

1963

In the Matter of the Estate of Chloe Ryan Call : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

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Clerk, Supreme Court, Utah

In the Matter of the Estate)
of)

Case No.
9863

CHLOE RYAN CALL,

Deceased.)

BRIEF OF RESPONDENT

MORGAN AND PAYNE

Attorneys for

Respondent, Bessie Call Nielson, Executrix
128 East Center Street
Provo, Utah

TABLE OF CONTENTS

	<u>Page</u>
Statement of Facts	1
Argument:	
Point I. THAT PARAGRAPH SECOND OF THE WILL OF CHLOE R. CALL CREATES A FEE SIMPLE TITLE IN THE CHILDREN OF TESTATRIX IF THEY SURVIVE HER.	4
Point II. THAT IF SAID WILL SUBSEQUENTLY ATTEMPTS TO CREATE A LESSER ESTATE IN THE FIRST TAKERS, SUCH LESSER ESTATE IS REPUGNANT TO THE FEE ESTATE FIRST CREATED.	9
Point III. THAT THE PROPERTY OF THE ESTATE SHOULD GO TO THE NEPHEW DON LEWIS RYAN ONLY IN THE EVENT BOTH CHILDREN OF TESTATRIX DIED BEFORE SAID TESTATRIX.	13
Point IV. THAT SAID WILL GIVES THE PROPERTY OF THE ESTATE TO THE CHILDREN AT THE LAST OF SAID WILL AS WELL AS AT THE FIRST OF SAID WILL.	19
Point V. THAT A LIFE ESTATE IS NOT STATED BY THE WILL AND THE POWER OF DISPOSITION OF THE PROP- ERTY GIVEN TO SAID CHILDREN DOES NOT CREATE AN "EXECUTORY LIMITATION OVER" TO THE NEPHEW DON LEWIS RYAN.	23
Point VI. THAT THE TRIAL COURT'S INTERPRETATION OF THE WILL IS CONSISTENT WITH THE WHOLE WILL.	27

TABLE OF CONTENTS (CONT.)

	<u>Page</u>
Conclusion	31

AUTHORITIES

Texts:

171 ALR 1308	13
17 ALR 2nd 1-227	11, 20, 27
33 Am. Jur. 498, Section 36, Life Estates and Remainders, etc.	21
33 Am. Jur.; Life Estates and Remainders, Sections 19-41	24, 27
1 Underhill on Wills, Section 358	8

Statutes:

Section 74-1-36, UCA 1953	24
Section 74-2-5, UCA 1953	21, 22
Section 74-2-6, UCA 1953	24

Cases:

Chapman v. Chick, 16 A. 407, 409, 81 Me. 109	6
Clarkson v. Bliley, 38 SE 2nd 22, (Va.)	13
Com'l Nat. Bk. of Kansas City v. Martin, 340 P 2nd 899, 185 Kan. 116, (1959)	7
In re Collias' Estate, 233 P 2nd 544, Calif., 1951	7, 8
Dawson v. McKee, 116 NE 2nd 538, Indiana 1954	16, 17
Fields v. Fields, 3 P 2nd 771, Oregon; Reh. den. 7 P 2nd 975	8, 9
In re Gormley's Estate, 338 P 2nd 457, Calif. 1959	19
Jones v. Pueblo Savings & Trust Co., 87 P 2nd 2, 103 Colo. 455	7
Lewis v. McConchie, 100 P 2nd 752, 151 Kan. 778	18

TABLE OF CONTENTS (CONT.)

	<u>Page</u>
Nickerson v. Hoover, 115 NE 588, 1919	17, 18
Palmer v. Cook, 42 NE 796 (Ill.)	6
Parker v. Parker, 46 Mass. (5 Metc.) 134, 138	6
Prusa v. Beasley, 335 P 2nd 346, Okla. 1958	8
In re Schira's Will, 165 NE 2nd 60, Ohio 1959	12, 13
Schomp v. Brown, 335 P 2nd 847, Oregon, 1959	5, 12
Shippy v. Elliott, 327 P 2nd 645, Okla. 1958	8
Smith v. Wood, 20 P 2nd 48, Calif.	19
In re Wilkins Will, 278 N.Y.S. 891, 155 Misc. 152	20
In re Young's Estate, 1 P 2nd 523, Calif. 1931	18

