7-1-1960

Wills -- Application of Florida Antilapse Statute to Class Gifts

Martin J. Nash

WILLS — APPLICATION OF FLORIDA ANTILAPSE STATUTE TO CLASS GIFTS

The plaintiffs sought a declaratory decree construing a clause of a will devising all the residue of the testatrix's property to a class, her brothers and sisters, to share and share alike. Three of the class had died prior to the execution of the will and two of the class had died subsequent to the execution of the will but prior to the death of the testatrix. The plaintiffs, lineal descendants of the deceased class members, sought to take the deceased class members' share by virtue of the Florida antilapse statute. *Held*, the antilapse statute prevented the failure of the class gift only as to those members of the class alive at the time of the will's execution but who predeceased the testatrix; those class members deceased prior to the will's execution were not members of the class described in the will. *Drafts v. Drafts*, 114 So.2d 473 (Fla. App. 1959).

At common law it was a familiar rule that a testamentary gift to a named beneficiary lapsed upon the death of the beneficiary in the lifetime of the testator;[1] further, a gift to a named beneficiary who was dead at the time the will was executed was void and of no force and effect.[2] An antilapse statute[3] is designed to abrogate either one or both of these common law rules depending upon the wording and judicial construction of the statute. It allows the surviving lineal descendants of the deceased beneficiaries who bore the requisite familial relationship to the testator[4] to take the share of those beneficiaries absent a contrary intent expressed in the will.[5] For example, the Florida antilapse statute provides:

> But when any property is devised or bequeathed to an *adopted child* or *blood kindred* of the testator, and when such devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed, leaving lineal descendants who survive the testator, such legacy or devise does not lapse. . . .[6]

The problem posed by the instant case is whether the Florida statute will operate to prevent a failure of the devise notwithstanding the fact

1. Williams v. Williams, 152 Fla. 255, 9 So.2d 798 (1942); Sorrels v. McNally, 89 Fla. 457, 105 So. 106 (1925); 1 REDFEARN, WILLS & ADMINISTRATION OF ESTATES IN FLORIDA § 149 (3d ed. 1957); 96 C.J.S. *Wills* § 1201, at 1041 (1957).

2. Dean v. Crews, 77 Fla. 319, 81 So. 479 (1919); 1 REDFEARN, *op. cit. supra* note 1 § 149; 96 C.J.S. *Wills* § 1201, at 1043 (1957).

3. Evidently all but three states — Louisiana, New Mexico and Wyoming — have some type of antilapse provision.

4. There is no uniform wording in the antilapse statutes describing the relationship of the claimants to the testator necessary in order to fall within the purview of the statute. Nor is there any uniformity in the judicial construction of the descriptive terms in these statutes pertaining to the extent of coverage. The most common words are, "child or other relative." California and Vermont use the word, "kindred" and Minnesota, "blood relation."

5. The antilapse statute has vitality only in the absence of any intent expressed in the will. Such intent will be given efficacy regardless of the operation of the antilapse statute. See generally Annot., 63 A.L.R.2d 1172 (1959).

6. FLA. STAT. § 731.20 (1957).

that the gift was to a designated class rather than to a named beneficiary:[7] 1) where the class member was alive at the execution of the will but predeceased the testatrix; 2) where the class member died prior to the time of the will's execution.

At common law a gift to a class was legally incapable of lapsing so long as one member of the class survived the testator.[8] Only those class members alive at the death of the testator, the time at which the class was fixed, were members of the designated sharing class.[9] Thus, the word lapse as used at common law had reference only to gifts to named beneficiaries.[10] It is not surprising to find that the English courts in construing the English Statute of Wills of 1837,[11] which was the first to incorporate antilapse provisions, strictly construed the statute[12] to prevent only what would have been a common law lapse. Consequently, the statute would not be applicable to class gifts.[13]

A minority of the American courts in the first situation, *i.e.* where the class member was alive at the time of the will's execution but predeceased the testator, follow this strict English construction and hold the antilapse statute inapplicable to class gifts.[14]

On the other hand, the majority of American courts, sacrificing technical consistency for liberality, have adopted a more modern approach and have held the statute applicable to class gifts as well as to named beneficiaries.

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7. Five states — Arkansas, Kentucky, Maryland, Pennsylvania and Tennessee — have antilapse statutes expressly applicable to class gifts. See MD. ANN. CODE GEN. LAWS art. 93 § 355 (1957).

8. Arnold v. Wells, 100 Fla. 1470, 131 So. 400 (1930); Dean v. Crews, 77 Fla. 319, 81 So. 479 (1919); 57 AM. JUR. *Wills* § 1426, at 957 (1948).

