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Lapsed Legacies and Devises--Intestacy vs. Passage Under Residuary Clause in Kentucky

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Notes and Comments

LAPSED LEGACIES AND DEVISES—INTESTACY VS. PASSAGE UNDER RESIDUARY CLAUSE IN KENTUCKY

Where a legacy or devise cannot vest at the time of the testator's death by reason of the previous death of the beneficiary the gift will become ineffective and is said to "lapse."[1] In recent years many states have enacted statutes designed to prevent lapse, but in spite of these "saving" statutes lapsed legacies and devises are still common. The reason for this is that the statutes are limited in their scope and thus are not able to "save" all testamentary gifts. For example, the applicable Kentucky statute provides:

> If a devisee or legatee dies before the testator . . . leaving issue who survive the testator, such issue shall take the estate devised or bequeathed. . . .[2]

Since the word "issue" in the statute is not synonymous with the word heir,"[3] but is restricted to lineal descendants of the devisee and not collateral or ascending heirs,[4] many gifts to predeceased beneficiaries are susceptible to lapse on failure of issue.

The following discussion relates to the Kentucky rule on lapsed legacies and devises, particularly the effect which a residuary clause in the will may have on such lapsed gifts.

The general rule is that a devise or bequest which has lapsed will pass as intestate property, except where there is a residuary clause in the will. When there is a residuary clause, the general rule is that lapsed gifts pass into the residuum and do not become intestate property unless the testator has expressed a contrary intention.[5] This rule, however, is not applied in those cases where the lapsed gift is itself a part of the residue. Where a residuary gift fails, it will pass as intestate property and not to the remaining residuary legatees,[6] unless the legatees take as members of a class. For example, if the testator provides that the residue of his estate shall pass to his children and he has three children at the time of the execution of the will, the death of one of the children will not prevent the other two from taking

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[1] ATKINSON, WILLS 727 (1937).
[2] KY. REV. STAT. 394.400 (1953).
[3] Slone v. Mason Coal & Coke Co., 168 Ky. 697, 182 S.W. 929 (1916).
[4] Dillender v. Wilson, 228 Ky. 758, 16 S.W. 2d 173 (1929).
[5] ATKINSON, WILLS 727 (1937); 3 PAGE, WILLS 95 (3rd ed. 1941); 57 AM. JUR. 971 (1948); anno. 10 A.L.R. 1522 (1921).
[6] ATKINSON, WILLS 734 (1937).

all of the residue since the gift is made to the class "children." On the other hand, if the testator provides that the residue of his estate shall pass "one-third to my son A, one-third to my son B, and one-third to my son C," the death of A will not cause his one-third share to be divided between B and C since they were to take individual shares and were not taking as a class. The reason for the rule that the remaining residuary legatees cannot take lapsed residuary gifts, unless they are taking as members of a class, is that since the lapsed gift is itself in the residue it can not be said to pass into the residue for it is already there.[7]

The justification for the general rule that lapsed gifts shall pass into the residuum, provided the will contains a residuary clause, is the presumption that the testator did not intend to die intestate as to any of his property. The mere presence of a residuary clause indicates that it was not the testator's intention that he should die intestate as to any of his property. Kentucky once followed this general rule.[8] Now, however, by reason of statutory enactment, Kentucky's rule has become unique in that such lapsed gifts pass as intestate property unless the testator expresses an intention that it should pass into the residuum.[9] The Kentucky statute provides:

> Unless a contrary intention appears from the will, real or personal estate, comprised in a devise incapable of taking effect, shall not be included in the residuary devise contained in the will, but shall pass as in case of intestacy.[10]

Since the rule in Kentucky is that lapsed gifts will not fall into the residuum unless the testator so intends, the problem is how may such an intention be manifested?[11] Once it has been determined that a

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[7] 3 PAGE, WILLS 98 (3rd ed. 1941).