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STATEMENT OF FACTS

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-2-

property. (Tr. 25, 32-34, 41-42). That on March 28, 1957, and on April 2, 1957, testatrix divided and deeded all of her property consisting of a very old home and unimproved building lots to the two children by separate deeds (Exhibits 1 and 2) after testatrix entered the hospital on her last illness (Tr. 43). That without the knowledge of testatrix while she was still in the hospital on her deathbed, the children on April 10, 1957, deeded by two deeds (Exhibits 3 and 4) back to their mother the said property of said estate for obvious tax advantages. (R. 22, 88, 89, 90, 91, Tr. 37-38).

That on July 22, 1960, the son Orvis W. Call died as a result of a truck accident (Tr. 12) after sale from said estate of certain building lots (Tr. 29, R. 32, 39, 52, 59) and thereafter on May 24, 1962, the appellant Don Lewis Ryan filed a Petition protesting the proposed sale of the 60 year old home by the Executrix Bessie Call Nielson

(R. 77) and appellant in reply. The Executrix answered petitioned for an interpretation of the Will of said Chloe H. Hall after removing said objection to the sale of said old home (R. 80, 86, 94). The lower Court after considering the arguments and briefs of the parties entered Findings of Fact and Conclusions of Law and Judgment and Decree (R. 99-107) that the testatrix intended her children to have all of the property of her estate and that the same vested in said children surviving at the death of testatrix and that there is nothing in the will which states or creates a life estate only and that the testatrix intended that the interests of said John Lewis Ryan, William K. Ryan, nephew and Phyllis F. Ryan Hastings, niece, were contingent only and depended upon the death of the children both occurring prior to the death of the testatrix Chloe H. Hall.

POINT I.

THAT PARAGRAPH SECOND OF THE WILL OF CHLOE R. CALL CREATES A FEE SIMPLE TITLE IN THE CHILDREN OF TESTATRIX IF THEY SURVIVE HER.

Paragraph Second of the Will of Chloe R. Call reads: "All the rest, residue and remainder of my estate, I give, devise and bequeath to my daughter Bessie Call Niel and to my son, Orvis W. Call, in equal undivided shares, share and share alike." (R. 18).

All of the cases found by writer hold that such wording creates an absolute fee simple grant or interest to the named take. Counsel for appellant have never quoted any authority for a different proposition or meaning of such wording. To mean anything different than that a fee has been created, this wording would have to be coupled with different or additional word-

ing which does not appear in this will or

additional wording required by cases interpreting a life estate. Subsequent wording contained in said Will attempts to provide what happens in the event the children do not get the fee rather than to design that the fee should go to someone else. The priority of interest of the testatrix is to provide primarily for her children as the first takers and not for the last takers. The property consisting of the 60 year old home and unimproved building lot would be a liability to a life tenant because it would bring little or no income and taxes and special assessments would have to be paid.

The case of Schomp vs. Brown, 335 P. 2d 847, Oregon, 1959, is one of the many recent cases dealing with the question of whether a life estate is created where a clause gives an interest to a second taker upon death of a first taker. The Schomp case was where a husband and wife made

reciprocal wills giving legacies; the surviving spouse "all the rest, residue and remainder of estate;" spouse first dying with a gift over to children as provided in the Wills. It was held that this wording created in said surviving spouse an absolute fee and did not impress a trust or life estate for the children.

Where testator devised "all the residue and remainder of my estate," such phrase creates a fee, though no words of limitation or inheritance are added. *Parker v. Parker* 46 Mass. (5 Metc.) 134 1.

"All the rest, residue and remainder of my estate," as used in a Will is intended as a "general description of all the property testator had left in the world, whether real, personal or mixed, after the payment of debts and specific legacies." *Chapman v. Chick*, 16A. 407, 409 81 Me, 109.

The word "remainder," in the law of real estate, necessarily implies what is left, and if the entire estate in fee be granted, there can be no remainder. It is an established principle of construction of contingent remainders that an estate cannot by deed be limited to another after a fee already granted. *Palmer v. Cook* 42 NE 796 (Ill.).

We agree that an estate vested at

testator's death but it vested in the children and not in Ryan.

