The Early Vesting Rule in Wisconsin

Stephen F. Schreiter

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
THE EARLY VESTING RULE IN WISCONSIN

"The law favors early vesting" or words to similar effect are frequently found in Wisconsin will construction cases. In this comment the objective will be to examine Wisconsin future interests law so as to properly categorize and explain the early vesting rule.

Will of Walker\(^2\) caused some confusion in the area of will construction because the Wisconsin Supreme Court, apparently without clear intent of the testator, found a future interest in a class gift vested subject to complete defeasance.\(^3\). Whether or not the early vesting rule has been changed by this case will be our chief concern.

Future interests can be of several types, i.e. remainders, reversions, executory interests, possibilities of reverter, and rights of entry for breach of condition.\(^4\)

In the Walker case the future interest is a remainder. Isabel R. Walker died testate and created a testamentary trust which provided that income was to be paid to her grandnephews and grandnieces. The corpus of the trust was to be distributed to the grandchildren when the youngest reached fifty years of age. The testatrix's words were:

The remainder of my estate is then to be held in trust until such time as the youngest of my great-nephews and nieces is fifty (50) years old. At the time the youngest great-nephew or niece is fifty years old the residue of my estate is to be divided among them all share and share alike. (A footnote by the court indicates that the prefix "great" was meant by the testatrix to refer to that relationship indicated by the use of the prefix "grand.").\(^5\)

At the time the will was drawn, the testatrix's two sisters, two nephews and five grandnephews and grandnieces were living. The youngest grandchild was seven years old and the oldest eighteen years old. The testatrix died in 1947 survived by her two nephews and

---

\(^1\) 12 WISCONSIN PROBATE LAW AND PRACTICE §15.64 (1959).
\(^2\) 17 Wis. 2d 181, 116 N.W. 2d 106 (1962).
\(^3\) RESTATEMENT, PROPERTY §157 (1936) classifies remainders as:
   (a) indefeasibly vested.
   (b) vested subject to open.
   (c) vested subject to complete defeasance.
   (d) subject to a condition precedent.

§157, comment o defines defeasance as a word used "... to describe not only the ending of an interest in accordance with its terms, as for example, by the expiration of its stipulated duration as in accordance with the terms of a special limitation, but also the cutting short of an interest, as for example, the ending of an interest by a power of termination or by an executory limitation. The word defeasance is thus broader in its inclusions than the word divestment which applies only to the ending of the interest by the cutting short thereof."

The words "defeasance" and "divestment" are often used interchangeably in the cases and treatises.

\(^4\) SIMES & SMITH, THE LAW OF FUTURE INTERESTS §64 (2d ed. 1956).
seven grandchildren ranging from seventeen to forty-one years of age. In 1960, one of testatrix's grandnieces died, survived by her husband and two daughters. Thereupon the trustee, representing the six surviving grandnephews, petitioned for a construction of testatrix's will to determine if the heirs of the deceased grandniece were entitled to share in the trust's distributions of income and corpus. Since the testatrix's two nephews were still living, a guardian ad litem was appointed to represent the interests of unborn grandnephews and grand nieces.

In affirming the lower court decision, the Wisconsin Supreme Court considered a number of arguments. Those favoring affirmance were:

1. Based on the ages of the grandchildren, both at the time of drafting the will and the time of the testatrix's death, and considering possible future events from those points in time, it was unlikely that the testatrix could have foreseen anything other than a long-term trust, the specific beneficiaries of which were not determined.6

2. The testatrix's use of the word "them" in her will can only have "great-nephews and nieces" as its antecedent. Thus one not meeting that description should be excluded. Also, the fact that no substitutional provisions are made for deceased grandchildren would seem to indicate that only grandchildren should be eventual recipients.

3. The words "share and share alike" signify a per capita and not a per stirpes distribution.7

4. A construction that will insure the transmission of the trust estate to blood relatives is preferred.8

5. Class gifts to an undetermined class shall pass only to those members of the class in existence at the time the class is determined.9

6. When coupled with other facts, class gifts in which the class may increase or decrease have a tendency to show that the testator intended to imply a condition that recipients survive until the time for distribution.10

Arguments favoring reversal were:

1. Where a gift of income accompanies a gift of corpus, the law favors a construction that the gift of corpus is a vested interest.

