Hastings Law Journal

Volume 8 | Issue 3 Article 12

1-1957

Wills: Disposition of Lapsed Residual Gifts

Raymond Free

whether the substance has been on the floor long enough to give the owner constructive notice of the condition.

Mere water, however, where deposited by storm is not generally considered so dangerous a substance as to create, as a matter of law, a jury question.

In the principal case, the Utah court relied for precedent on one of its own decisions[17] which was based partly on the fact that the surface involved did not contain the customary amount of abrasives, and was unusually slick when wet. In the principal case there was no indication that the surface was inherently more slippery than other floors of similar composition.

The Utah court seeks to minimize the effect of its decision by pointing out: "It is to be borne in mind that we are not holding that the defendant's conduct amounted to negligence as a matter of law. We are only required to determine whether there was any legitimate basis in the evidence upon which reasonable minds could believe that the defendant failed to meet its standard of reasonable care under the circumstances for the safety of its customers."[18] No citation of cases is required to demonstrate the danger to the pocketbook of the store owner implied in this statement.

Because of the weight of decisions to the contrary, it is questionable whether the Utah case will influence other courts toward imposing a stricter standard of care upon store owners. It is still true that if one is unlucky enough to fall on a wet floor, he had better pick one that has something more wrong with it than mere dampness.

Dallas S. Edgar

WILLS: DISPOSITION OF LAPSED RESIDUAL GIFTS

In re Stauffer's Estate,[1] is a 1956 California case in which two specific devisees and legatees, one of whom was also a residual devisee and legatee, were found to have exercised undue influence upon the testator in the procurement of their gifts. These facts present three interrelated problems:

1. Is a will which is tainted by undue influence admissible to probate?
2. If admissible, to what extent?
3. If admissible to probate in part, what is the proper disposition of the lapsed gifts?

The problem of admissibility will arise whenever fraud or undue influence is found to have been exerted upon the testator, but the problem of the disposition of lapsed gifts is not restricted to these two instances. It will arise whenever a gift fails to vest in the designated recipient.

If undue influence is exercised in the procurement of a will, all courts agree that probate of the will must be denied because the testator lacks the required testamentary intent.[2]

If only a part of the will is affected by undue influence, the courts are divided on the question of whether the will should be admitted to probate.[3] A very strict

---

[17] Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210 (1951).
[18] 5 Utah 2d 116, 297 P.2d 898 (1956).
[1] 142 Cal.App.2d....., 297 P.2d 1029 (1956).
[2] Estate of Corithers, 156 Cal. 422, 105 Pac. 427 (1909).
[3] 1 PAGE, WILLS § 193 (Lifetime ed. 1941).

view, followed in Alabama,[4] Missouri[5] and Illinois,[6] requires that the will be admitted to probate in its entirely or not at all. These courts apparently base their holdings on statutes requiring that when probate of a will is sought, an issue must be made up to determine whether the writing produced is the will of the testator. This statute is a revival of the old common law rule of *devisavit vel non*, whereby an issue was sent out of the Court of Chancery to a court of law to try the authenticity and validity of a paper offered as a will.[7] The law courts would find that the will was either valid or invalid in its entirety.

The California case of *In re Freud*[8] has been cited[9] as holding that California is in agreement with the view expressed above. In the *Freud* case the court said that a will must be admitted to probate in its entirety or be denied; but such a broad statement was not required to resolve the special problem in that case. There had been a finding of undue influence in the procurement of the will in the *Freud* case, and the contestant was willing to make a compromise with the legatees by allowing its admission to probate insofar as it would not affect the share said contestant would receive under the intestate laws. It was in answer to this proposed scheme that the court said a will must be admitted to probate in its entirety or not at all, and the statement should be limited to this context.

The majority of the courts in the United States allow a will to be admitted to probate in part, rejecting that part which is tainted by fraud or undue influence.[10] The *Estate of Webster*[11] is the leading California case in point, and is a definite adoption of the majority view. The court there said:

> "The general rule is that if the whole will is the result of the presence of undue influence, probate of the whole will must be refused. If only a part of it is affected by undue influence, that part may be rejected as void, but the remainder . . . ought to be sustained . . ."[12]

Section 22 of the California Probate Code resolves any doubt by providing that:

> "A will or *part of a will* procured by . . . undue influence may be denied probate." (Emphasis added.)

In those jurisdictions which allow probate of a will in part, the clauses thereof must be found to have the characteristic of being severable. The problem of severability is difficult inasmuch that it is seldom possible to know or even surmise the extent to which the undue influence has affected the disposition of the remainder of testator's property. However, insofar as possible to establish any objective standard, the Pennsylvania Supreme Court has said:

> "If effect cannot be given to such provisions as are not caused by undue influence without defeating the intention of the testator, the entire will is invalid."[13]

---

[4] Lewis v. Martin, 210 Ala. 401, 98 So. 635 (1923).

[5] Gott v. Dennis, 296 Mo. 66, 246 S.W. 218 (1922).

[6] Snyder v. Steele, 304 Ill. 387, 136 N.E. 649 (1922).