[8] Cunningham's Devisees v. Cunningham's Heirs, 57 Ky. (18 B. Mon.) 19 (1856).

[9] Castleman v. Eastin's Ex'rs, 176 Ky. 762, 197 S.W. 445 (1917).

[10] KY. REV. STAT. 394.500 (1953). This statutory declaration amounts to more than a mere principle of construction; it provides as a rule of law that a lapsed gift will pass as in case of intestacy unless a contrary intention appears from the will; thus, it alters the usual effect of a residuary clause. Cunningham's Devisees v. Cunningham's Heirs, 57 Ky. (18 B. Mon.) 19 (1856).

[11] In some cases the residuary legatees may get the property, not because the testator expressed an intention that they should take lapsed gifts, but because the gift does not actually lapse and hence the statute does not apply. For example, in Sigmon v. Moore's Adm'r, 297 Ky. 525, 180 S.W. 2d 420 (1944), the testator bequeathed $2,000 to his wife "for her use and benefit during her natural life with power to dispose of the same by will at the death as she may desire", but the wife did not so dispose of the property and the court held that the legatees under a general residuary clause should take the $2,000. The heirs argued that since the wife did not dispose of the $2,000 it was a lapsed bequest and should pass as in case of intestacy under the statute. The court answered this contention by stating that since the wife enjoyed her life estate and could have disposed of the remainder by will if she so desired, the gift did take effect and therefore was

legacy or devise has lapsed the Kentucky Court has been reluctant to find sufficient manifestation of intention by the testator that the property should fall into the residuum. *May* v. *Walter's Ex'rs*[12] is the only Kentucky case found which holds that the testator had expressed a sufficient intention to cause the property to fall into the residuum. In that case the testator devised his house and furniture, except a piano and some pictures, to his sister, H. He gave the piano and the pictures to his other sister, M, but provided that they should not be removed from the house. The will further provided that should H not prefer to live in the house, then M could live in it without paying rent. H died childless in the lifetime of the testator. The court pointed out that under the provisions of the statute the house would descend to the heirs at law unless the language in the will manifests an intention that it should go to M and her children under the residuary clause. The court granted the house to M reasoning that if the piano and pictures devised to M were to remain in a house in which she had no interest, present or contingent, the devise of them to her would be a mere mockery. The court also pointed out that the fact that M could use the house without paying rent, provided that H did not choose to live in it, showed that the house was not intended to be given absolutely to H but that she was only granted the use of it.

The other Kentucky cases have not been as liberal as *May* v. *Walter's Ex'rs*. In *Schroeder* v. *Bohlsen*[13] the testatrix' will provided that if her brother in a lunatic asylum should be restored to his right mind, and discharged as cured, he should have $2,000. The brother died in the lifetime of the testatrix without being restored to reason. It was contended that it was a condition precedent to the vesting of the bequest to her brother that he should be restored to his right mind, and as his death in the lifetime of the testatrix rendered it impossible for these conditions to be realized, the bequest to him failed and remained a part of the estate which passed under the residuary clause of the will. The court rejected this contention and held that it was a lapsed legacy and passed as intestate property under the statute. In *Cundiff* v. *Schmitt*[14] the testatrix devised two lots to her sister and gave all the residue of her estate, which "I may own or have the right to dispose of at the time of my decease" to her husband. The sister predeceased the testatrix. The court held that the two lots did not fall into the

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not a lapsed bequest. It is also clear that where only a life estate is devised and no disposition is made of the remainder the remainder will remain in the estate and pass to the residuary legatees. Lester's Adm'r v. Jones, 300 Ky. 534, 189 S.W. 2d 728 (1945).

[12] 30 Ky. Law Rep. 59, 97 S.W. 423 (1906).

[13] 119 Ky. 305, 83 S.W. 627 (1904).

