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Wills: Devolution of Lapsed Portion of Residue

Sheldon J. Plager

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significant in the extension of liability to the manufacturer—and his smaller margin of profit. But concern for the welfare of the food consumer should not be dampened by undue concern for the economic welfare of the wholesaler. The wholesaler, being in privity of contract with the manufacturer, should be able to recover from him on his warranty in any jurisdiction the judgment paid the injured consumer. The burden placed upon him by the necessity of suing in the manufacturer's state should be counted as part of the price he pays for the patronage of the consumer, who usually can ill afford to bear the burden himself.

AUBREY V. KENDALL

WILLS: DEVOLUTION OF LAPPED PORTION OF RESIDUE


The testator's will left the substantial residue of his estate to his two sisters in equal shares. One sister predeceased the testator, leaving no issue. The executor brought proceedings for construction of the will, requesting, inter alia, an instruction as to disposition of the residue. Held, in the absence of the testator's manifest intent to create a joint tenancy, residuary legatees who are described by name are tenants in common, and that portion to which a predeceased legatee would have been entitled if living passes as intestate property.

In the absence of a controlling statute American courts generally have held that lapse of a portion of the residue, whether realty or personalty, does not inure to the benefit of the surviving residuary legatees but passes under the applicable laws of intestacy. Upon consideration of the argument that this rule does violence to the general presumption against intestacy as well as to the probable intent of the testator, a number of courts have adhered to the rule with

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1The lapsed residuary portion may be realty or personalty. As used herein, the term "legatees" contemplates the donees of either type of property.


3E.g., Wright v. Wright, 225 N.Y. 329, 122 N.E. 213 (1919); Gray's Estate, 147 Pa. 67, 23 Atl. 205 (1892).
some reluctance; a growing minority of courts and most writers have rejected it for a rule favoring the surviving residuary legatees. Those courts that remain faithful to the rule are skeptical of the proposition that there can be a residue of a residue or hesitate to endow the surviving residuary legatee with more than they conceive to be the specific proportion of the residue set aside for him by the testator. If, however, the residuary legatees are held to be members of a class or joint tenants, the problem generally is resolved in favor of the survivors.

At common law, in the event of lapse outside the residue, realty descends as intestate property but personalty passes to the residuary legatees. In order to abolish this distinction, several states enacted statutes that direct to the residue all property contemplated by a lapsed devise or bequest outside the residue and expressly denote the surviving residuary beneficiaries as recipients of lapsed portions of the residue itself. Other states, including Florida, Colorado, and the District of Columbia, have broad lapse statutes that apparently

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8 See Roberts v. Tamworth, 96 N.H. 223, 73 A.2d 119 (1950); In re Long's Estate, 121 N.Y.S.2d 183 (1953).

9 See Smith v. Savin, 31 Del. Ch. 347, 75 A.2d 785 (1950); Estate of Hoermann, 234 Wis. 130, 135, 290 N.W. 608, 610 (1940) (dictum).

10 E.g., Crawford v. The Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N.E. 998 (1905); Trinity Meth. Episc. Church, South v. Baker, 91 Md. 539, 46 Atl. 1020 (1900).

11 E.g., English v. Cooper, 183 Ill. 203, 55 N.E. 687 (1899); Batchelder, Petitioner, 147 Mass. 465, 18 N.E. 225 (1888); Leggett v. Stevens, 185 N.Y. 70, 77 N.E. 874 (1906).

12 N.J. STAT. ANN. 3A:3-14 (1953); OHIO REV. CODE ANN. 2107.52 (Page 1953); PA. STAT. ANN. tit. 20, §180.14 (10) (Purdon 1950); R.I. GEN. LAWS c. 566, §7 (1938).

13 FLA. STAT. §731.20(2) (1953): "If a legacy or devise is void or lapses, it shall become a part of the residuum and shall pass to the residuary legatee or devisee unless a contrary intent is expressed by the testator in his will."

14 COLO. REV. STAT. ANN. §152-5-11 (1953).

abolish the distinction between realty and personalty in this context but fail to provide specifically for disposal of lapsed portions of the residue. The courts of Colorado\textsuperscript{16} and the District of Columbia\textsuperscript{17} have held that the missing provision is not to be implied from the statute; the Florida Court has yet to meet the problem.

The court in the instant case followed controlling precedent\textsuperscript{18} in ruling that the lapse statute did nothing to abrogate the common law rule or to enhance the rights of surviving residuary legatees.

By these decisions the operations of two imperfect lapse statutes were confined to dissolving the distinction between lapsed bequests of personalty and lapsed devises of realty occurring outside the residue.\textsuperscript{19} This avenue is not so easily traveled by the Florida Court. The distinction between realty and personalty under a lapsed devise or bequest outside the residue was abolished by statute\textsuperscript{20} in Florida forty-one years prior to the enactment\textsuperscript{21} of the lapse statute.

A legislative amendment to the present statute to the effect that the surviving residuary legatees may share the lapsed portion in proportion to their existing shares would provide the most satisfactory solution of this problem. In the absence of legislation two alternatives are before the Florida Court. It may perpetuate the common law generosity to the heirs, as has been done in Colorado and the District of Columbia, or it may construe the statute as encompassing lapse both in and out of the residue and award a lapsed residuary portion to the surviving residuary legatees.\textsuperscript{22} A choice of the former alternative apparently would declare the Florida lapse statute to be devoid of significance and merely repetitive of existing statutory law. Whether the Court will be receptive to the latter alternative may depend on


\textsuperscript{17}George Washington Univ. v. Riggs Nat'l Bank, 88 F.2d 771 (D.C. Cir. 1936).

\textsuperscript{18}\textit{ibid.}

\textsuperscript{19}See also Patterson v. Reed, 260 Pa. 319, 103 Atl. 735 (1918).

\textsuperscript{20}FLA. REV. STAT. §1794 (1892), Hurt v. Davidson, 130 Fla. 822, 178 So. 556 (1937). The last compilation containing this statute as enacted is FLA. GEN. LAWS ANN. §5459 (1927). This section was superseded by part of the current probate chapter, FLA. LAWS 1933, c. 16103, §6, as amended, FLA. STAT. §731.05 (1955). Although the language of the present statute differs somewhat from that of the original enactment, the legal effect appears to be the same.

\textsuperscript{21}FLA. LAWS 1933, c. 16103, §21.

the strength of its belief that most men by making wills evince their intent to avoid intestacy. On numerous occasions the Florida Court has declared the testator's intent to be controlling, even when confronted with a statute that dictates a result opposite to that apparently intended by the testator. The comparative equitable claims of the litigants whose case first comes before the Court may well determine the weight assigned to the testator's intent and thus indirectly determine the ultimate destination of a lapsed residuary portion.

SHELDON J. PLAGER

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24Williams v. Williams, 152 Fla. 255, 9 So.2d 798 (1942).