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Class Gifts: Time When Class Closes - Rule of Convenience

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ment upon his default. In addition, one form contains a novation which would appear to modify the commission provisions of the listing contract.[9] The listing agreement, on which plaintiff in the principal case based its claim, recites:

> "All deposits made shall be retained by you in a trust account. If forfeited by the buyer, said monies shall first pay for cash advancements made by you; one-half the balance, but not in excess of the commission agreed upon, shall belong to you. The balance shall belong to the undersigned."

The significance of this clause was not argued in briefs of counsel, and the Court makes no mention of it in its decision. It is suggested that such clause might reasonably have been construed as limiting the commission, in event of purchaser-default, to one-half of the forfeited earnest money. If so construed, the limitation would be far more liberal toward the seller than is the standard novation clause, cited at note 9, *supra.* Certainly it would be unreasonable to construe the clause so as to give broker one-half of the forfeited deposit in addition to his full commission. The absence of any express limitation in the plaintiff's listing contract would not authorize such unreasonable construction, especially in view of the rule that doubtful provisions of contracts are construed most strictly against the party who drew the contract.[10]

It is unfortunate that the matter of the buyer's $1000 down payment was not put in issue.[11] Future actions, however, based on similar facts will undoubtedly involve the application of forfeitures to any commissions claimed. Inasmuch as such application may still result in the seller's personal liability for a balance of the commission, it is suggested that Sec. 240.10, Wis. Stats., be amended so as to limit the broker's commission in buyer default cases to the amount of the forfeited down payment, or the amount provided in the commission agreement, whichever is smaller.

ROBERT CHOINSKI

Class Gifts: Time When Class Closes—Rule of Convenience— Testator left a will bequeathing to his grandchildren the sum of fifty thousand dollars in trust. The income from the principal was

[9] Offer to Purchase form No. 168 *ibid.*, incorporates the following clause in the seller's acceptance: "For and in consideration of the services furnished, the undersigned agrees to pay to————as commission, the sum of $————, and in the event the deposit made by the buyer shall be forfeit, such deposit shall first apply to your commission; the balance, if any, shall belong to the undersigned. In such event, the commission shall not exceed the deposit."

[10] Deree v. Reliable Tool & Machine, Inc., 250 Wis. 224, 26 N.W. 2d 673 (1947).

[11] A reading of the cases and briefs disclosed both the amount of the down payment and the fact that it was returned to the buyers. The sellers presently have an action pending against the plaintiff for recovery of the down payment.

to accumulate until the grandchildren became of age. After each grandchild became of age he was to receive the income which had accumulated on his share, said income to be paid to him annually until he reached the age of thirty years. After each grandchild reached the age of thirty, he was to be paid his full share of the principal sum. Six grandchildren were alive at testator's death. Three more were subsequently born before the oldest reached the age of thirty. In a hearing brought by the trustee to construe the terms of the will, the county court found a class gift which vested in those grandchildren alive at testator's death, subject to being reopened with the birth of each additional grandchild as long as there were assets remaining in the trust. On appeal the Wisconsin Supreme Court held, *inter alia*, that membership in the class closed when the oldest grandchild arrived at the age of thirty years, and hence grandchildren born thereafter could not become members of the class. *Estate of Evans*, 274 Wis. 459, 80 N.W. 2d 408 (1957), rehearing denied, 247 Wis. 472, 81 N.W. 2d 489 (1957).

The problem before the court was that of determining maximum class membership.[1] There did not appear to be any serious problem of minimum class membership,[2] as the Supreme Court seemed to find a vested gift, subject to open, affirming the county court. But the lower court's finding of increase in class membership was modified, the Supreme Court citing the rule that:

> " . . . membership in the class is determined when the time for distribution has arrived. The class may increase until that time and persons born thereafter are excluded."[3]

Attorneys practicing in Wisconsin courts now have an additional rule of construction to bear in mind. Often denominated the "rule of convenience," it has a long history both in the United States[4] and in England.[5]

In considering the merits of the adopted rule, it must be realized that it is a rule of *construction, i.e.*, a rebuttable presumption,[6] rather than a binding rule of law. The construction of a will

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[1] The determination of maximum class membership involves ascertaining the time for closing of a class. SIMES, FUTURE INTERESTS §91 (1951).