9. [At common law] "a gift to a class is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number." 3 PAGE, WILLS § 1046, at 196 (Lifetime ed. 1941).

10. It can be argued that where all class members predecease the testator the gift has lapsed. Nevertheless the English courts when faced with this situation have held the antilapse statute, which had been construed as preventing common law lapse, inapplicable to class gifts. *In re* Harvey's Estate, [1893] 1 Ch. 567.

11. Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26 § 33.

12. The antilapse statute provided:

> [T]hat where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

13. *In re* Harvey's Estate, [1893] 1 Ch. 567; Olney v. Bates, 3 Drew 319, 61 Eng. Rep. 925 (Ch. 1855).

14. *Ga.*: Toucher v. Hawkins, 158 Ga. 482, 123 S.E. 618 (1924); *Iowa*: Friederichs v. Friederichs, 205 Iowa 505, 218 N.W. 271 (1928); *Neb.*: Lacy v. Murdock, 147 Neb. 242, 22 N.W.2d 713 (1946); *N.H.*: Campbell v. Clark, 64 N.H. 328, 10 Atl. 702 (1887); *N.J.*: *In re* Force's Estate, 23 N.J. Misc. 141, 42 A.2d 302 (Orphans' Ct. 1945) (by implication); *N.Y.*: *In re* Guering's Estate, 206 Misc. 850, 133 N.Y.S.2d 253 (Surr. Ct. 1954) (Earlier cases contra were overruled).

The rationale of these courts can be divided [roughly] into the *purpose* and *intent* approaches.[15]

The courts which follow the *intent* approach hold that the antilapse statute was designed by the legislature to give efficacy to the testator's probable intent, viz., that all class members alive at the will's execution should share in his estate.[16] The courts which follow the *purpose* approach reason that the statute is remedial in nature and should be liberally construed to give efficacy to its purpose, viz., rectifying the inequality of the distribution of the testator's property among the objects of his affection resulting from the common law rule of allowing only those beneficiaries alive at the death of the testator to share in his estate.[17]

In the second situation, *i.e.*, where the class member was deceased prior to the will's execution, the courts are faced with the additional argument that at common law a gift to a deceased beneficiary was void and, thus, such a beneficiary was never a member of the described class.[18] The only courts which hold the statute applicable in this second situation are those courts which follow the extremely liberal purpose approach.[19] This minority reasons that if the testator's estate is to be equitably distributed the date of death of a class member must not be determinative.[20]

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15. See, 3 PAGE, *op. cit. supra* note 9, at § 1062; Casner, *Class Gifts—Effect of Failure of Class Member to Survive the Testator*, 60 HARV. L. REV. 751 (1946); Annot., 56 A.L.R. 2d 848 (1957).

16. *Cal.*: *In re* Steidl's Estate, 89 Cal. App.2d 488, 201 P.2d 58 (1948); *Ky.*: Barnhill v. Sharon, 135 Ky. 70, 121 S.W. 983 (1909) (by virtue of the express terms of the Kentucky statute); *Me.*: Moses v. Allen, 81 Me. 268, 17 Atl. 66 (1889); *Mass.*: Galloupe v. Blake, 248 Mass. 196, 142 N.E. 818 (1924); *Mo.*: Stolle v. Stolle, 66 S.W.2d 912 (Mo. 1933) (dictum); Zombro v. Moffett, 329 Mo. 137, 44 S.W.2d 149 (1931); *Pa.*: *In re* Harrison's Estate, 202 Pa. 331, 51 Atl. 976 (1902) (dictum); *In re* Haupt's Estate, 57 Pa. D. & C. 416, 30 Northampton County Rep. 261 (Orphans' Ct. 1946) (cases decided under an express statutory provision); *R.I.*: Winsor v. Brown, 48 R.I. 200, 136 Atl. 434 (1927) (dictum); Moore v. Dimond, 5 R.I. 121 (1858); *Tex.*: Burch v. McMillin, 15 S.W.2d 86 (Tex. Civ. App. 1929); *Wash.*: *In re* Hutton's Estate, 106 Wash. 578, 180 Pac. 882 (1919) (dictum). For a complete collection of cases, see Annot., 56 A.L.R.2d 948 (1957); Annot., 3 A.L.R. 1673 (1919).

