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Article 8

Wills - Lapse in Residuary Clause

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examination and production of documents painstakingly limited the scope of the adverse examination in that he did not seek to inquire as to the contents of the documents, but only wanted such documents to be present at the examination so that the person being examined could refresh his memory; nor did he seek any matters within the attorney-client privilege.

In the opinion of the writer, the *Tomek* case is one of those situations which the court, in *Estate of Briese,*[33] had in mind when it declared that there were instances in which the attorney may be the agent of his client within sec. 326.12. The case rests on the sound, logical foundation that an attorney who was acting on behalf of his client at the time of the occurence made the subject matter of the examination, and himself observes relevant facts, may be compelled to disclose such facts on an adverse examination before trial. As long as the inquiry is confined to observed facts, this principle applies with equal force to an insurance investigator or a private detective without in any way violating the policy so firmly outlined in *Hickman v. Taylor.*[34] The net effect, then, of the *Tomek* case is to further refine the line between discovery and its undesirable counterparts, secrecy, surprise, and violation of the essence of the adversary system.

RICHARD J. ASH

Wills—Lapse in the Residuary Clause—The residuary clause in testator's will provided:

> . . . It is my will and I do direct that all the residue of my estate be distributed as follows: One Tenth of such residue shall be paid, in equal parts, to my brothers and sisters who, at the time this Will is executed, were residing in Solvakia as follows:
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> To my brothers:
> Chill Majerovics
> Herman Majerovics
> To my sisters:
> Mollie Teichman
> Sarah Reidman
>
> Should either of my said brothers or sisters be dead at the time of my death, then the share of such brother or sister shall go to the surviving child or children of such brother or sister living at the time of my death. Should either of my brothers or sisters have died before my death and have left no children, then the share of such deceased brother or sister shall go to the surviving brothers or sisters in equal parts.

Sarah Reidman and her son, Henry Reidman, were deceased at the time of testator's death; but Sylvia Reidman, daughter of Henry

[33] *Supra,* n. 9.
[34] 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Reidman, survived. All the remaining brothers and sisters also predeceased the testator, but they left surviving children. Instructions were sought as to the disposition of the share to which Sarah Reidman would have been entitled had she survived the testator. The trial court found that both the gift to Sarah and the gift over to her children lapsed, because none survived the testator, but gave effect to the gift over to the "surviving brothers and sisters" and allowed their children to take. *Held*: Both of the gifts over lapsed, and the share passed as intestate property. *Meyers v. Teichman, 70 So. 2d 17 (Miss. 1954).*

Lapse "refers to a legacy or devise which would have taken effect if the testator had died the instant after he executed the will; but which fails because the devisee or legatee has, in some way, become incapable of taking under the will between the time that the will was made and the time that testator died."[1] Normally a gift over will prevent a lapse.[2]

In the principal case the grandchild contended that the words "surviving child or children" included grandchildren. Both the trial court and the appellate court rejected this construction. The general rule is that the term "child" or "children" in a will does not include the grandchildren.[3] The chief exception to this rule is when the testator's intent is otherwise. But the grandchild in the present case could not take advantage of this exception because of the second gift over. The latter tends to defeat any theory that the testator may have intended the term "children" to mean "issue," since this decreases the likelihood of the second gift over taking effect and might be frustrating rather than fulfilling the intent of the testator.

In a bequest or a devise to two or more persons, lapse, in the event one of them predeceases the testator, may sometimes be prevented on the theory of joint tenancy. At common law a gift to two or more

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[1] 4 PAGE, WILLS §1413, p. 158.

[2] 4 PAGE, WILLS §1420, p. 170; Will of Johnson, 199 Wis. 154, 225 N.W. 818 (1929); Will of Peters, 223 Wis. 411, 270 N.W. 921 (1937).

[3] 104 A.L.R. 282;

3 PAGE, WILLS §1019, p. 138:

"The primary meaning of 'children' is the immediate legitimate offspring of the person indicated as the parent." An exception exists if the circumstances or intent are otherwise.