[2] The problem of minimum class membership is one of determining the time for "vesting" of the class gift, the word "vest" being used to refer to transmissibility or the absence of a condition of survivorship to the date of distribution. *Id.* at §92.

[3] 2 SIMES AND SMITH, THE LAW OF FUTURE INTERESTS §634 (2d ed. 1956).

[4] For representative decisions employing the rule, see B.M.C. Durfee Trust Co. v. Taylor, 325 Mass. 201, 89 N.E. 2d 777 (1950); In re Murphy's Estate, 99 Mont. 114, 43 P. 2d 233 (1935); In re Austin 's Estate, 315 Pa. 449, 173 Atl. 278 (1934); Williams v. Harrison, 72 Ind. App. 245, 123 N.E. 245 (1919); Thomas v. Thomas, 149 Mo. App. 52, 51 S.W. Ill. (1899).

[5] The famed English case of *Andrew v. Partington*, 2 Cox 223, 3 Bro. C.C. 401 (1791), appears to have laid down the "convenience" doctrine.

[6] 2 SIMES AND SMITH, *op. cit. supra* note 3, §633.

has long been recognized to be guided by the intention of the testator.[7] This intent is to be ascertained from a full and complete consideration of the entire will read in light of surrounding circumstances.[8] However, since the testator in a class gift situation has probably never thought of the problem which has arisen following his death, it is quite futile to speak of his intent.[9] Rather what the courts appear to be doing is to effectuate such purpose as the testator (that is, the average testator) may be presumed to have had. Professor Simes treats the problem in this way:

> "First, in the absence of words in the will or circumstances indicating a contrary intent, a testator would normally desire to include all persons possible within the class, whenever they are born and whenever they die.
>
> "Second, as a matter of convenience, it is desirable to close the class as soon as distribution is possible."[10]

It is submitted that the above solution effectuates such intent as the testator has manifested. His group designation of beneficiaries is indication of an intent to benefit all persons who fit into such descriptive category. But such indicated "intent" is inconsistent with the existence of a date for distribution which requires identification of the distributees and the shares to which each is entitled. The resulting ambiguity requires resolution in the form of application of the rule under discussion.[11]

Further justification for the rule has been advanced in that it is in furtherance of public policy.[12] Such policy appears to favor the utiliztaion of the subject matter of the gift as soon as possible, for economic reasons, and the avoidance of security measures which would otherwise be necessary for the as yet unborn takers.[13]

In discussing reasons for disregarding the rule, the frustration-of-intent argument must be discarded as a form of question-begging. As stated above, in most instances the intent of the testator is in no way clearly revealed. To speak of a constructional rule as thwarting the donor's intention would seem anomalous, as the ab-

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[7] See 2 GARY, WISICONSIN PROBATE LAW §597 (1944), where it is stated at page 56 that: "Construction of a will is primarily a question of ascertaining the intention of the testator." The author supports this proposition by citing a myriad of cases arising in Wisconsin and neighboring jurisdictions.

[8] Will of Klinkert, 270 Wis. 362, 71 N.W. 2d 279 (1954).

[9] It would appear noteworthy that in the case under review the Court spends little time in search of a hidden intent. On motion for rehearing, a brief was submitted that stressed the implication of the words "his full share," in connection with the payment of the principal, as having but one meaning, *i.e*, the exclusion of afterborn grandchildren from the class. The Court ignored this contention. Estate of Evans, 274 Wis. 472, 81 N.W. 2d 489 (1957).

[10] 2 SIMES AND SMITH, *op. cit. supra* note 3.

