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Substitutionary Rule-Future Interests-Life Estate with Gift over on Death Without Issue

SUBSTITUTIONARY RULE—FUTURE INTERESTS—LIFE ESTATE WITH GIFT OVER ON DEATH WITHOUT ISSUE—Testator devised all his realty to his wife for her life, and subject to the wife's life estate to his adopted daughter, Olive, to have and to hold the same for and during her natural life time only. Subject to the aforesaid life estates, he devised the property absolutely and in fee simple to the children of Olive, should she have any; but should she die without children then the property is devised to his brothers and sisters or their descendants. The widow elected to take under the law, and filed suit for partition. The adopted daughter claims that having survived the testator, and although she is unmarried and has no children, she takes a fee subject only to defeasance in favor of her children upon their birth. The brothers and sisters claim as contingent remainderman subject to the life estate of Olive

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[21] 22 Iowa L. R. 731, n. 91.

[22] Florida v. McCarthy (1936), 126 Fla. 433, 171 So. 314.

[23] 1 Cooley, Taxation (4th ed. 1929), Sec. 27.

[24] Laundry License Case (1885), 22 F. 701; Stull v. Demattos (1900), 23 Wash. 71, 62 P. 451; State ex rel. City of Bozeman v. Police Ct. of Bozeman (1923), 68 Mont. 436, 219 P. 810; State v. Caplan (1927), 100 Vt. 140, 135A. 705.

[25] 4 Cooley, Taxation (4th ed. 1929), Sec. 1806, n. 66.

[26] Tomlinson v. Indianapolis (1896), 144 Ind. 142, 43 N. E. 9.

[27] Birmingham v. Hood-McPherson Realty Co. (1937), 233 Ala. 352, 172 So. 114.

[28] Florida v. McCarthy (1936), 126 Fla. 433, 171 So. 314.

and the statutory rights of the widow. Held, Olive having survived the testator, the contingency upon which the brothers and sisters could have any interest in the estate has terminaed. *Schenck v. Schenck* (Ind. App. 1939), 18 N. E. (2d) 941.

The cardinal rule in the construction of wills has always been that the intention of the testator should control; but where words are used which have a settled legal meaning, full effect must be given to them.[1] Another rule which the courts—especially the Indiana courts—have used is that the testator's intention must be given effect when clearly expressed, but if his intention is in doubt then it is the duty of the courts to apply recognized rules of construction, even though that may result in a construction different from what the testator had in his own mind but failed to clearly express.[2] In the application of the latter rule, the courts have given themselves practically a free hand in deciding whether or not the intent is so clearly expressed that it is necessary to apply rules of construction to the will.

A well established rule in Indiana is that words of survivorship, used in disposing of an estate, are presumed to relate to the death of the testator, rather than the death of the first taker.[3] The Indiana courts have extended this presumption to apply when there is an intermediate (particular) estate followed by a fee with a gift over upon death without issue,[4] although there are many states holding to the contrary.[5] One effect of this presumption is brought out in the substitutionary rule: that where real estate is devised to one, in terms sufficient to give a fee simple, and a devise over is made, conditioned upon the first taker dying without issue, the phrase "dying without issue" is construed to refer to a death in the lifetime of the testator unless a contrary intention is clearly expressed.[6] This presumption is based on the policy of early vesting and also on the repugnancy in the giving of an absolute fee and then putting limitations upon it.[7]

Although the Indiana court has been liberal in extending the doctrine of refering words of death or survivorship to the lifetime of the testator,[8] it

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[1] Allen v. Craft (1887), 109 Ind. 476, 9 N. E. 919; Fowler v. Duhme (1895), 143 Ind. 248, 42 N. E. 623. See note in 40 West Virginia L. Q. 385.

[2] Quilliam v. Union Trust Co. (1923), 194 Ind. 521, 529, 142 N. E. 214, 216. Also see Boren v. Reeves (1919), 73 Ind. App. 604, 125 N. E. 359.

[3] Fowler v. Duhme (1895), 143 Ind. 248, 42 N. E. 623; Aldred v. Sylvester (1916), 184 Ind. 542, 11 N. E. 914; Harris v. Carpenter (1887), 109 Ind. 540, 10 N. E. 422; Quilliam v. Union Trust Co. (1923), 194 Ind. 521, 530, 142 N. E. 214, 216, and cases cited therein. See Warren, Gifts Over on Death Without Issue, 39 Yale L. Jl. 332.

[4] Death of child refers to death of testator, and not to death during the particular estate. Taylor v. Stephens (1905), 165 Ind. 200, 74 N. E. 980; Duzan v. Chappel (1907), 41 Ind. App. 651, 84 N. E. 775; Tarbell v. Smith (1904), 125 Iowa 388, 101 N. W. 118.

