination of such other condition precedent or defeasibility".[18] In the comment to this section it is noted that "The rule stated in this section would be almost too obvious for statement, if it were not for the erroneous view, often expressed in cases concerning class gifts, that the members of the class necessarily remain subject to the condition precedent of survival so long as the ultimate ascertainment of the class is postponed by another defeasibility or condition precedent of such gift. . . ."[19] The Maryland Court of Appeals itself in the *Evans* case points out that the Restatement of Property seems to regard survival as a question of construction in each case with respect to class gifts and gifts to individuals, not necessarily an implied condition in the case of contingent gifts to a class.

The modern tendency is to regard all future interests as alienable. There is a definite trend steering away from "recondite doctrines of ancient property law".[20] There has been a gradual evolution toward the free alienability of contingent future interests from the rule of non-alienability. The modern tendency is to hold that contingent re-

[16] RESTATEMENT, PROPERTY (1940) Sec. 296 (2).
[17] *Ibid*, comment j.
[18] *Ibid*, Sec. 261.
[19] *Ibid*.
[20] Helvering v. Hallock, 309 U. S. 106 (1940), concurring opinion of Mr. Justice Roberts. As a result of this decision, a distinction as to vested or contingent remainders is no longer a problem in the field of federal taxation. See also, Jones, *Vested and Contingent Remainders, A Suggestion with Respect to Legal Method* (1943) 8 Md. L. Rev. 1, 20-21, wherein the writer states that the courts should abandon their basic assumption that all cases involving remainders must be solved by first classifying the interest as vested or contingent, but should solve the problem on hand.

mainders are freely alienable irrespective of whether that contingency be as to event or as to persons.[21] This tendency lends weight to any criticism of the rule of *Demil v. Reid,* which makes an arbitrary distinction between gifts to individuals and gifts to a class. It is admitted that the great weight of authority supports the rule but a growing minority has repudiated it.[22] Perhaps one remedy is a statute to the effect that all future interests including rights of entry and possibilities of reverter, which are not expressly made terminable by the death of the owner, shall be alienable *inter vivos* and pass in case of intestate succession in the same manner as possessory interest.[23]

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[21] RESTATEMENT, PROPERTY (1940) Sec. 162, Sec. 166.

[22] *Supra,* n. 14, 118.

[23] *Supra,* n. 14, 119. See also RESTATEMENT, PROPERTY (1940) Sec. 162 where the rule is stated.