The law favors the vesting of estates, especially when given to children or those standing in like relation to the testator; and under such circumstances it imposes such a construction of the terms of a will as will create a vested estate if possible. Jones v. Pueblo Savings & Trust Co. 87 P 2nd 2,103 Colo. 455.

The law favors the early vesting of testamentary gifts, and unless contrary intention clearly appears in will, interest will be regarded as vested, rather than contingent. Com'l. Nat. Bk. of Kansas City v. Martin, 340 P2nd 899,185 Kan. 116 (1959).

In re Collias' Estate (Cal. 1951) 233 P2nd 554. "It is clear that the sentence 'All the rest and residue of my estate..... I give, devise and bequeath unto my nephew' standing alone, would bequeath the property to Argirios (nephew) absolutely." Thus, that estate will not be limited by subsequent words unless they indicate as clear an intention therefor as was shown by the words creating the estate. Words of instruction to give one half of estate to relatives in Greece do not impose a legally enforceable duty or impose a trust upon property. To impose a trust on property thus devised or bequeathed, it must appear that the testator intended to impose mandatory duties upon devisee. "Where the person directed to carry out the wishes of the testator is both executor and legatee, the courts in construing the effect of the language have refused to follow the strict rule which imposes a mandatory duty on the executor and have apparently treated the words as being addressed to him in his

capacity as legatee" (and thus precatory).

A devise of the residue of a testator's property passes all of the property which he was entitled to devise or bequeath at the time of his death or bequeathed by his will. Prusa v. Beasley (Okla. 1958) 335 P2nd 346.

Paragraph of will devising land to testator's wife was clear and unambiguous and wife took a fee simple title to land, not a life estate, notwithstanding subsequent paragraph of will providing that it was testator's will and desire that all property devised to wife that remained her property at time of her death should be equally divided among their three children, and wife had right to dispose of land by will. (Okla. 1958) Shippy v. Elliott 327 P2nd 645.

"I give, devise and bequeath to my wife, Lillie Maud Fields, all the rest, residue and remainder of my property" created a fee simple title that could not be cut down or limited to a life estate by subsequent words that "the remainder of my property devised and bequeathed to her by me that shall be in her possession at the time of her death shall be divided in equal shares between my sons." Fields v. Fields (Oreg.) 3 P2nd 771. Rehearing denied 7 P2nd 975 and quotes 1 Underhill on Wills Sec. 358: "Where an absolute gift is given in clear and expressive, or, as sometimes expressed, in positive and decisive language, the rule of construction is that the interest thus given shall not be taken away, cut down, limited or diminished by subsequent vague and general expressions. In other words, any subsequent expression of intention of the

testator must, in order to limit the prior gift, be equally clear and intelligible, and indicate an intention to that effect with reasonable certainty."

POINT II.

THAT IF SAID WILL SUBSEQUENTLY ATTEMPTS TO CREATE A LESSER ESTATE IN THE FIRST TAKERS, SUCH LESSER ESTATE IS REPUGNANT TO THE FEE ESTATE FIRST CREATED.

The children of testatrix were the primary beneficiaries of said will and subsequent language in the will was intended to prevent a lapse in the event a fee did not vest in said children. Any interpretation of subsequent language that cuts down the absolute grant to the children in Paragraph Second of the will is repugnant to the interest stated to the children as first takers.

To point out the repugnancy contained in the will of Chloe Call, let us consider the wording of the Paragraph Fifth which purportedly grants to Don Lewis Ryan a fee

reversion subject to life estates of Bessie

Call Nielson and Orvis W. Call, to-wit:

"I direct that upon the death of my daughter Bessie Call Nielson and upon the death of my son Orvis W. Call, that the shares herein devised to them, shall go to my nephew Don Lewis Ryan of Heber, Utah." Now did Testatrix mean that all of the shares given to the children should go to Ryan? Obviously not, because that would mean that she gave nothing to the children. Then what part of the children's share did she intend go to Ryan--only that which they did not use in their lifetimes? The Testatrix does not say this anywhere in the will nor does she ever mention that the children shall have only the income and cannot invade the corpus.

A literal application leaves nothing to the children because all of their shares devised by the will to them would go to Ryan, even their share of the property constituting income from their alleged

life interests. The will never mentions a life estate, income vs. corpus, unused portions, unconsumed principal, trust or any other legal divisions or controls necessary to determine how much the children get and how much that Ryan is to get. There is not, therefore, any logical basis to divide the estate between the children and Ryan. This is why the wording giving all of the estate to the children and the wording giving all of the children's share under the will to Ryan is repugnant or directly contrary.