---

6 Id. at 189, 116 N.W. 2d at 110. The court stated: "Rather the inference is fairly strong that she desired a long-term trust extending over a great many years during which her estate was to be kept intact."
7 Will of Bray, 260 Wis. 9, 49 N.W. 2d 716 (1961).
8 5 American Law of Property §21.3 (1952).
9 Will of Friend, 259 Wis. 501, 49 N.W. 2d 423 (1951).
10 Simes & Smith, op. cit. supra note 4, §656.
2. The law favors a construction which results in an absolutely vested interest rather than a defeasibly vested one.

In connection with this preference for absolute vesting the court said:

The preference for absolute vesting originated in connection with conveyances of interest in land and at a time in feudal England when contingent interests in land had not attained a dignified nature. 5 American Law of Property, p. 130, sec. 21.3. It was based upon the desirability of a definitely ascertained placement of an interest as opposed to a suspension thereof pending some contingency. This rationale is still appropriate to support a preference for a vested, rather than a contingent interest. However, because of the wide use of the trust device this rationale does not lend any support to the preference for absolute rather than defeasible vesting. Therefore, it is doubtful if this rule should continue to have vitality when applied to beneficial interests in a trust where title is at all times vested in the trustee. This is in accord with the view expressed in the above cited text that adherence to this preference in modern times "is at least of doubtful validity in many situations."11

It would be incorrect to say that any one of these factors controlled the decision; obviously the joint impact of all of them resulted in the court's decision. Note, however, that the court has not mentioned a rule of construction which favors vested interests over contingent interests despite the existence of a Wisconsin statute defining the two terms.

Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right, by virtue of it, to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect remains uncertain.12

Rundell, in his introduction to the Wisconsin real property statutes strongly contended that this statute was of little help in solving vesting problems.

The question of the conditions upon which a given person is entitled to the possession of certain land, through a conveyance, is ordinarily a question of construction. Under the present Wisconsin statutes, all questions of vesting are of this character. Section 230.13 can be of no aid in answering them. It should never have been adopted. It should now be repealed. Until it is, it cannot be completely ignored, although the court, after earlier trouble with it, has come to minimize its effect.13

11 Will of Walker, supra note 5, at 190, 116 N.W. 2d at 111.
12 Wis. Stat. 230.13 (1961). This provision first appeared in Rev. Stat. ch. 56 (1849), which was renumbered Rev. Stat. §2037 (1878). By Wis. Laws 1931, ch. 72, §2 the words "by virtue of it" were added.
Unlike New York, from whose laws our statute is derived, the Wisconsin statute applies only to realty. An early writer thought that the New York revisers intended to change the common law definitions of vested and contingent. More recent opinions state that the definitions in the statute and the common law definitions were intended to be the same.

On its face the statute does not purport to include remainders vested subject to complete defeasance. However, the following cases, considered in chronological order, both mention the statute and recognize such a remainder. Apparently, the early case of Scott v. West represents the first appearance, in Wisconsin, of a remainder vested subject to complete defeasance. In that case the testator provided:

After the death of my said daughters, Mary and Kate, I give devise and bequeath all the residue and remainder of my property, real and personal, to my surviving grandchildren, and to the legal issue of any deceased grandchild or grandchildren, and to their heirs and assigns, forever, in equal parts.

Holding the grandchildren's future interests vested subject to complete defeasance, the court stated:

So bequests of legacies and personal property when the payment or distribution is to be made at a future time certain to arrive, and not subject to a condition precedent, are deemed vested when there is a person in being at the time of the testator's death, capable of taking when the time arrives even though his interest is liable to be divested by dying without issue or diminished by future births. In other words, each such grandchild became, at once, on the death of the testator (or its subsequent birth), the owner of an equitable interest in a fractional share of the corpus of such personal estate and such ownership must ultimately ripen into and become an absolute legal

---

14 N.Y. REAL PROP. LAW §40 (Note I, No. 8).
15 In re Albiston's Estate, 117 Wis. 272, 276, 94 N.W. 169, 170 (1903). In this case the court stated: "It ought to be said that it seems clear that there was error in that case referring to sec. 2037, Stats. 1898, as in any way having a bearing thereon. That case, like the present, was clearly a case of equitable conversion, and hence the bequests were bequests of personalty."
17 Brake, The "Vested vs. Contingent" Approach to Future Interest—A Critical Analysis of the Michigan Cases, 9 U. DET. L.J. 61, 66 (1946). The author states: "A few states have adopted statutory definitions of vested and contingent interests. While it may well be doubted whether the statutes were ever intended to modify the common law in this respect, some courts have decided that this has been their effect. The later cases exhibit a tendency to veer back to the common law distinctions. In a few instances in states lacking similar statutes, their courts have thought that the statutory distinctions were declaratory of the common law, and have treated them as such. There is no doubt but that the statutes have contributed in some measure to the difficulty of distinguishing remainders."
18 Scott v. West, 63 Wis. 529, 533, 24 N.W. 161, 161 (1885).
19 Id. at 571, 24 N.W. at 173.
title, with the right to immediate possession and this can only be defeated or divested by the death of such grandchild without issue, before the determination or execution of the trusts and rights given to and imposed upon the executors of the will.\textsuperscript{20}