Will of Scholl, 100 Wis. 650, 76 N.W. 616 (1898):

"The word 'children' in a will may be construed to include grandchildren, stepchildren, illegitimate children, or descendants, however remote, where there are no immediate children to whom the term can apply, or where it is manifest from other words in the will that it was used in the broad sense of issue or descendants."

In re Will of Stark, 149 Wis. 631, 134 N.W. 389 (1912):

"While the word 'child' may be construed as applying to a grandchild, nephew, or even a grandnephew, and the like, its meaning will be so extended only where the evident purpose of the testator so demands."

persons was presumed to create a joint tenancy.[4] The modern rule is, however, that the testator's intention must clearly indicate a joint tenancy before the present presumption of a tenancy in common is overcome.[5] The words "paid in equal parts" used in the principal case support the construction of a tenancy in common as opposed to a joint tenancy.[6] Also, the fact that the testator included a gift over to the children of a deceased brother or sister is inconsistent with the right of survivorship in a joint tenancy.

Perhaps the most difficult theory under which lapse may be prevented is that of a class gift. The test of whether a class has been set up is based on the intent of the testator. There are a number of concrete factors used by the courts to determine this intent. Generally, if the beneficiaries are named, or numbered, or named and numbered, or if such words as "share and share alike" and "equally" are used, no class gift is intended. However, even these indicators can be overcome by other evidence of a general intent to establish a class gift.[7] Such factors as "groupmindedness" and the relation between the beneficiaries may indicate the intention of establishing a class gift.[8] The presumption against intended intestacy also supports the theory of a class gift in a residuary clause. But in the present case it is clear that no class gift was intended. The beneficiaries were specifically named, and the will also designates what percentage each beneficiary is to receive. Furthermore, the gift over to the children of a deceased brother or sister is inconsistent with the theory of a class gift.

Even though theories of gift over, joint tenancy and class gift do not apply, a small minority of jurisdictions, including Wisconsin, generally refuse to recognize a lapse of part of the residuary clause.[9] The basis for such refusal rests in the theory that the testator intended the beneficiaries named in the residuary clause to take all that remained of the estate, and none was to pass as intestate property.[10] In *Will of Waterbury*[11] the residue clause gave one fifth to certain specifically named beneficiaries. Also, in *Will of Nielsen*[12] the testator set up a residue clause specifically naming each beneficiary and the percentage each was to receive. Clearly, in neither case was there a class gift. In

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[4] 4 PAGE, WILLS §1144.
[5] 4 PAGE, WILLS §1145; 14 AM. JUR. 11, p. 82; WIS. STATS. (1953) §230.44.
[6] Ann. Cas., 1917B 61.
[7] 75 A.L.R. 773; 105 A.L.R. 1394: 36 A.L.R. 2d 1117 at p. 1129; 57 AM. JUR. 1258.
[8] Estate of Pierce, 177 Wis. 104, 188 N.W. 78 (1922), where the nieces and nephews were said to constitute a class but the half-brother was excluded.
[9] The majority rule is firmly established that a lapse of part of the residue goes intestate. 4 PAGE, WILLS §1430, p. 197 and §1413, p. 158; GARDNER, WILLS 419 (1903); 1 UNDERHILL, WILLS §336 (1900).
[10] 28 A.L.R. 1237; 139 A.L.R. 868; 36 A.L.R. 2d 1117 at p. 1121; 31 YALE L. J. 782.
[11] 163 Wis. 510, 158 N.W. 340 (1916).
[12] 256 Wis. 521, 41 N.W.2d 369 (1949).

each case one of the beneficiaries specifically named in the residue clause predeceased the testator. Normally, that part of the residue should pass as intestate property as it did in the principal case. However, the Wisconsin court divided it among the surviving beneficiaries named in the residuary clause. Although the court did not find a class gift in either case, the net result was the same. The court may have invoked more equity than law in these decisions, but the result seems just. Would Wisconsin apply this approach in the principal case?