The voluminous annotation on this doctrine of repugnancy without exception supports the interpretation that in wording similar to the Chloe R. Call will a fee is created in the first takers (children) and that subsequent language repugnant to such fee is void and ineffectual. 17 ALR 2nd 1-227. On pages 72 and 87 of said annotation appears the following: "The

rule prevailing in nearly all jurisdictions is that where the bequest, devise, or grant is sufficient in its terms to carry the fee or if personalty the analogous interest, and is construed to have that effect, a purported limitation over of property remaining undisposed of, or all of the property if undisposed of, is wholly void. The more usual ground of such holding, sometimes found joined or blended with others, is that the limitation over is repugnant to the estate of the first taker.

Where the language of the bequest, devise, or grant to the first taker includes words of inheritance or perpetuity, or is by its express terms absolute or in fee, the cases are, in general, strongly inclined to construe the instrument as vesting in such taker the fee or analogous interest, and to reject the life estate construction, and accordingly to hold the limitation over of property not disposed of void by virtue of the commonly prevailing doctrine concerning executory limitations of that sort.

Very recent cases continue to bear out this doctrine:

"When an estate in an absolute fee is given in one clause of will, the interest which the devisee there obtains cannot be taken away or diminished by any subsequent or general expressions of doubtful import, or by any inference deducible therefrom that may be repugnant to the estate given." Schomp v. Brown, supra.

In re Schira's Will: A fee, once given, cannot be cut down, by other provisions of the will, and remainder cannot be engrafted upon a fee. In case of a

conflict between testator's intention and settled rules of law, the latter must prevail. Where a will has two possible interpretations, that which complies with the law will be preferred to that which violates the law. Where a fee is clearly given, a limitation over of the remainder is void as inconsistent with the fee granted, whether the gift over is expressed to be of what remains, or may be left or the residue or is on death of the first taker without having disposed of the property. An attempt to dispose of remainder of the estate the first legatee or devisee chose to leave is, in effect, attempting to make a will for the first devisee, to take effect in case the first devisee fails to make one for himself or otherwise dispose of the property--this the testator cannot do. If it is found that one clause, standing alone, clearly evinces a purpose to create a certain interest, and the subsequent language merely operates to create a doubt about the testator's intent in that particular, the latter words will be disregarded. In re Schira's Will, 165 NE 2nd 60, Ohio 1959.

Clarkson v. Bliley, (Va.) 38 SE 2nd 22, 171 ALR 1308, holds "an estate in fee to wife of residue of testator's property is not cut down to a life estate by a subsequent clause where testator attempted, upon death of the wife, to dispose of the property to his wife's nephew, the attempted limitation over being void for repugnancy."

POINT III.

THAT THE PROPERTY OF THE ESTATE SHOULD
GO TO THE NEPHEW DON LEWIS RYAN ONLY IN THE

EVENT BOTH CHILDREN OF TESTATRIX DIED
BEFORE SAID TESTATRIX.

The Will of Chloe Call is not unusual in its general form. The meaning of the Will fits the general pattern of simple wills if the children are considered the primary objects of Testatrix' bounty. The secret of the conflict between opposite advocates claiming under this Will is the omission by the Will of a time or event in which the interest of Don Lewis Ryan attaches. The literal wording says "upon the death" of both the children that Ryan gets "the shares herein devised to them." Now the Testatrix could not have meant that literally because the children would then be mere holders or conduits to take the estate to the nephew. It is much more reasonable to understand that the Testatrix meant that the nephew was to have the shares devised to the children if both the children predeceased her. This is the more reasonable

when considered in light of the previous paragraph that the surviving child was to take the interest of a deceased child as is usually provided in a will. If Paragraph Fifth had said upon death of both children "before I die" that the shares of children would then go to Ryan, the whole controversy here would be eliminated. It is not surprising therefore to find that this is the law of wills and the general rule is that where no time is fixed for the vesting of an estate contingent upon the death of the first takers, that Testator contemplated that deaths of first takers must occur within Testator's lifetime. There is no question but that the children are the first takers of all of the estate and that Ryan's interest is contingent upon the deaths of both such children. If it is assumed that by Paragraph Fifth that Testatrix meant that Ryan would get the whole estate devised to the

children as the will is alleged to state, she could only have meant that Ryan were to get the whole estate if the children both died before Testatrix.

