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Volume 75 | Issue 3 Article 9

April 1972

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Recommended Citation

Thomas R. Ross II, *Real Property--Wills--Judicial Construction of to A and His Children*, 75 W. Va. L. Rev. (1972).
Available at: https://researchrepository.wvu.edu/wvlr/vol75/iss3/9

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Real Property — Wills — Judicial Construction of "to A and His Children"

One of the incidents of property ownership is the determination by the owner of the objects to whom his property will be distributed after his death. The owner expresses his desires by a will. In the law of wills, precise language is of the utmost importance. Once the will takes effect, its language and the circumstances surrounding its making are the only means of determining the intentions of the testator. Such language, when clear and unambiguous and not in violation of any positive rule of law, controls the interpretation of the will.[1] When the language used is ambiguous and susceptible of different interpretations, however, courts have adopted rules of construction that determine the interpretation in the absence of evidence indicating a contrary intention of the testator. By the use of these rules of construction, the courts attempt to give effect to the probable intention of the testator. The designation of beneficiaries by the phrase "*A* and his children" has been the source of much litigation and has resulted in the application of several different rules of construction to ascertain the testator's intent.

A devise "to *A* and his children" has three possible interpretations.[2] In the first of these, *A* takes a fee simple absolute to the exclusion of his children[3] under the theory that the word "children," normally a word of purchase, is used as a word of limitation.[4] In the second interpretation, *A* and his children take as tenants in common.[5] In the third, *A* takes a life estate with the remainder to his children.[6] The origin of the first two interpretations is the Rule in *Wild's Case*.[7]

[1] Young v. Lewis, 138 W. Va. 425, 76 S.E.2d 276 (1953); McCreery v. Johnston, 90 W. Va. 80, 110 S.E. 464 (1922); Cresap v. Cresap, 34 W. Va. 310, 12 S.E. 527 (1890).

[2] 4A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2008 (1961); Talley v. Ferguson, 64 W. Va. 328, 62 S.E. 456 (1908); Martin v. Martin, 52 W. Va. 381, 44 S.E. 198 (1903). For an extensive discussion of the nature of an estate created by grant or gift to one and his children see Annot., 161 A.L.R. 612 (1946).

[3] L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 696 (2d ed. 1956) [hereinafter cited as SIMES & SMITH]; Larew v. Larew, 146 Va. 134, 135 S.E. 819 (1926).

[4] Hutchens v. Denton, 83 W. Va. 580, 98 S.E. 808 (1919); Wills v. Foltz, 61 W. Va. 262, 56 S.E. 473 (1907).

[5] Wills v. Foltz, 61 W. Va. 262, 56 S.E. 473 (1907); Bently v. Ash, 59 W. Va. 641, 53 S.E. 636 (1906); 36 VA. L. REV. 985 (1950).

[6] Smith v. Smith, 119 Ky. 899, 85 S.W. 169 (1905); McCullough's Estate, 272 Pa. 509, 116 A. 477 (1922); Talley v. Ferguson, 64 W. Va. 328, 62 S.E. 456 (1908); *see also* 36 MARQ. L. REV. 191 (1952).

[7] 77 Eng. Rep. 277 (K.B. 1599).

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The rule is famous for its two resolutions, which have been accepted in the United States.[8] The first resolution holds that if a person devises his lands to *A* and his children, and *A* has no children at the time of the devise, an estate in fee tail is created. The devise "to *A* and his children," when *A* has no children, clearly indicates the testator's intention to benefit the children of *A* if any should be born. If *A* dies seized of this estate, it will be inherited by one or more of these after-born children.[9] Today, instead of taking a fee tail when the first resolution is applied, *A* receives either a fee simple or a life estate under modern statutes favoring such estates.[10]

There is little justification for the rule of construction set forth in the first resolution of the Rule in *Wild's Case*. The popularity of fee tail estates has disappeared, and it is doubtful that a testator would intentionally create such an estate.[11] Furthermore, since estates in fee simple may now be created without the use of words of limitation (and his heirs) essential under old English law,[12] it is probable that the testator used the word "children" as a word of purchase. This would give the children of *A* an interest in the devised property.[13] However, additional factors in the will may indicate that the word "children" is used as a word of limitation, and thus the parent under modern statutes would take a fee simple.[14] The children, if any are subsequently born, could then take by descent or by devise from their parent. Still, this construction presents the possibility that the intention of the testator to benefit *A*'s children might be defeated; the parent,

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[8] SIMES, & SMITH, *supra* note 3, at §§ 696-98; Casner, *Construction of Gifts "To A and His Children" (Herein the Rule in Wild's Case)*, 7 U. CHI. L. REV. 438, 454 (1940).