Here is one of the most common dispositive provisions which is often times construed to create a remainder subject to complete defeasance, \textit{viz.}, a gift to \( X \) subject to being defeated if \( X \) dies without issue. Since the cardinal rule of all will construction is intention of the testator,\textsuperscript{21} the next step is to attempt the discovery of such intent. Although it is difficult to assess the persuasive power of the language on this decision, the court does find some intent expressed in the testator's words.

But the class which is thus made the object of the testator's gifts, devises and bequests is not limited to such "surviving grandchildren," but extends by way of representation "to the legal issue" of any pre-deceased grandchild or grandchildren. By that clause of the will, the testator in effect, on the death of both of his daughters, gave, devised and bequeathed "all the residue and remainder" of his property, real and personal to such of his grandchildren as should then be living, and to the legal issue of any pre-deceased grandchild, "and to their heirs and assigns, forever, in equal parts."\textsuperscript{22}

This case then would seem to support the contention that a court may find sufficient intent expressed by the testator so as to postpone enjoyment, but still may construe the interest as vested, thus allowing for the delayed enjoyment by providing that the vested interest is subject to complete defeasance. The court further provides:

The direction, that if any grandchildren shall have died before final division, leaving children, they shall take and receive \textit{per stirpes} the share of estate both real and personal, which their parents would have been entitled to have and receive if then living, was evidently intended merely to provide for children of a deceased grandchild and not to define the nature, as vested or contingent, of the previous general gift to the grandchildren; and its only effect upon that gift is to divest the shares of any grandchild deceased, leaving issue, and to vest that share in such issue.\textsuperscript{23}

Overlooking the fact that in \textit{Walker} there was no such gift over, (only the inherent gift over present in a class gift) the same reasoning would seem to be applicable. Apparently the statutory definition influenced the court because they continue:

From the authorities cited it is obvious that the words "after the death of my said daughters," in the fourth clause of the

\textsuperscript{20} Id. at 573, 24 N.W. at 174.

\textsuperscript{21} \textit{WISCONSIN PROBATE LAW AND PRACTICE} \textsection{15.55} (1959).

\textsuperscript{22} \textit{Scott v. West}, \textit{supra} note 18, at 563, 24 N.W. at 169.

\textsuperscript{23} Id. at 569, 24 N.W. at 172.
will, at least as to the real estate of which the testator died seized, refer to the time when the grandchildren will come into complete possession and enjoyment, and not to the time of vesting of the remainder in fee in them. In other words, the clause in effect devised such real estate directly upon the death of the testator, to the grandchildren, born or to be born, and to the legal issue of any predeceased grandchild, subject, of course, to the dispositions made in other portions of the will to the daughters, as executors in trust and otherwise, during their lives and the life of the survivor of them. It follows that the devise of land to the grandchildren, etc., by that clause of the will, must be construed to convey to them all the estate of the testator therein which he could lawfully devise, except in so far as it appears by other portions of the will as above indicated that the devisor intended to convey a less estate, Sec. 2278 R.S.; In re Estate of Pierce, 56 Wis. 565; Newman v. Waterman, post. p. 612. Such devise is denominated by the statute as a future estate, because it is limited to commence in possession at a future day on the determination of a precedent estate created at the same time and upon which it is dependent, and hence is termed a remainder, Secs. 2033-2035, R.S. And since as we have seen, there were persons in being at the time of the testator's death who would have had an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate, it follows that the estate was a vested remainder. Of course the remainder thus vested must open and let in after-born grandchildren, and the legal issue of any predeceased grandchild, by way of representation, and is liable to be divested as to any grandchildren dying without issue during the lives of the daughters.\textsuperscript{24}

Note that the second last sentence of this quote reads almost the same as statute 230.13.