The case of Dawson v. McKee, 116 NE 2nd 538, Indiana 1954, handled this problem where contingent beneficiaries claimed that first takers took a life estate where will provided for contingent beneficiaries if first takers died under certain conditions as against claim of grandchildren that they took a vested fee upon death of Testator. The question was whether grandchildren took a fee title to property where they survived the Testator or whether they took a life interest that would descend to survivor or descendants of one or other or a nephew of Testator. Held, when the grandchildren survived Testator, property vested absolutely in fee in them. The death mentioned by the Will meant and referred to death of grandchild or both

occurring before death of Testator, and an adverse claimant had burden of proof of proving Testator meant otherwise.

"Where will giving all property to named grandchildren provided that (1) if either should die without children or heir descendants surviving, his share should go to survivor of the grandchildren, (2) if both should die without survivors, lands should go to a nephew, and (3) if either grandchild should die with child surviving his share should go to such child, but testator did not clearly fix a time for occurrence of death of first takers affecting such provisions, general rule would be applied, whereby death in testator's lifetime would be deemed contemplated, and hence fee simple vested in named grandchildren when they survived testator."

"One seeking to avoid application of general rule of construction, whereby devise conditioned on death of first taker would be deemed to contemplate death during testator's lifetime, had burden of proving a definite and certain time contemplated for such death."

Another case setting out the general rule is Nickerson v. Hoover, 1919, 115 NE 588:

"The law favors the vesting of estates at the earliest possible moment and a will should be construed accordingly in the absence of a clear manifestation of the intention of the testator to the contrary.

It is also well settled that where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of death of such primary devisee without children or issue, the condition refers to a death without children or issue within the lifetime of the testator, and that, if the primary devisee survives the testator, he takes at the latter's death an estate in fee simple."

Such a death provision with carry over to another is a lapse provision only and not intended to create a life estate in first taker as the rights of parties must be determined upon death of testator. See *In re Young's Estate*, (Cal. 1931) 1 P 2nd 523.

"Where there is devise to one person in fee and in case of his death to another, contingency referred to is death of first-named devisee during testator's life."

Where testatrix devised property to her four named children and directed "either of them dieing, their share goes to the surviving above-mentioned children" the words "either of them dieing" mean death of any one of the devisees before death of testatrix and will could not be construed as giving testatrix's children a life estate only. *Lewis v. McConchie*, 100 P 2nd 752, 151 Kan. 778.

Construction giving estate of inheritance to first devisee is favored, and such estate cannot be reduced to life estate only by unambiguous provisions. Will provided if testatrix's daughter died without issue, property would go to others. Court held this meant if she died without issue before testatrix. "To hold that it means death at any time would place a higher value on uncertainty than upon certainty as a goal in interpretation." *Smith v. Wood* (Cal.) 20 P 2nd 48.

Where testator made an unequivocal devise to the wife of the house as well as other property and then stated that the house at the wife's death should go to another, will was construed to provide a bequest of all of the testator's property to the surviving widow and the second clause was properly disregarded as qualifying the clear and unambiguous provision of the first clause. *In re Gormley's Estate*, 338 P 2nd 457 (Calif. 1959).

POINT IV.

THAT SAID WILL GIVES THE PROPERTY OF THE ESTATE TO THE CHILDREN AT THE LAST OF SAID WILL AS WELL AS AT THE FIRST OF SAID WILL.

Paragraph Seventh of said will gives the children of testatrix power to convert the whole property of the estate by sale before the estate is closed and the proceeds thereof invested in American Telephone and

Telegraph Company stock in the names of said children in equal shares, share and share alike. This provision amounts to an absolute power of disposition in the children. It gives the stock to the children, not the Executors. Formerly, objections were sometimes raised that the power of sale was inconsistent with a fee, but the later cases above cited in 17 ALR 2nd 72 hold that such an absolute power of disposition is consistent with a fee and is only another way of saying that the first taker is to have the full benefits of the property devised and that the power of disposition is an incident of the fee.