In neither of the Wisconsin cases cited above was there a class gift involved. The Wisconsin test of intent to limit the residue to those named in the residuary clause does not appear to be satisfied, since the gift over to their children is evidence that the testator did not intend to limit the residue to those first named in the residuary clause. However, since the "surviving brothers and sisters" are both the beneficiaries under the second gift over and the parties primarily named as recipients of the residue clause, the intention of the testator was to limit the residue to those persons in the event the first gift over failed. The question then arises: does the intent evidenced by the second gift over to limit the residue to the "surviving brothers and sisters" encompass their children? It is more probable that the testator intended that his nieces and nephews should take before his grandniece, Sylvia Reidman. Furthermore, the testator provided that the share of any deceased brother or sister should go to his child or children. The first gifts over to the children of Chill Majerovics, Herman Majerovics, and Mollie Teichman did not fail. Thus, the second gift over sets up the intent to limit the residue to the surviving brothers and sisters, and the first gift over establishes the intent to give whatever is coming to those brothers and sisters to their children. It would seem, therefore, that if Wisconsin is to be consistent in following the intent of the testator, it would give the share of Sarah Reidman to the surviving children of the rest of the brothers and sisters.

A question also arises as to whether the Wisconsin "anti-lapse statute," section 238.13, would affect the result in the principal case. The main import of this statute is that on the death of a legatee (who is a blood relative of the testator)[13] during the latter's lifetime but after the will was executed,[14] the legatee's issue are entitled to his share.[15] In the principal case the will was executed on September 20, 1944; and Sarah Reidman died sometime during 1944. Thus, if Sarah Reidman was alive at the time the will was executed, the statute would seem to require a different result and give her share to her grandchild.

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[13] Cleaver v. Cleaver, 39 Wis. 96 (1875).
[14] Estate of Phillips, 236 Wis. 268, 294 N.W. 824 (1940).
[15] Will of Griffiths, 172 Wis. 630, 179 N.W. 768 (1920).

However, the last clause of the statute, "unless a different disposition shall be made or directed by the will," eliminates its application in favor of the grandchild since the will directed a gift over to Sarah's children and, if none, to her surviving brothers and sisters.

Also, it is probable that section 238.13 would not be applied to prevent lapse of the gift over to the surviving brothers and sisters, although to them no different disposition was made and they were survived by issue, since the will expressly provides that the brothers and sisters must "survive" the testator. It could be argued that in every case of a devise it is presumed that the devisee will survive the testator; and that, therefore, the word "surviving" adds nothing in essence to the will. However, since Wisconsin courts hold so firmly to the expressed intent of the testator, and since none of the brothers or sisters survived the testator, it is doubtful whether the anti-lapse statute would apply.

JOSEPH SWIETLIK

Adoption — Constitutionality of "Same Religion" Statute — Petitioners, husband and wife, sought to adopt twin children. The judge made findings of fact, concluding that it would not be for the best interest of the Catholic twins to be adopted by a Jewish couple and dismissed the petition. General Laws (Ter. Ed.) c. 210, 5B, inserted by St. 1950, c. 737, 3, is as follows:

> "In making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother. If the court with due regard for the religion of the child, shall nevertheless grant the petition for adoption of a child proffered by a person or persons of a religious faith or persuasion other than that of the child, the court shall state the facts which impelled it to make such a disposition and such statement shall be made part of the minutes of the proceedings."

The court found that the mother and the "natural father" of the twins were Catholic. The petitioners, who were found to be financially and physically equipped to bring up the twins and to intend to care for them to the best of their ability, were of the Jewish faith and intended to bring up the twins in that faith. The court found that the mother of the twins consented to the adoption and knew that the petitioners were Jewish and was satisfied that the twins should be raised in the Jewish faith. The court also found that many Catholic couples were available with whom the twins could be placed. *Held*: The findings of the lower court were proper, and the statute involved was constitutional and not contrary to the First Amendment to the Constitu-