The Vesting of Remainders and Their Alienability - Bishop v. Horney Hans v. Safe Deposit & Trust Co.

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Property Law and Real Estate Commons

Recommended Citation
The Vesting of Remainders and Their Alienability - Bishop v. Horney Hans v. Safe Deposit & Trust Co., 5 Md. L. Rev. 98 (1940)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol5/iss1/5

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
THE VESTING OF REMAINDERS AND THEIR ALIENABILITY

Bishop v. Horney

Hans v. Safe Deposit & Trust Co.

In the first principal case the testatrix devised certain realty to her three daughters for life with remainders to their issue, but in event of the death of any daughter without issue her share should go to the surviving daughters or daughter, with a gift over in event of the death of all three daughters without issue. There was also a provision that should any daughter leave a child surviving at the time of her death, but the child should die before reaching the

---

1 177 Md. 353, 9 A. (2d) 597 (1939).
2 12 A. (2d) 208 (Md. 1940).
age of 21, its share should be distributed as if the child had never lived. In 1924, after two of the daughters had died without issue, the surviving daughter and her four adult children executed a mortgage upon this real estate to the Centreville National Bank, of which appellees subsequently became trustees. In 1931 appellant obtained a judgment against one of these children. In 1936 the surviving daughter died leaving her four children as her sole issue. Subsequently, appellant claimed a portion of the proceeds, realized in the sale of this land under partition proceedings, to satisfy his judgment. He contended that the remainder to the issue of the surviving daughter was contingent as to the takers until the death of this daughter in 1936, and thus the mortgage, under which appellees claim, was void under the principle that remainders contingent as to the person are inalienable. From a decree in favor of the appellees the appellant appealed. Held: Decree affirmed, on the construction of the remainder to the issue as being vested during the life estate of the surviving daughter and therefore fully alienable in 1924.

In the second principal case the testator devised realty and personalty to defendant-appellee in trust for the use and benefit of testator's widow, sister, and his children during their lives, and after the death of the last survivor to be equally divided among the testator's grandchildren then living, together with the lawful issue of any dead grandchild. In 1916 before the death of the last surviving life tenant, the plaintiff-appellant, being one of the testator's grandchildren, executed a deed purporting to convey all of her interest in this realty and personalty to defendant-appellee upon certain trusts. In 1927 the last surviving life tenant died, and the defendant-appellee then instituted a suit in equity to determine the persons entitled to the remainder. A decree was entered dividing the remainder among nineteen grandchildren then living, and directing that the share of the plaintiff-appellant be paid to the defendant-appellee as trustee under the deed of trust of 1916 executed by plaintiff-appellant. Plaintiff-appellant was a party to this proceeding and entered a written consent to the decree. For ten years defendant-appellee carried out this trust, paying the income to plaintiff-appellant under its terms. In 1938 plaintiff-appellant filed her bill of complaint seeking to have her deed of trust executed in
1916 annulled on the ground that at the time of its execution her interest in the realty and personality was merely a contingent remainder, and, being contingent as to the person, was inalienable. From a decree in favor of the defendant-appellee, the plaintiff-appellant appealed. Held: Decree affirmed on the grounds (1) that the remainder to the testator's grandchildren then living should be construed to create a vested remainder in the grandchildren of the testator living at his death, subject to being opened to let in after-born grandchildren, and subject to divestment as to the share of each grandchild by his or her death prior to the death of the last surviving life tenant, and therefore, as a vested remainder, was alienable as to the share of plaintiff-appellant in 1916; and (2) that the decree of 1927 was res adjudicata as to the validity of the deed of trust executed by plaintiff-appellant in 1916.

In both cases the Court of Appeals was presented with the opportunity to re-examine the rule established in *In re Banks' Will*, 4 that a remainder contingent as to the person is inalienable although a remainder contingent as to an event is fully alienable. In each the contingency, if any existed, went to the ascertainment of the taker, and therefore if the remainders were contingent, as contended, they were contingent as to the person and inalienable under this rule. However, in both cases a decision as to the soundness of this distinction was avoided by construing the remainders as vested.