Words and Phrases defines the meaning of "in equal shares" and "share and share alike" by quoting the following case:

Words "in equal shares" or "share and share alike," used in testamentary gift of remainder to named children, import an absolute gift. In re Wilkin's Will, 278 N.Y.S. 891 155 Misc. 152.

Even if you assume that this will does not clearly create a fee in the first takers (children) the last mentioned power of disposition in the children under Paragraph Seventh is held to be enough authority to convert a general or indefinite gift into a fee, to-wit:

33 Am. Jur. 498, Section 36, Life Estate and Remainders, "It is a well-settled rule, firmly supported by a great numerical preponderance of the authorities, that where there is a devise or bequest to one in general terms only, expressing neither fee nor life estate, and there is a subsequent limitation over of what remains at the first taker's death, if there is also given to the first taker an unlimited and unrestricted power of absolute disposal, express or implied, the devise or bequest to the first taker is construed to pass a fee. The attempted limitation over, following a gift which is in fee with full power of disposition and alienation, is void. Most of the cases arriving at this conclusion are based upon the reasoning that the well-settled rule that a general or indefinite gift, coupled with an absolute or unlimited power or disposition, passes a fee applies with full force and effect even though the will purports to make a gift over of whatever may remain at the death of the devisee, the purported gift over merely being an invalid repugnancy.

The Utah statute, Sec. 74-2-5, UCA

are to be construed in relation to each other, and, if possible, so as to form one consistent whole; but where several parts are absolutely irreconcilable, the later must prevail."

In view of this statute the will shows that the first and last sentiments of the testatrix were to provide absolutely for her children if they survived her. The last gift also gives the property of the estate to both children "in equal undivided shares, share and share alike" and the only provision of the will following is to appoint said children as Executors of the will to serve without bond.

Counsel for appellant mention on page 7 of their brief that the son, Orvis W. Call, needed protection from "known financial irresponsibility." It is true that the son had not been as wise and frugal as the daughter, Bessie Call Nielson, had been, and this is perhaps the reason that

if the property were held in undivided shares by the children that Orvis would undoubtedly consult with his sister Bessie before encumbering or disposing of his share of the property. However, in both instances Paragraphs Second and Seventh of the will grant the property to the children outright and absolutely.

POINT V.

THAT A LIFE ESTATE IS NOT STATED BY THE WILL AND THE POWER OF DISPOSITION OF THE PROPERTY GIVEN TO SAID CHILDREN DOES NOT CREATE AN "EXECUTORY LIMITATION OVER" TO THE NEPHEW DON LEWIS RYAN.

How easily testatrix could have stated a life estate to her children instead of "all the rest, residue and remainder." The will nowhere says life interest and the only place it mentions a "remainder" is in Paragraph Second where the grant is to the children. The life estate raises only by inference and must

therefore fail.

"Every devise of land in any will conveys all the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate." Section 74-1-36, UCA 1953. See also 74-2-6, UCA 1953, stating that a clear and distinct gift prevails over inference from other parts of will.

The authorities cited on Pages 13 and 14 of appellant's brief simply do not fit the conditions stated in this will and counsel for appellant have still failed to apply as authority a single specific case to the questions raised by the Chloe R. Call will. We recommend a careful reading of the sections in 33 Am. Jur.; Life Estates, Remainders, etc. Sec. 19-41, and it will be found that the principles stated support respondent's contentions instead of appellant's. No case similar to this will holds that a fee is not granted by wording as contained in Paragraph Second. Any cases purporting to find a life estate instead of a fee are almost without

exception cases where the will attempts to create a "limitation over" to a second taker by employing words giving to such second taker "whatever remains", "property undisposed of", "unconsumed portion", "what is left", "not used for support", "residue" and so forth. There is no such language in the Chloe R. Call will. Such "unused portion: would remain in fact in hands of first taker at time of death of such first taker. This is a "fee" on a "fee" situation which the older cases would not allow but that are now allowed to operate on the unused balance of property which the first taker does not use during his lifetime and thus may be carried over to the second taker. Appellant does not wish this doctrine of executory-limitation-over employed in this case however as the cases hold that the first taker may exhaust the property and convert the assets during the life of the first taker and the second taker then

has no estate or expectancy. This puts the second taker in the category of a third-party beneficiary who may be dispossessed before realizing any estate. No, the appellant Ryan is asking for a strict life estate and that the whole assets of the estate be preserved for him and that the children have no right to invade the corpus or expend the principal. The appellant also expects a constructive trust to be applied to preserve the estate assets for him whether in the form of real estate or the Telephone Company stock. If the limitation-over theory applies (and we do not think it does for the reason stated that the will says nothing about "property remaining or unconsumed") then the children would have the right to use the property "as they see fit" under the cases.