In Baker v. Estate of McLeod the testator placed his estate in trust, the income and required portions of the corpus to be paid for and toward the maintenance and education of his daughter. He further provided:

And I further order, direct and declare that all my aforesaid estate, or the proceeds thereof, with the rents, profits, and income thereof, so far as the same shall not have been paid or applied as aforesaid shall be paid and transferred to my said child, the said Annie May McLeod, as and when she shall attain the age of twenty-one years. But, if the said Annie May McLeod shall die under the age of twenty-one years, then all my aforesaid estate, or proceeds thereof, with the rents, profits, and income thereof, so far as not then paid, applied or required for the purposes aforesaid, shall immediately after her death, be paid, applied, and disposed of in the manner following, that is to say:

(testator then provided two fixed amount bequests.)\textsuperscript{25}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 570, 24 N.W. at 172.
\item Baker v. McLeod, 79 Wis. 534, 535, 48 N.W. 657, 657 (1891).
\end{enumerate}
\end{footnotesize}
Subsequent to her father's death, Annie May McLeod died under the age of twenty-one but was survived by her son. It was held that upon the death of the testator, the estate vested in Annie, subject only to the condition subsequent that, if she died under the age of twenty-one years, *without issue*, then the gifts over would become effective.

In *Brown v. Higgins*, the testator gave his son Frederick a life estate in a farm, but provided:

> And in the event of the said Frederick's having an heir or heirs, then on the death of the said Frederick I give and devise all of said lands herein described to him or them and their heirs and assigns forever. But in the event of the said Frederick's dying without leaving any legal heir or heirs, then I hereby devise and bequeath said lands, each and every of them to my own heirs at law, to have and to hold the same unto them and their heirs and assigns forever.\(^2^6\)

The court rejected appellant's contention that the intent evidenced by these words was one postponing the granting of the remainder until Frederick's death, and, citing the Wisconsin statutory definitions, affirmed the trial court's decision, holding that upon the testator's death the future estate vested in his then heirs subject to being divested if Frederick died leaving heirs. This case would seem to be authority for the statement that the term vested, as used in the statute, encompasses interests vested subject to complete defeasance.

In *Will of Greene* the testator created a testamentary trust and provided that upon termination of the trust, the residue of his estate including the trust property was to pass to his four children in equal shares. The will further provided:

> In the event of the decease of any of my said children before his or her shares shall be paid, then the issue of such deceased child or children shall take the share of their deceased parent, and in the event any of my said children shall die without issue surviving, his or her share shall be paid to such of my said children as shall be living and the issue of any of said children as may be deceased.\(^2^7\)

The court then quoted from *Will of Roth*\(^2^8\) and the material from Law Reports Annotated therein:

> ... [I]t is well settled that where a future gift is postponed in order to let in some other interest or, as it is sometimes expressed, for the benefit of the estate, the gift is vested although the enjoyment is postponed. Note, L.R.A. 1915C, 1049.\(^2^9\)

The court then stated that:

---

\(^2^6\) *Brown v. Higgins*, 180 Wis. 253, 254, 193 N.W. 84, 84 (1923).

\(^2^7\) *Will of Greene*, 240 Wis. 452, 458, 3 N.W. 2d 704, 705 (1942).

\(^2^8\) *Will of Roth*, 191 Wis. 366, 210 N.W. 826 (1926).

\(^2^9\) *Id.* at 371, 210 N.W. at 827.
There is here no doubt that the postponement of the gift was entirely for the benefit of the estate. We are of the opinion that the rights of the children of the testator vested at the death of the testator, subject to be divested upon the contingency of death of a child prior to receipt of his or her share.

The trust property consisted of testator's stock in several corporations and the land on which one of the corporations was located, but statute 230.13 was not mentioned.

The remainder which would otherwise be vested is not made contingent because the life tenant may, if necessary, consume the corpus; rather this results in a defeasance of the vested interest. Estate of Wadleigh held that this defeasance was only to the extent of the life tenant's exercised right of encroachment.

A further extension of the usual vesting problem may occur because of a slight change in the testator's language and the occurrence of an unusual fact situation. In Will of Coleman, testator was survived by his wife, three brothers and one sister but that sister and all of her children died before testator's widow. His will granted a life estate to his wife and individual remainders to his sister and brothers. He then provided:

And in case of the death of my said sister or either of my said brothers before the death of my said wife, the share that he or she would have taken shall be divided equally between his or her surviving children, by right of representation.

First the court, relying on the testator's intent, determined the extent of the sister's and brother's interests.

By the language in the second sentence of the residuary clause that the said interests of the testator's brothers and sisters were made subject to be divested on the condition subsequent that of prior to the death of the testator's wife one of said legatees died leaving surviving children, such legatee's interest would be divided equally between his or her surviving children, by right of representation.