[11] See RESTATEMENT, PROPERTY §295, comment *a* (1936).

[12] 2 SIMES AND SMITH, *op. cit. supra* note 3, §633.

[13] RESTATEMENT, PROPERTY, *op. cit. supra* note 11.

sence of such intention has given rise to the necessity for employing such rule.

An alternative to use of the rule in the case of gifts in the form of personal property has been proposed.[14] The court, at the time of distribution to the first legatee to become of age, might take a bond as security from such legatee to cover any beneficiaries that might subsequently be born. This procedure could be repeated as each legatee reached the specified age. But the question arises as to whether the beneficiaries are truly "enjoying" their gift under such a device. Depending upon the amount of security required, the donees might well incur more difficulty than derivation of benefits. That this solution appears impracticable to the courts is evident when it is considered that it has not been applied in cases involving realty. In distribution of realty, the inconveniences of posting security are lessened as the subject of the gift can be enjoyed nonetheless. But as stated by an eminent authority:

> "Although the inconveniences suggested are more significant when the subject matter of the gift is personal property than when it is real property, . . . the general rule of construction is applied to dispositions of either type of property."[15]

Perhaps the greatest value of the use of the rule by the courts in construction proceedings is that it precludes guessing as to the true intent of the testator and gives a degree of symmetry and predictability to the law.[16] Criticism may properly be launched not at the rule itself but at its misapplication in a given case. The Pennsylvania Supreme Court decried the employment of the rule in the leading case of *In re Earle's Estate*,[17] but close examination reveals that the court there attempted to reach a decision compatible with it, when they found the true time of distribution to be the distribution of the corpus of the residuary trust, stating:

> " . . . the date of the audit of the executor's account as evidenced by the award to the executors in their capacity of trustees . . . was not the kind of distribution which warrants the application of the rule of convenience."[18]

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[14] See Note, 100 PA. L. REV. 908 (1952).

[15] 5 AMERICAN LAW OF PROPERTY §22.41 (Casner ed. 1952).

[16] As stated by Professor Casner in *Class Gifts to "Heirs" or "Next of Kin," Increase in the Class Membership*, 51 HARV. L. REV. 254 (1937), at page 308: "The technique now employed . . . has the merit of introducing some certainty as to the result that will be reached by a court in certain types of cases. The alternative (casting aside rules of construction and precedent and considering each case completely divorced from what has gone before) would introduce chaos and uncertainty without any compensating advantages."

[17] 369 Pa. 52, 85 A.2d 90 (1951).

[18] 369 Pa. at 57, 85 A.2d at 97.

A Student Note reviewing the *Earle Estate* case in 51 MICH. L. REV. 305,

Proper utilization of the rule of construction is, of course, dependent on correct determination of the date of distribution. Professor Casner has the following to say regarding the time for distribution:

> "The period of distribution has arrived whenever a member of the class described is entitled to demand the possession of a share of the subject matter of the gift . . . . [I]t is not a condition precedent to the right of a class member to demand the possession of his share that it be no longer possible for additional members of the group described to be born . . . . [I]f there are no outstanding unsatisfied interests which precede the gift to the class and if all conditions which are precedent to the interest of any member of the class have been performed, the period of distribution has arrived."[19]

One questionable facet of the case under review is the fact that the appellant-trustee failed to argue that the proper time for distribution was at the time of the first accumulated income payment.[20] It might have been reasoned that the reaching of twenty-one by the oldest grandchild closed the class, inasmuch as a recomputation of income to each beneficiary as of the birth of each additional grandchild would be burdensome.[21] But such argument was not proposed to the court.

In concluding analysis of the so-called "rule of convenience" it is obvious that the rule is not so convenient for potential class

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at 306 gives a lucid discussion on the importance of properly determining the date of distribution in applying the rule, stating: "As the lower court interprets the facts, 'distribution' took place at the time the trusts were established . . . . In giving the word 'distribution' such a technical definition the lower court overlooks the fact that the terms used in the rule are subordinate to the policy of convenience behind it."