There is a difference of opinion yet today as to whether the limitation-over theory is applicable at all in a case w

a fee is first stated in the will, as commented in 17 ALR 2nd 36 and 102, to-wit:

The general proposition supported by many cases is that where the first taker is given, either expressly or by implication, what is commonly designated as "the absolute power of disposition," and the terms of the devise, bequest, or conveyance to him are appropriate to carry the fee, or if personalty the analogous interest, he takes the property absolutely and an attempted limitation over of anything remaining undisposed of, or of the whole property if undisposed of, is void. The rule has been applied without regard to whether or not the limitation is conditioned on any further event such as death of the first taker without issue surviving.

However no case imposes a strict life estate upon property given to first taker where a fee is stated to first taker, unless it is specifically mentioned in the will as a life usage.

See 33 Am. Jur., Life Estates, etc. Sections 29, 36, 37, 38, and 17 ALR 2nd 1-227.

POINT VI.

THAT THE TRIAL COURT'S INTERPRETATION OF THE WILL IS CONSISTENT WITH THE WHOLE WILL.

The will of Chloe R. Call gives the surviving children one whole estate in both Paragraph Second and Seventh with no limitation to anyone else either express or implied in said Paragraphs. There is no life tenancy mentioned, no constructive trust, no remainder to others, no "unexpended portions" to go to other parties. The will speaks as of testatrix' death and vests in the living children a fee. The will makes no distinction between the corpus of the estate or principal thereof as contrasted with income or profits thereof. To interpret strictly or literally all the shares devised by the will to the children goes to the nephew Ryan, but this would fly in the face of the language giving the children equal shares of all the property in the first and last gifts of the will. The court would have to find a constructive trust on the telephone stock in the names of the children

share and share alike to prevent the children from disposing of the property nephew Ryan in expectancy. This strict interpretation as applied to this will would impose a burden on the children rather than a benefit and would be contrary to the expressed intention of the will to give absolutely to the children all of the estate in equal shares, share and share alike. It would have been better to give the estate outright to Ryan as testatrix knew the property had little or no income value. Testatrix also knew her son was a building contractor who commenced building homes on the property during her occupancy and testatrix in fact deeded all the estate to her children before she died (See Statement of Facts) but said children recorded deeds back to their mother while she lay on her deathbed in the hospital.

The will should logically be inter-

preted as follows:

First, that the Testatrix conveyed all of the property to her children in equal, undivided shares, share and share alike.

Second, that all of the property should go to the daughter, Bessie Call Nielson, in the event she should survive the Testatrix and Orvis W. Call.

Third, that all of the property should go to the son, Orvis W. Call in the event he should survive both the Testatrix and Bessie Call Nielson.

Fourth, that in the event both of said children died before Testatrix, that the property of the estate should go to the nephew, Don Lewis Ryan.

Fifth, in the event that the property does not go to the children Bessie or Orvis and in the event the property does not go to the nephew, Don Lewis Ryan, the property should go to William K. Ryan and Phyllis F. Ryan Hastings, in equal shares, share and share alike.

Sixth, that during administration the children can sell the property of the estate and place the proceeds thereof in American Telephone Company stock in the names of Bessie Call Nielson and Orvis W. Call in equal, undivided shares, share and share alike.

It would seem that since both children survived testatrix, the logical intention would favor a vesting of a fee simple estate

in the children as direct descendents of testatrix.

CONCLUSION

We cannot find any support that the executory-limitation-over doctrine is applicable to the Call Will, but we do find that each legal argument returns to the conclusion that a fee was given by testatrix to the children and that Ryan was mentioned and intended to get the estate if a lapse occurred caused by the deaths of the children before the testatrix. We have cited ample authority and uncontroverted cases for this proposition.

The judgment of the lower court should be affirmed giving the children a fee simple title.

Respectfully submitted,

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