The next question was whether the death of the sister's children before the widow caused their interest to be defeated. It was argued that the defeated interests should be the subject of an implied gift over to the other remaindersmen. However, the court determined that:

There are three ancestors; there are three distinct gifts over; and there is no relation between the three in the application of

30 Will of Greene, supra note 27, at 459, 3 N.W. 2d at 707.
31 Id. at 458, 3 N.W. 2d at 707.
32 Estate of Downs, 243 Wis. 303, 305, 9 N.W. 2d 822, 822 (1943). See also 2 WISCONSIN PROBATE LAW AND PRACTICE §15.65 (1959).
33 250 Wis. 284, 26 N.W. 2d 667 (1946).
34 Will of Coleman, 253 Wis. 91, 93, 33 N.W. 2d 237, 239 (1947).
35 Id. at 96, 33 N.W. 2d at 240.
the testamentary direction. Hence, there is nothing in the words 
"by right of representation" which can be considered to indi-
cate that the words "surviving children" means "children surviv-
ing the death of the widow."

There are a large number of cases in the Wisconsin reports holding
remainders vested, but they should not be considered as contra to the
cases just discussed because frequently the fact situation does not re-
quire a determination as to possible defeasance of the interest.

Some of the cases previously discussed have concerned gifts to
individuals and some have concerned class gifts. This variance in factual
background makes no difference when considering the problem of sur-

Several writers have recently considered defeasibly and indefeasibly
vested future interests. This general definition has been offered:

For a remainder to be vested absolutely it must be created
in favor of an identifiable remainderman; it must be capable of
becoming a possessory interest at the proper moment, and it must
be free from any condition or limitation whatever. Though a
remainder be created in favor of an identifiable person and be
capable of becoming a possessory estate at the proper moment,
if it has annexed to it a condition subsequent, special limitation
or executory limitation, it is accorded legal attributes somewhat
at variance with remainder vested absolutely, and, must, for some
purposes, be accorded a separate category.

A remainder vested subject to complete defeasance resulted from
the common law draftsmen blending two separate techniques. Recogniz-
ing these techniques and the fact that they are distinct explains why the
interest is considered vested before the defeasance occurs.

Before the Statute of Uses (1536) and Wills (1540) remain-
ders defeasibly vested must have been rare, if used at all. As soon
as shifting executory interests were recognized as permissible
interests in property, the practice of annexing executory limita-
tions to vested remainders became common. The annexation of
a condition subsequent, special limitation or executory limitation
to an otherwise vested remainder does not affect the vested
character of such remainder, for so long as it continues as a
remainder it is ready to become effective as a possessory estate
whenever and however the particular estate terminates. Though
the defeasing contingency be such that it may defeat the re-
mainder either before or after becoming a possessory estate the
vested character as such is not affected thereby.

Some general reasons have been advanced as to why a court might

36 Id. at 99, 33 N.W. 2d at 242.
39 Brake, supra note 17, at 72.
40 Ibid.
prefer to interpret a testator's language as creating an interest subject to defeasance.

The preference for vested interests has, however, a second aspect: a preference for defeasibly vested interests, rather than for interests subject to a condition precedent. In this situation it is clear that the transferor has manifested an intention that the property be finally enjoyed only by beneficiaries who meet some condition imposed by him. The question is whether the condition is precedent or is to operate as a divesting contingency.

Unlike the preference for indefeasibly vested interests, this second aspect of the preference for vested interests may be an important means of effectuating, in some situations, the intention of transferors. The determination that an interest is defeasibly vested, rather than contingent, means that it will not be subject to any of the unfavorable characteristics inherent in contingent interests at common law which may still be recognized in the jurisdiction. Furthermore, the holder of defeasibly vested future interest may be entitled to beneficial enjoyment pending the performance of the condition while the holder of a contingent interest is not. At the same time the determination that an interest is defeasibly vested rather than contingent, does not substantially affect the ultimate ownership of the subject matter of the gift, since on the non-occurrence of the condition applicable to the interest the enjoyment of the property will terminate just as if the condition had been precedent, rather than subsequent.41

Classification based on the difference between the purely form distinctions of a condition precedent or condition subsequent has been long criticized, but at least in the area of future interests, their continued presence seems inescapable.42

Areas in which there is a practical difference between denoting an interest contingent instead of vested subject to complete defeasance are few.