[7] Kerrich v. Bransby, 7 Brown Parl. Cases 437, 3 Eng. Rep. 284 (1727).

[8] 73 Cal. 555, 15 Pac. 135 (1887).

[9] See note 3, *supra*.

[10] *In re* Harris' Estate, 38 Ariz. 1, 296 P.2d 267 (1931); Estate of Webster, 43 Cal.App.2d 6, 110 P.2d 267 (1931); Jeffrey's v. International Trust Co., 97 Colo. 188, 48 P.2d 1019 (1935); Glover v. Baker, 76 N.H. 393, 83 Atl. 916 (1912).

[11] 43 Cal.App.2d 6, 48 P.2d 81 (1941).

[12] *Id.* at 15, 48 P.2d at 86.

[13] *In re* Wagner's Estate, 289 Pa. 361, 368. 137 Atl. 616, 619 (1927).

In other words, if probate is allowed in part, will the testamentary scheme be completely distorted? The simplicity with which the rule may be stated gives one the false impression that its application to any particular factual situation would be equally simple. Normally, if the wrongdoer has not procured the execution of the will, but has exerted undue influence as to a part of it, he is either a specific devisee or a residual devisee. In either of these two instances, it is easier to determine whether the rule of severability is to be applied.

In the *Stauffer* case, the errant devisee was both a specific devisee and one of three residual devisees and legatees. The lower court said that to apply the rule of severability in this instance would be to make a new will for the testator, but the California District Court of Appeal overruled the lower court, thus admitting the will to probate in part. This being so, the court found it necessary to make a distribution of the lapsed gifts: when the specific gift failed, the property thereby devised fell into the residue; the share which would have been received by the erring residual devisee was to be distributed by the laws of intestacy; and each of the two remaining devisees was to receive one-third of the residue as swelled by the lapsed specific devise. We will now proceed to examine this result to determine whether a disposition of the residuum was properly made.

When the residual devisees are members of a class or are joint tenants, there is complete unanimity among the courts that the lapsed share of such a devisee will pass to the remaining devisees. If one of the presumptive members is unable to share, such inability simply leads to the contraction of the class, and what that individual would have taken is automatically absorbed and becomes divisible among the reduced number.[14]

On the other hand, if it is determined, as in the *Stauffer* case, that the residual devisees are tenants in common (so construed from the words "share and share alike."), there is a difference of opinion among the various states as regards the final distribution of the lapsed gift. England and the majority of the courts in the United States allow the lapsed gift to pass by the laws of intestate succession. A minority of the courts allow a residue of a residue, *i.e.*, the entire residue is distributed among the surviving residual devisees, thus preventing partial intestacy.[15]

The *Stauffer* case is the latest reiteration of the present California rule; and in adhering to the English and majority United States view, the court said:

> "Thus when one of such designated persons [tenants in common] dies, or as in the present case, is precluded from taking his designated share, then as to that share the testator died intestate and such portion is vested in his heirs at law."[16]

Though the majority view is apparently a well embedded rule of law, it has not escaped severe criticism. The English courts have said that such a rule acts to defeat the intention of the testator when a residue of a residue is not allowed.[17] However, the English courts, though critical of the result, have nonetheless continued to apply the rule, asserting that they are bound by the doctrine of *stare decisis*.[18]

---

[14] *In re* Ralston, 1 Cal.2d 724, 37 P.2d 76 (1934); *In re* Murphy's Estate, 9 Cal.App.2d 712, 50 P.2d 828 (1935).

[15] *In re* Richards, 1 Cal. 478, 98 Pac. 528 (1908).

[16] See note 1 *supra*, at ....., 297 P.2d at 1033.

[17] *In re* Dunster, [1909], 1 Ch. 103.

[18] *Id.* at 106.

The Pennsylvania Supreme Court, when presented with the problem of distributing a lapsed residual gift had this to say:

> "The rule thus established does not commend itself to sound reasoning, and is a sacrifice of the settled presumption that a testator does not intend to die intestate as to any portion of his estate, and also of his plain actual intent, shown in the appointment of general residuary legatees, that his next of kin shall not participate in the distribution at all."[19]

But again, the rule of *stare decisis* prevented the court from allowing a residue of a residue. A statute preventing the further application of the majority view was subsequently enacted in Pennsylvania,[20] and other states have similar statutes.[21]

Some courts, without the aid of a statute, have refused to adhere to the orthodox view, and will not permit a lapsed residuary devise to pass by the laws of intestacy, but instead allow a residue of a residue.[22] The Kansas Supreme Court in adopting this view and criticizing the majority view said:

> "We regard the rule that lapsed shares of deceased residuary legatees shall be treated as intestate property as in direct conflict with the one to which this court is definitely committed, that the actual purpose of the testator so far as possible must be given effect. The presumption against intestacy of any part of the estate is a means of carrying out this policy which is disregarded by taking lapsed legacies out of the residue for the benefit of those who would inherit from the decedent in the absence of a will."[23]

The Indiana Supreme Court, in *Hedge v. Paine*,[24] held that the policy of avoiding partial intestacy overrides the general rule elsewhere that a lapsed residuary legacy passes by intestate law.