17. *Conn.*: Clifford v. Cronin, 97 Conn. 434, 117 Atl. 489 (1922); *Del.*: Todd v. Gambrill, 15 Del. Ch. 342, 138 Atl. 167 (1927); *Ill.*: Kehl v. Taylor, 275 Ill. 346, 114 N.E. 125 (1916); *Mich.*: Strong v. Smith, 84 Mich. 567, 48 N.W. 183 (1891). (Dictum in the case leads one to believe that although following purpose rationale, court will look to the intent); *Minn.*: *In re* Kittson's Estate, 177 Minn. 469, 225 N.W. 439 (1929); *Ohio*: Wooley v. Paxson, 46 Ohio St. 307, 24 N.E. 599 (1888); S.D.: Hoverstad v. First Nat'l Bank & Trust Co., 76 S.D. 119, 74 N.W.2d 48, 56 A.L.R. 938 (1955); For a complete collection of cases, see Annot., 56 A.L.R.2d 948 (1957); Annot., 3 A.L.R. 1673 (1919). For a rationale which best represents this view, see Kehl v. Taylor, *supra*.

18. See note 2 *supra*.

19. *Conn.*: Ackerman v. Hughes, 11 Conn. Supp. 133 (Super. Ct., Fairfield County 1942); *Del.*: Todd v. Gambrill, 15 Del. Ch. 342, 138 Atl. 176 (1927); *Ill.*: Kehl v. Taylor, 275 Ill. 346, 114 N.E. 125 (1916); Ky.: Abney v. Pearson, 225 Ky. 394, 74 S.W.2d 465 (1934), (by virtue of express statutory terms); *Minn.*: *In re* Kittson's Estate, 177 Minn. 469, 225 N.W. 439 (1929); *Ohio.*: Shumaker v. Pearson, 67 Ohio 330, 65 N.W. 1005 (1902); S.D.: Hoversted v. First Nat'l Bank & Trust Co., 76 S.D. 119, 74 N.W.2d 48, 56 A.L.R.2d 938 (1955); A Maine court, following an intent approach, has held the statute applicable after finding that the testator intended the statute to apply. Bray v. Pullen, 84 Me. 185, 24 Atl. 811 (1892).

20. Casner, *supra* note 15, at 762, indicates that in order to promote the statute's purpose the time of death of a person, otherwise a class member, should not be important.

The great weight of authority is against applying the statute to class gifts where the class member was deceased prior to the execution of the will. This majority is composed of: 1) those courts which adopt the strict English construction of the antilapse statute and refuse to apply the statute to any class gifts;[21] 2) those courts which follow the common law rule that a gift to an already deceased beneficiary is void, reasoning that a statute preventing lapse can not prevent a gift from being void;[22] 3) those courts which follow the intent approach and hold that the testator could not have intended persons deceased at the time of the execution of the will to share as class members.[23]

The court in the instant case was presented for the first time with the question of the applicability of the Florida antilapse statute to class gifts. The court divided the question into two parts: 1) as to the lineal descendants of the class members alive at the time of the execution of the will but who predeceased the testatrix; 2) as to the lineal descendants of the class members deceased prior to the will's execution. In the former situation, the court recognized the rule that statutes in derogation of the common law should be strictly construed.[24] Nevertheless, the court construed the legislative use of the words "blood kindred" in the statute to mean blood relatives in the plural, thus manifesting a clear legislative intent to apply the statute to class gifts.[25] As a result, the lineal descendants of those deceased class members who were alive at the time of the will's execution will now take that share the class member would have taken had he survived.[26]

As to the situation where the class member was deceased prior to the will's execution, the court recognized once again the rule that the antilapse statute is in derogation of the common law and should be strictly construed.[27] In this situation the court expressly followed an intent approach,[28] reasoning that when a testator provides for his brothers and sisters he normally intends to include only his *then* living brothers and sisters.[29] To allow the statute to operate in this situation would defeat the probable intent of the testator. Accordingly, the statute was held inapplicable and the

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21. See note 14 *supra*.
22. *Mass.*: Morse v. Mason, 93 Mass. (11 Allen) 36 (1865); *Mont.*: Hash v. Hash 64 Mont. 118, 208 Pac. 605 (1922); *Pa.*: *In re* Haupt's Estate, 57 Pa. D. & C. 416, 30 Northampton County Rep. 261 (Orphans' Ct. 1946) (in spite of a statutory provision).
23. *Cal.*: *In re* Steidl's Estate, 89 Cal. App.2d 488, 201 P.2d 58 (1948) (dictum and by implication); *Me.*: Bray v. Pullen, 84 Me. 185, 24 Atl. 811 (1892); *Mich.*: Strong v. Smith, 84 Mich. 567, 48 N.W. 183 (1891) (by implication); *Mo.*: Stolle v. Stolle, 66 S.W.2d 912 (Mo. 1933) (A gift to a class creates an ambiguity which has to be resolved by ascertaining what the testator intended); R.I.: Winsor v. Brown, 48 R.I. 200, 136 Atl. 434 (1927) (by implication); *Tex.*: Burch v. McMillin, 15 S.W.2d 86 (Tex. Civ. App. 1929) (by implication); *Wash.*: *In re* Hutton's Estate, 106 Wash. 578, 180 Pac. 882 (1919) (by implication).
24. Drafts v. Drafts, 114 So.2d 473, 475 (Fla. App. 1959).
25. *Ibid.*
26. *Id.* at 476.
27. *Ibid.*
28. *Ibid.*
29. *Ibid.*

lineal descendants of the class member deceased at the time of the will's execution were not to be included in the sharing class.