There are some questions with respect to which it is essential to determine whether the remainder is subject to a condition precedent or is vested subject to complete defeasance. The law of acceleration is one example. The rule against perpetuities sometimes requires this decision. The necessity for this secondary decision is relatively infrequent. When it is necessary, the character of the requirement of survival commonly supplies the answer.43

With respect to estate taxation, the difference is apparently irrelevant; the test being the existence of the condition of survivorship, not form.44

41 5 AMERICAN LAW OF PROPERTY §21.31 (1952).
43 2 POWELL, op. cit. supra note 38, at 716.
44 Halbach, supra note 42, at 461. The author states: “For the purposes of estate taxation, too, the issue of whether a future interest is to be included in the
The significance of a condition precedent or a condition subsequent is diminished in Wisconsin because of the presence of Wisconsin statute 230.13 Although recent years have seen the statute rarely cited, theoretically all future interests including realty should be tested with it. In *In re Moran's Will*, the court discussed the interrelationship of the term vested per the statute and vested at common law; it decided that there was a difference and held that a future interest could be both vested and contingent. This apparent contradiction has been explained as a failure to distinguish between remainders absolutely vested and those vested subject to complete defeasance. A Wisconsin Attorney General's report seems to reinforce this contention.

In *In re Moran's Will*, 118 Wis. 177, discusses contingent and vested interests fully. The case is authority for the statement that what might have been merely a contingent interest at common law is, under the statute a vested interest subject to be divested. This case is authority also for the rule that the law favors vesting of estates.

The scope of the statute is probably not as broad as first impression would lead one to believe. As previously mentioned it is limited to real property and, in addition, as one law review commissioner suggests:

In this state [Wisconsin] then, the remainder is simultaneously vested and contingent, depending on the purpose for which it is being considered. This seems to be the happiest solution under the express language of the statute. (Brackets added.)

Such a solution is supported by Fulton's statement of the probable intent of the New York revisers.

The distinction between "vested" and "contingent" rights or estates, is of the first importance in the law of property. The revisers probable purpose in defining "vested" and "contingent" had, no doubt, immediate reference to the subsequent section relating to the unlawful suspension of the power of alienation.

Practical problems of determining whether a given future interest is indefeasibly vested, vested subject to complete defeasance, or contingent have not been answered by the *Walker* case. A recent note in the *Wisconsin Law Review* suggested that the *Walker* case has affected the persuasive effect of the rule favoring early vesting.

The preference for early vesting has been followed by the courts and relied upon by attorneys in Wisconsin for years. After estate of a remainderman who dies before possession turns on the question of descendability, which depends on the existence or non-existence of a condition of survivorship, not on its form."

---

45 *In re Moran's Will*, 118 Wis. 177, 96 N.W. 367 (1903).
46 Simes & Smith, *op. cit. supra* note 4, §162.
the *Walker* case one wonders about the present strength of the construction rule. In the past, courts have used the rule to resolve the problems created when a testator's intention was not expressed. From the court's treatment of the early vesting rule in the *Walker* case, it appears that the canon has been relegated to a position of secondary importance.\(^5\)

Actually it would appear that the importance of the rule favoring early vesting has not been relegated to a position of secondary importance; rather all that has been done is to re-evaluate the relative effects of the expression of testator's intent and the presumed intent reflected in the construction rule. A simple case, *viz.*, testator gives a life estate with remainder to his surviving children, will still be governed by this rule and the children's future interests found indefeasibly vested. The Wisconsin court, in *Estate of Ferdinand*, recognized the fact that the quantity of expressed intent could vary.

There (in the case of *In re Moran's Will*) the court thought there was nothing appearing upon the face of the will to indicate that the words of survivorship referred to any other event than that event (death of the life tenant). However the language of the will in *Will of Reimers*,\(^5\) supra, is stronger to support vesting than the language used in the *Moran* will; but nevertheless we held that survivorship was determined and the remainder vested at the death of the testator. (Parenthesis added.)\(^5\)

As a result of this relaxed attitude toward the requirement of expression of intent, all will construction cases will have to be carefully examined for evidence of testator's intent, both in the dispositive language used and in the facts surrounding the testator at his death and at the execution of the will.

Stephen F. Schreiter

---

\(^5\) Note, 1963 Wis. L. Rev. 494.  
\(^5\) *In re Moran's Will*, supra note 45.  
\(^5\) 242 Wis. 233, 7 N.W. 2d 857 (1943).  
\(^5\) 7 Wis. 2d 577, 584, 97 N.W. 2d 414, 418 (1959).