[5] Mayer v. Walker (1906), 214 Pa. 440, 444, 63 A. 1011, 1012; Singhi v. Dean (1920), 119 Me. 287, 110 A. 865; White v. White's Guardian (1916), 168 Ky. 752, 754, 182 S. W. 942, 943.

[6] See cases cited note 3, *supra.*

[7] Britton v. Thorton (1884), 112 U. S. 536, 5 S. Ct. 291; Vanderzee v. Slingerland (1886), 103 N. Y. 47, 8 N. E. 247. Gavit, Future Interests in Indiana, 3 Indiana L. Jl. 505, 627.

[8] Wright v. Charley (1891), 129 Ind. 257, 28 N. E. 706; Hall v. Bauchert (1917), 67 Ind. App. 201, 117 N. E. 972; Antioch College v. Branson (1896), 145 Ind. 312, 44 N. E. 314.

has in the past limited the substitutionary rule to gifts in terms sufficient to give a fee simple, and refused to apply the rule where the primary grant was only a life estate.[9]

Another factor to consider when there is a conveyance "to A and his heirs, but if A die without issue to B and his heirs," is whether or not "die without issue", means definite or indefinite failure of issue. At common law the presumption was to construe such grants as meaning indefinite failure of issue,[10] and since indefinite failure of issue marks the termination of an estate in fee tail, A was held to have an estate tail and B a vested remainder in fee simple.[11] Although the present trend is away from the presumption of indefinite failure of issue,[12] Indiana is among the few remaining states which still clearly follows the presumption in favor of the indefinite construction.[13]

Upon the face of it, the two theories appear to be inconsistent, but upon close scrutiny they emerge as separate problems. The definite or indefinite failure of issue presumption is a question of whether failure of issue means failure by death of the named person or failure by the death either of the named person or by the death of the last of his issue, while in the substitutionary rule it is a question of whether the failure of issue must happen before a given event such as the death of the testator or the death of a life tenant.[14]

In the instant case the court, imbued with the substitutionary construction, and having a will before it that contained a "die without children" clause, applied the substitutionary rule to cut out the interests of the brothers and sisters

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[9] Nickerson v. Hoover, Admr. (1919), 70 Ind. App. 343, 115 N. E. 588. One should note that the repugnancy theory which is one of the bases of the substitutionary rule, wouldn't be applicable where primary grant is only a life estate.

[10] Jones v. Owens (1830), 1 Barn. & Ad. 318, 109 Eng. Repr. 805; Wyld v. Lewis (1738), 1 Atk. 432, 26 Eng. Repr. 276. Simes, Law of Future Interests, Sec. 335.

[11] Warren, Gifts Over on Death Without Issue, 39 Yale L. Jl. 332.

[12] See detailed outline of rules in the different states in Simes, Law of Future Interests, Sec. 342. Also note in Powell, Cases on Future Interests (second edition) p. 299.

[13] Where the residue of an estate was given to B & C and if B & C should die without issue, then their share to go back to the estate of the testator, the Indiana Supreme Court held this a limitation over which is not to take effect until after an indefinite failure of issue and therefore the gift over was in violation of the statute against perpetuities and the first taker thereby received the residue in fee. The court defined a definite failure of issue to be when a precise time is fixed by the will for the failure of issue, as in the case where there is a devise to one, but if he die without lawful issue living at the time of his death. An indefinite failure of issue was defined as the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the grantee, without reference to any particular time or any particular event. Huxford v. Milligan (1875), 50 Ind. 542. Compare Hall v. Brownlee (1904), 164 Ind. 238, 72 N. E. 131, which held a gift over in the case of the death of the first taker without issue, expressly limited to take effect after such death, imports a definite failure of issue at the death of the first taker and not an indefinite failure.

[14] For a more detailed study and condemnation of Indiana cases dealing with the substitutional construction see Powell, Construction of Written Instruments, 14 Indiana L. Jl. 397, 419. Also see proposed section of Uniform Property Act to correct many of these constructions, 14 Indiana L. Jl. 397, 424. Simes, Law of Future Interests, Sec. 329.

of the testator upon the survivorship of the adopted daughter after the death of the testator. To the writer it appears that since the gift to the adopted daughter was expressly for life only, there was a class gift to the unborn children subject to the rights of the widow and the life estate in Olive. However, since none of the class were in existence at the time of the death of the testator, the unborn children take a defeasible fee subject to its being defeated by a gift over to the testator's brothers and sisters if there be no children born at Olive's death.[15] Therefore, the brothers and sisters of the testator seem to have a contingent remainder, dependent upon Olive's death without children; and the survival by Olive of the testator should not have affected their interest. I. K.

[15] Coquillard v. Coquillard (1916), 62 Ind. App. 426, 113 N. E. 474; Barres v. Johns (1935), 261 Ky. 181, 87 S. W. (2d) 387.