The dissent in the instant case would follow the strict English construction that the antilapse statute is designed solely to prevent common law lapse. Since a class gift at common law did not present such a lapse situation, the antilapse statute is inapplicable to all class gifts.[30] The dissenting judge indicated that if the legislature really intended the antilapse statute to apply to class gifts, such intention easily could have been effectuated by inserting in the statute one or two additional words which would have eliminated any doubt as to its purpose or meaning.[31]

As a general proposition, the application of the statute to class gifts appears to be a proper result. If the antilapse statutes are designed to prevent a failure of testamentary gifts, should the result be any different if the testator specifically names his beneficiaries or generally names them through a class designation?

Although the Florida decision is consonant with the majority viewpoint in both fact situations presented, an analysis of the statute indicates that the instant problem may necessitate another pronouncement before it is finally settled. In reaching the majority rule as to class members alive at the execution of the will but who predeceased the testatrix, the court hinged its decision upon the interpretation of the unique words[33] "blood kindred" in the Florida statute as meaning a class. However, in arriving at the conclusion that the antilapse statute was not applicable to gifts to class members deceased prior to the execution of the will, the court did not appear to notice the uncommon[34] wording of the statute to the effect that when ". . . such devisee or legatee dies before the testator . . . *or is dead at the time the will is executed* . . . such legacy or devise does not lapse." (Emphasis added.)[35]

From a plain reading of the statute, if blood kindred means class, and the court says it does, then the statute should logically operate to prevent the failure of testamentary gifts to class members in both fact situations.[36]

30. *Id.* at 477.
31. *Ibid.*
32. *Ibid.*
33. See note 4 *supra.*
34. It appears that of the states which do not have express provisions applicable to a class, only six states besides Florida—California, Georgia, South Dakota, Utah, and West Virginia—have the additional proviso in their statutes to the effect, "or is dead at the time the will is executed."
35. FLA. STAT. § 731.20 (1957).
36. Of the six states in note 34 *supra*: Georgia follows the strict English view and will not prevent failure of the testamentary gift even to a *named* beneficiary who is dead prior to the will's execution; Utah and West Virginia have no cases interpreting the provision; Ohio and South Dakota follow the purpose approach and hold the statute applicable in both situations; California follows the intent approach that has not had the problem presented squarely before it; however, by implication in *In re* Steidl's Estate, 89 Cal. App.2d 488, 201 P.2d 58 (1948) it would appear that the statute will be inapplicable to class gifts if the class member was dead prior to the execution of the will.

Unless the court used the interpretation of the words "blood kindred" as merely lending credence to an implied holding that the legislature intended the statute to apply only if the result would approximate the testator's probable intent,[37] the decision appears open to attack by lineal descendants of class members who were deceased prior to the will's execution. They may logically point out the inconsistency of relying upon the words of the statute in one situation, yet adopting an intent approach in the second situation and ignoring the words of the statute, ". . . or is dead prior to the will's execution."[38]

MARTIN J. NASH

37. This appears to be a reasonable inference to draw based upon the court's opinion in the instant case where it states:

> Such holding (speaking of the applicability of the statute to class gifts where the class member was alive at the execution of the will but predeceased the testator) is justified on the premise that a lapse of a testamentary gift is thereby prevented and the gift will pass to those whom the testator would most likely have wished to be substituted for the deceased member of the class. Drafts v. Drafts, 114 So.2d 473, 475 (Fla. App. 1959).

38. RESTATEMENT OF PROPERTY § 298 (1940) takes the view that the statute should be applied as to class members who die prior to the execution of the will only if: "A) the testator is found to have intended to include the already deceased possible taker as a member of the class in favor of which he made the limitation." (Florida will apparently follow this reasoning which requires an affirmative intent on the part of the testator); "B) or the statute, in terms applies to a devisee *'who dies before that will is executed'* (as the Florida statute provides) and no contrary intent of the testator is found from additional language or circumstances." (Emphasis added.)