In the *Bishop* case the possible contingency contended for by the appellant was the implication of an implied condition precedent of survival until the death of the life tenant, raised from the use of the term "issue" to describe the remaindermen. If such a condition precedent of survival could be implied, it would operate as a condition precedent to the ascertainment of the takers, and therefore render the remainder contingent as to the person. Survival until the death of the life tenant would have become part of the class description, so that during the continuance of the life tenant's life her children or grandchildren would not have held vested interests, but would have been merely prospective class members who would have been required to survive their mother in order to enter the class to which the remainder was devised. This contention was rejected by construing the remainder to "issue" as identical with a remainder to "children", and therefore vested, subject to

---

4 87 Md. 425, 40 A. 268 (1898).
opening to let in after-born children, as to all those children who were in esse at the death of the testator. Under this construction the vested interests of these four children of the life tenant would not have been defeated by their subsequent deaths either with or without issue during the continuance of the life estate. The only defeasible characteristics of their vested interests were their ability to decrease in size to let in after-born children and the express provision that death before attaining the age of 21, either before or after the death of the life tenant, would operate as a condition subsequent divesting each child's share over to the others.

This construction of a remainder to "issue" of the life tenant as being identical with a remainder to "children" of the life tenant is contrary to the position assumed by the Restatement of Property to the effect that the word "issue" or "descendants" of a person not deceased normally creates a requirement of survival to the death of such person. In other words, a remainder to the "issue" of the life tenant implies a condition of survival to the same extent that a remainder to the "heirs of the body" of the life tenant does. However, the Restatement of Property does take the position that this condition of survival is normally construed to be a condition subsequent rather than a condition precedent, and therefore a gift to the "issue" of the life tenant will create a vested remainder in the issue during the life of such life tenant subject to defeasance by death prior to the life tenant. If the Court of Appeals had adopted this rule of the Restatement, the four adult children would not have held indefeasibly vested interests in this remainder subject only to opening to let in after-born children when the mortgage was executed in 1924, but would have held interests which were vested subject to complete defeasance by failure to survive

---

5 This construction is supported by Haab v. Schneeberger, 147 Mich. 583, 111 N. W. 185 (1907) (where the remainder was to the "issue share and share alike"); French v. Logan's Adm'r, 108 Va. 67, 60 S. E. 622 (1908); In re Reed's Estate, Appeal of Biggan, 307 Pa. 482, 161 A. 729 (1932).

6 RESTATEMENT, PROPERTY (1940) Vol. 3, Sec. 249, and Comment (i).

7 The following cases support the Restatement in construing a gift to "issue" as implying non-survival as a condition subsequent: Eaton v. Eaton, 58 Conn. 286, 91 A. 196 (1914); Stamford Trust Co. v. Lockwood, 96 Conn. 327, 119 A. 218 (1922); Kennard v. Kennard, 81 N. H. 509, 129 A. 725 (1925); Com'r. v. Alford, 282 Mass. 113, 184 N. E. 437 (1933). On the other hand, the following cases construed a gift to "issue" as implying survival as a condition precedent: Jackson v. Jackson, 153 Mass. 374, 26 N. E. 1112 (1891); Twaltes v. Waller, 133 Iowa 84, 110 N. W. 279 (1907); Graft v. Rankin, 250 Fed. 150 (C. C. A., 5th, 1917); Greenwich Trust Co. v. Shively, 110 Conn. 117, 147 A. 367 (1929).
their mother, the life tenant. Such a construction would then have raised the question of whether alienability should be made to depend upon whether survival is treated as a condition precedent or a condition subsequent. In either case the interest of the "issue" during the continuance of the life estate would have been subject to the contingency of death before the life tenant as well as to a decrease in size by the subsequent birth of additional children. Yet according to the rule of *In re Bank's Will* the interest will be alienable if non-survival is a condition subsequent but inalienable if survival is a condition precedent. Does such a rule, which makes alienability depend upon a play of words where the tenuous character of the interest is the same under either construction, belong in the jurisprudence of Maryland?