There is an apparent exception to the majority rule, but one which, as we shall see, is not a true application of the minority view, although the same disposition of the property results. If the Probate Court finds that it was the intention of the testator not to die intestate as to any of his property (*e.g.*, in the introductory clause to the will the testator asserts that he intends to dispose of his property by this will and in no other manner), then a lapsed residual gift will be distributed to the legatees and devisees entitled to share at time of probate.[25] In the case of *In re Neilson's Will*[26] the court went so far as to permit extrinsic evidence as a basis for its determination that the testator did not intend to die intestate as to any of his property. If a court will allow extrinsic evidence for such a purpose, adherence to the majority view seems to be little more than mere lip service.

Two strong arguments may be advanced in support of the minority view. The first of these is the presumption of law that the testator, by virtue of having executed a will containing a residual clause, did not intend to die intestate, and that, therefore, the will should be given that construction which will avoid partial intes-

---

[19] Gray's Estate, 147 Pa. 67, 74, 23 Atl. 205, 206 (1892).

[20] PA. STAT. ANN. tit. 20 § 253 (1954), " . . . In any case where such devise or bequest shall fail or be void . . . shall be contained in the residuary clause of such will, it shall pass to and be divided among the other residuary devisees or legatees . . . in proportion to their respective interests in such residue."

[21] N.J.S.A. 3:2–19–1 (1952); OHIO REVISED CODE § 20157.52 (1953); R.I. GEN. LAWS c. 566, § 7.

[22] Hedge v. Paine, 85 Ind. App. 394, 154 N.E. 293 (1926); Corbett v. Skaggs, 111 Kan. 380, 207 Pac. 819 (1922).

[23] Corbett v. Skaggs, *supra* note 22 at 386, 207 Pac. at 822.

[24] 85 Ind. App. 394, 154 N.E. 293 (1926).

[25] *In re* Maloney, 15 N.J. Super. 583, 83 A.2d 837 (1951); *In re* Nielson's Will, 256 Wisc. 521, 41 N.W.2d 369 (1950).

[26] 256 Wisc. 521, 41 N.W.2d 369 (1950).

tacy whenever possible. Estate of *Le Franc*[27] is a leading California case expressing this presumption:

> "The making of a will raises a presumption that the testator intended to dispose of all his property. Residuary clauses are generally inserted for the purpose of making that disposition complete, and *these clauses are always to receive a broad and liberal interpretation* with a view of preventing intestacy as to any portion of the estate of the testator." (Emphasis added.)[28]

It seems apparent to this writer that to allow a lapsed residual gift to pass by the law of intestacy even though no joint tenancy is created, conflicts with the presumption set forth in the *Le Franc* case. Yet, as seen from the holding in the *Stauffer* case, the mere insertion of the words "share and share alike" is sufficient to rebut the presumption. The testator is probably unaware of the legal effect of the words and they seem too weak to rebut such a presumption.

The second argument which may be made on behalf of allowing a residue of the residue is that such a disposition of the testator's property is more in accord with his intention. Suppose that after having provided for his next of kin and presumptive heirs, the testator leaves the residue to four named persons, having employed such language that they will be deemed to take as tenants in common. Then the will is admitted to probate and it is found that one of the residuary legatees is unable to participate (having exerted undue influence, employed fraud, or predeceased the testator). The Probate Court in this situation would distribute one-fourth to each of the eligible devisees and allow the remainder to pass by intestate succession. One may only speculate as to how the testator would have redrafted his will had he known that one of the residuary legatees would be unable to share. But on the basis of common sense, it seems reasonable to assume that if the testator was made aware of the situation as posed above, he would have disposed of his property in the same manner as before except that he would now have provided that the residue go to the three individuals previously named rather than to the four. If such speculation is justified, then it would be more in accord with the intention of the testator to interpret the phrase "share and share alike" as "share and share alike among those and only those who are eligible to participate in the distribution of the estate."

To show the inequitable result of the majority rule, take the case wherein the testator has three children: *A, B,* and *C*. In will number one, let us suppose he gives the residue to "my children," and in will number two he gives the residue to "*A, B,* and *C,* share and share alike." Supposing in each case that *C* predeceases testator, without issue surviving, by will number one, *A* and *B* will each receive one-half, because the residual clause creates a class gift, the members of the class being determined at the date of the testator's death. However, in will number two, *A* and *B* will each receive one-third, since they will be adjudged to take as tenants in common—the lapsed share will not pass to the surviving tenants. The intent of the testator is apparently the same in each instance, but a diametrically opposite distribution would be made.

Suppose that rather than naming individuals as residual devisees, the testator creates a testamentary trust of the residue for three named charitable organizations, "share and share alike" and at time for probate one of these organizations has ceased to exist. Here, in addition to the presumption that the testator by

[27] 38 Cal.2d 289, 239 P.2d 617 (1952).
[28] *Id.* at 296, 239 P.2d at 621.