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Article 15

Property - Wills - Vested Interests

Charles M. Denissen

PROPERTY—WILLS—VESTED INTERESTS. In re *Caldwell's Will,* 238 N.W. 367. (Wis.). This is an appeal from an action by James L. Caldwell for construction of the will of Eleanor M. Caldwell, his mother.

The controversy is centered around Section 3 of the will:—

Third. "I give, bequeath and devise to my children Harriet M. Kay, Beatrice C. Casey and James L. Caldwell, all the residue and remainder of my property, real, personal and mixed and wherever situated to be divided between them, share and share alike; except that in case my said son James L. Caldwell should die without issue then I direct that his wife Mida Louise Caldwell should have the use and income of James L. Caldwell's share as long as she remains single, but in case of her marriage, or death then I direct that the share given, bequeathed and devised to her should go to my two other daughters, Harriet M. Kay and Beatrice C. Casey, share and share alike."

No testimony was taken, and the decision is based on the language used by the testatrix.

The County Court correctly rendered a decision based upon the intention of the will, construing the provision quoted as vesting a one-third interest each in the daughters.

The question arises as to the share of James L. Caldwell.

Justice Fairchild in deciding the case lays down the rule:

"Where there is a devise to one person in fee, and, in case of his death without issue to another, the death referred to is death during the lifetime of the Testator, unless there is language in the will which gives fair, clear and reasonable ground for saying that the Testator had a different intention."

In giving this rule the Court cites *Lovass* v. *Olson,* 92 Wis. 616. There the will devised to Testators wife, if she survived him, his estate, then continued:

Fourth. "I will and bequeath to my son Jacob, Two Hundred Dollars to be to him paid by my daughter within one year after the death of my wife, if she survives me, and which, when paid is to be in full of his share of my estate.

Eight. "In case my daughter shall die without issue of her body, then, and in that case the whole of my estate devised to her to be equally divided among my children * * * "

The court in this case pointed out that two principles must be remembered in determining a will; 1. That the intention of the Testator is to be gathered from the whole instrument. 2. That a construction which give effect to the will is to be preferred to one which would make it nugatory.

In referring to the second clause, the exception clause wherein the

Testatrix provided "that in case my said son James L. Caldwell should dies without issue then I direct," etc. In the Caldwell will, the court cites *Will of Owen,* 164 Wis. 640; and *Will of O'Brien,* 173 Wis. 41.

The Will of Owen provided:

Sixth. "I give, devise and bequeath all my property and estate to my six children (who are all specifically named), the share of any deceased child leaving no issue to revert to my other children.

Held. First: In the absence of words showing a contrary intention the death of a child in a will where the bequest is in terms, to such child direct with a provision in case of the decease of such child, for the bounty to go to some other person or persons refers to the life of the Testator.

Second: The law favors the early vesting of estates and in case of uncertainty a construction accomplishing that result is preferred.

Third: It was held the children at the death of the testatrix took a vested interest.

The Will of O'Brien provided:

"In case my son Edmund should die leaving children the share which I have given him shall go to his children, share and share alike."

It was held, "there was a present gift, absolute in form with no restrictions, except postponing the time of payment. In such case the interest of the legatee vests upon the death of the Testator, unless a contrary intent can be clearly gathered from the will."

The respondent cites a number of cases in support of his contention that the will gave but a life estate. However, these cases were distinguished from the case at bar by Justice Marshall in *Will of Owen.* The court cites in this case *Chesterfield* v. *Hoskins,* 133 Wis. 368; and *Korn* v. *Friz,* 128 Wis. 428, in regard to the statement that the death may refer to a death after that of Testator, but the presumption is otherwise and will prevail in the absence of some clear indication to the contrary.

In Chesterfield v. Hoskins the will provided:

Fourth. "I give, devise and bequeath unto my son, all the rest * * * for him and his use during his natural life, and in case of his death without issue and leaving a widow, him surviving, then, I devise * * * all said residue unto his widow, and to Stephen, William and John Hoskins, my nephews."

If the son should die leaving issue, they were to take the residue. There was no further provision in regard to the remainder. The son had a wife living at the time of the execution of the will. She subse-

quently died, and at the time of the proceedings involving construction of the will the son was living, unmarried, and without issue.

Therefore, the will did not go into effect until the death of the Testator. If the son had died prior to his father he would have taken nothing. It was therefore held that the intention of the Testator as derived from the will did not refer to death prior to the Testator; for in such case the paragraph in regard to the residue would be without force and of no significance.

The Will of Korn provided:

"To my son William, my farm, on condition, that he shall pay to my daughter $5,000 within one year after the death of my wife. In case of the death of my son, without issue, then, I will to my grandchildren all my real estate, it being my desire that said real estate shall be kept and retained by persons of my own blood."

It was held: The intention as determined from the whole instrument referred to death of the life tenant, William, himself, was not to take at the death of the father, showing it was the intention of the Testator to refer to the death of the remainderman as being subsequent to his own death.

Again the Testator expressly shows a desire that the property should pass only to those of his own blood. If at Testator's death the son took a vested interest, at the son's death his widow would take and could dispose to others than of his father's blood.

Then, too, the limitation over is to be ascertained and determined finally at the moment of William's death. It is inconceivable that the Testator would state such a fixing of time when it may have referred to a time prior to his own death. Since with several married children, and no apparent reason for preferring one grandchild to another, it is improbable that he meant to fix a date perhaps years before his death at which the class, namely, the grandchildren should become determined to the exclusion of others.

Therefore, the Court holds, "that the principle that 'death' refers to death of Testator," yields readily to anything in words or context to indicate a different intention.

Based upon these citations Justice Fairchild correctly held that "the language of the will in question is such that its construction makes the death of the legatee mentioned refer to a death occurring during the lifetime of the Testatrix."

The language in the instant case offers no basis for a construction such as given the Korn Will and therefore the holding at the beneficiary took a vested interest is correct.

CHARLES M. DENISSEN.