[19] 5 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 15, §22.40.

[20] Respondents' brief at p. 21 apparently gives the treatment accorded the ambiguous income provision: "The six living grandchildren were entitled to accumulations of interest up to the time of the birth of the first afterborn from which time all the existing grandchildren were entitled to a share in the subsequent accumulations. This would apply in the case of each additional birth, at which time such birth diminished thenceforth the accumulations to the others.

"When each grandchild reached 21 it would be entitled to accumulated interest diminished by the amount of accumulated interest due any afterborn from its birth to the date of payment of interest."

[21] The text commentators have considered the effect of income provisions, and apparently find that they are not so inconvenient as to create additional problems, since only those children born before each income payment are held entitled to share in the payment. See RESTATEMENT, PROPERTY, *op. cit. supra* note 11, comment i; 2 SIMES AND SMITH, *op. cit. supra* note 3, §649; 5 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 15, §22.46. It is suggested that the typical income provision calling for annual income payments until the time of majority when the corpus will be distributed is distinguishable from the income provision in the *Evans* case. In the case under review, the income was to be "accumulated on each share," rather than paid out annually, until the oldest child reached twenty-one. This would appear to impose a more intricate computation duty on the trustee.

members who are shut out by it.[22] However, its logical application is in cases where it is the only reasonable means of carrying out the general objectives of the testator; and so, it is submitted, in such instances it is a rule of necessary interpretation rather than merely one of "convenience."[23] To avoid the consequences of the rule, the testator (or more properly, the attorney drafting the will) should state clearly when the class is to close.[24]

The writer has attempted to explain the new addition to the long list of rules of construction employed by Wisconsin courts, and to show that judicious use of such rule is sound. It is felt that perhaps often in the past the actual problems of construction have been obscured by the courts' frantic efforts to determine the testator's purpose in cases where his individual intent was elusive.[25] It is suggested that once such intent is determined to be beyond ascertainment with reasonable certainty, the court is most correct in employing such rules of construction as will effectuate the probable intent of the average testator[26] and produce a decision in accordance with sound public policy.[27]

ADRIAN P. SCHOONE

Domestic Relations—Divorce Decree Incorporating Stipulation That Child Shall Be Reared In A Given Religion—Defendant and her husband agreed upon a property settlement and upon the custody of their children the day before the grant of their divorce decree. This agreement gave the custody of their five year old son to the defendant, and provided that the child be reared in the Roman Catholic religion. The defendant was Protestant and the husband was Catholic. Upon the request of the parties to the divorce, this stipulation was incorporated into the divorce decree. Two years later the husband filed "Information for Contempt" alleging that the defendant has been, and is violating the divorce decree, in that

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[22] See Re Wenmoth's Estate, 37 Ch. Div. 226, 57 L.J. Ch. 649, 57 L.T. 709, 36 Wkly. Rep. 409 (1888).

[23] Annot., 155 A.L.R. 757 (1945).

[24] In Casner, *op. cit.* supra note 16, at 307, it is suggested: "The crying need in this field of law is not for reform of the courts' technique in handling the problem in class gifts . . ., nor reform of the precedents followed by the courts in the solution of the problem of increase in the class membership. Rather the crying need is for draftsmen, educated to the seriousness and difficulties of the task they are employed to perform."

[25] *E.g.*, in *Will of Ehlers*, 155 Wis. 46, 143 N.W. 1050 (1913), where after giving extended cautioning in the use of rules of construction, and belittling their value, the court concludes: " . . . . the intention of the testator should prevail *so far as it can be read out of the language used to express it.*" [Emphasis supplied.] Query as to what the court would do if such intent could not be gleaned from the will, the testator not having anticipated the problem.

[26] See note 10 *supra.*

[27] See note 12 *supra.*