This question was answered in the affirmative in the *Hans* case, where the words "then living" were construed to make non-survival a condition subsequent. There the gift in remainder to the testator's grandchildren "then living" at the death of the last surviving life tenant was construed to create a vested remainder in the grandchildren of the testator at his death, subject to opening to let in after-born grandchildren, and subject to complete defeasance as to each grandchild by his or her death before the last surviving life tenant. The entire discussion by the Court in its opinion, as to whether this was a vested or contingent remainder, rested upon the assumption that if survival was a condition precedent the interests of these grandchildren were contingent as to the person during the continuance of the life estate and therefore inalienable. Instead of questioning the soundness of such a distinction, the Court avoided its application by making the unusual construction of the words "then living" as a condition subsequent. No words expressly making survival a condition are more indicative of an intention to make it a condition

---

*Supra* n. 4.

*Restatement, Property* (1940) Vol. 3, Sec. 250, states that the words "then living" tend to establish survival as a condition precedent. In Reid v. Walbach, 75 Md. 205, 23 A. 472 (1892), "then living" was construed as a condition precedent. To the same effect see Lansdale v. Linthicum, 139 Md. 155, 115 A. 116 (1921), where the Court stated: "While the law favors the early vesting of estates, the settled rule is that the testator has the right to fix the period of vesting, and to make it depend upon a contingency, and when he has done this with reasonable certainty, his wishes will prevail and the estate will not vest until the happening of the contingency. The testatrix having by her will fixed the death of her husband as the time for the vesting of the remainders, and having described those who were to take at that time as such of her children as were then living and the issue of any deceased child, only those coming within that description at the death of her husband can take under the will."
precedent than the phrase "then living," yet under the general policy of the law in favor of the early vesting of estates the Court felt justified in construing these words as making non-survival a condition subsequent.

The underlying significance of this decision lies in the tacit admission by the Court that, where a person need only survive to a future date, i.e., the death of the life tenant, in order to take an estate in possession, he has a sufficient probability of taking such estate that his interest should be alienable. Whether we call it a contingent remainder or a vested remainder subject to complete defeasance, the tenuous character of the interest is the same if the only contingency which will prevent the person enjoying the possession of his interest is his failure to survive the life tenant. In either case his share is subject to decrease by birth of after-born grandchildren, and to the non-happening of the same event, namely, his death before the life tenant. To hold one alienable and the other inalienable is to sanctify the word "vested". The only real basis for denying alienability to a future interest is because of its highly tenuous character. Therefore if its tenuous character is the same whether survival is construed to be a condition precedent or a condition subsequent, then alienability should not be made to depend upon whether a court shall elect to call it vested subject to complete defeasance rather than contingent.

Unfortunately, the Court of Appeals passed by an excellent opportunity in the Hans case for examining the true basis for the inalienability of certain types of future interests. If this question is to continue to depend upon the artificial distinction between vested and contingent remainders, then in each case the Court of Appeals has within its own hands the absolute power to determine alienability by merely electing to treat a clause requiring survival as a condition subsequent rather than a condition precedent. If "then living" can be treated in one case as a condition subsequent thereby rendering the interest alienable and as a condition precedent rendering it inalienable in the next case, how can a lawyer advise his client in

---

10 In Gray, Rule Against Perpetuities (3rd ed. 1915) Sec. 108 it is said that "if the conditional element is incorporated into the description of, or into the gift to the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested subject to be divested. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."
advance? Probably the only sound solution of this problem is the rule of the Restatement of Property\textsuperscript{11} that remainders and executory interests, whether vested or contingent, are fully alienable; and that "the tenuousness of the remainder or executory interest is material only in determining the value and constituent characteristics of the interest acquired by the transferee."\textsuperscript{12}

\textsuperscript{11} Sec. 162.
\textsuperscript{12} Ibid, Comment (d).