[14] 243 S.W. 2d 667 (Ky. 1951).

residuary clause for the benefit of the testatrix' husband. Here the court might very easily have held that the lots should fall into the residuum since it was expressly stated that the husband should take all the residue of her estate which she might own *or have the right to dispose of.* There was no doubt as to the testatrix' right to dispose of the two lots. However, the court did not deem this fact to be a sufficient manifestation of intention under the statute to cause the lapsed devise to go to the residuary legatee. Probably the strongest manifestation of intention that a lapsed gift should pass to the residuary legatee appeared in the will involved in *Northcutt's Ex'r* v. *Farmers Nat. Bank.*[15] In that case the will provided for a bequest of $2,000 to a named person "if living, otherwise void." The court held that this provision did not indicate an intention that that amount should go to the residuary legatees in case of the death of the named legatee before that of the testator. It would seem that it would be sounder reasoning to say that since the named legatee was not living and his bequest void, the will should be read without the mention of the void provision. To arrive at the testator's true intention under such a provision the only just thing to do would be to strike out the bequest which was expressly made void by the terms of the instrument and read the will just as though no such provision was ever present. The necessary effect of striking out such void bequests would be to cause the property to go into the residuum if the will contains a residuary clause. It could have been argued further that the statute had no application in the above case since the bequest was expressly made *void* and the statute was only intended to apply to *lapsed* gifts. This contention, however, could be answered by pointing to the broad language of the statute applicable to all devises and bequests "incapable of taking effect," since void bequests would be those incapable of taking effect.[16]

The attitude of the Kentucky court, gathered from the foregoing cases, indicates a strict application of the statute. The residuary legatee is most apt to lose his case unless a clear intention that he should take lapsed bequests and devises appears in the will. The statute has defined the policy by which the court is to be guided. The statute may be said to form a double purpose. First, it probably more truly defines the testator's intention in those cases where he disposes

[15] 292 Ky. 628, 166 S.W. 2d 971 (1942).

[16] The language of the will is construed in favor of the heirs at law. Of course, only those wills in which the intention is difficult to determine reach the Court of Appeals for interpretation. None of the above cases can be said to express a *clear* intention that residuary legatees should take lapsed gifts, rather, the intention must be inferred. If a testator wishes that lapsed gifts should pass into the residuum it is a simple matter for him to express his intention clearly by a statement to that effect.

of a substantial part of his estate to his wife or other member of his family and then leaves the residue to some stranger or charitable organization. If the wife or member of the family predeceases him and no change is made in the will, it would be hard to assume in the majority of cases that his intention was that the lapsed gifts should go to the residuary legatee to the detriment of his heirs at law. Second, it is just as reasonable to suppose that the testator would have intended for all of his heirs to share in such property rather than to allow only one or two to receive a windfall.

The Kentucky statute requiring lapsed legacies and devises to go to the heirs at law, thus contradicting the presumption against intestacy, seems to this writer to state a reasonable policy. The truth in this type case is that the testator lacked sufficient foresight to anticipate such an event, otherwise he surely would have made provision for it. Where no provision is made or intention is clearly expressed, it is reasonable for the legislature in furtherance of the public interest to provide for the distribution of such property and for the court to give full effect to that provision.

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ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN AMBIGUITIES IN WILLS

A valid will may exist, yet, when the will is probated, it may be discovered that because of the surrounding facts or circumstances, or because of the wording upon the face of the will itself, the disposition of the testator's property is uncertain. The purpose of this note is to attempt a clarification of the rules governing the admissibility of evidence to explain ambiguous terms in wills. Problems of admissibility where fraud, mistake or undue influence is alleged will not be considered.

Where it is sought to employ parol evidence to explain a word or term in a will, major policy considerations come into conflict. On the one hand is the policy of giving effect to the testator's intentions; on the other, the policy against writing the will for the testator or giving effect to an oral will. Where a devise or bequest is such that two meanings may equally apply, it is reasonable to suppose that the testator intended one of the two rather than neither; therefore, the court should admit extrinsic evidence to determine and give effect to the testator's intention. This, however, comes into conflict with the