[9] RESTATEMENT OF PROPERTY § 283, comment *a* at 1484 (1940); SIMES & SMITH, *supra* note 3, at § 692.

[10] For a collection of the statutes on estates in fee tail see RESTATEMENT OF PROPERTY ch. 5, Introductory Note, *Special Notes* 1-6 (1936). In West Virginia, every estate that would have been an estate in tail in 1776 in Virginia is deemed an estate in fee simple. W. VA. CODE ch. 36, art. 1, § 12 (Michie 1966).

[11] Casner, *supra* note 8, at 447.

[12] 5 AMERICAN LAW OF PROPERTY § 22.18 (A. J. Casner ed. 1952). For a collection of the statutes that eliminate the necessity of words of limitation see RESTATEMENT OF PROPERTY § 39, *Special Note* (1936). Words of limitation are no longer necessary in West Virginia. W. VA. CODE ch. 36, art. 1, § 11 (Michie 1966).

[13] *See* Martin v. Martin, 52 W. Va. 381, 387, 44 S.E. 198, 201 (1903). Ordinarily, the words child or children are words of purchase, vesting a new estate in those persons, and not words of limitation, ineffectual to vest an estate, but effectual to mark out the limits of the ancestor's estate, showing it to be an estate of inheritance and prescribing the course of descent.

[14] *See* note 10, *supra*; Casner, *supra* note 8, at 446.

as owner of a fee simple absolute, could convey or devise the property to some third person to the exclusion of his children.

Two other constructions of the situation in which the first resolution applies assure the children of *A*, if born, of sharing in the property. The gift "to *A* and his children" may be construed to give to *A* an estate in fee simple subject to partial divestiture when children are born; at that time the children receive a concurrent interest in fee simple. The construction most likely to give effect to the true intention of the testator — since most people think of parent and children enjoying property successively, rather than concurrently — is that *A* takes a life estate with remainder to his children.[15]

In West Virginia, although it appears that the first resolution in *Wild's Case* is settled law, the existence of other factors in the will indicating a contrary intention of the testator are given effect.[16] At least two states — Kentucky and Pennsylvania — have repudiated the first resolution and adopted the construction that gives a life estate to the parent with a remainder to his children.[17] In these states, as in West Virginia, the application of the first resolution in *Wild's Case* would have resulted in the creation of a fee simple estate because of statutes favoring such an estate.[18] The life estate-remainder view was developed in Kentucky to insure that the property would ultimately pass to blood relatives of the testator. This construction eventually was adopted for all devises "to *A* and his children."[19]

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[15] Casner, *supra* note 8, at 448. The Restatement of the Law of Property has repudiated the first resolution in *Wild's Case* and adopted the life estate and remainder construction. RESTATEMENT OF PROPERTY § 283(b) (1940). The UNIFORM PROPERTY ACT § 13 (1938) also adopts this construction.

[16] Martin v. Martin, 52 W. Va. 381, 44 S.E. 198 (1903). After the gift "to *A* and her children" the will provided that if *A* "died without children," the gift would go to another. The court held that such a provision was inconsistent with the idea of a fee tail estate. In denying a partition to the children of *A*, the court rejected the construction of a tenancy in common between parent and children and intimated that the parent might take a fee simple. A concurring judge believed that the parent took a life estate with remainder to his children. In Clemens v. Morris, 24 F. Supp. 380 (N.D. W. Va. 1938), a deed conveying land to a woman and her children vested no interest in her children born after the date of the deed.

[17] Righter v. Forrester, 64 Ky. 278 (1866); Carr v. Estill, 55 Ky. 309 (1855). In Hicks v. Jewett, 202 Ky. 61, 258 S.W. 934 (1924) and Ramey v. Ramey, 195 Ky. 673, 243 S.W. 934 (1922), a life estate and remainder construction was adopted in a conveyance "to *A* and his children *forever*." In Chambers v. Union Trust Co., 235 Pa. 610, 84 A. 512 (1912), the first resolution in *Wild's Case* was held to be inapplicable and a devise "to *A* and his children" was held to create a life estate in the parent with a remainder to his children.

[18] *See* note 10, *supra*.

[19] Hicks v. Jewett, 202 Ky. 61, 258 S.W. 934 (1924); Ramey v. Ramey, 195 Ky. 673, 243 S.W. 934 (1922).

According to the second resolution of the Rule in *Wild's Case*, if a man devises his lands "to *A* and his children" and *A* has children at the time of the devise, *A* and his children will take equal and concurrent estates. This resolution has been widely recognized in the United States and has been followed in West Virginia.[20] At the time of *Wild's Case*, the second resolution created a joint tenancy. Today, many jurisdictions, including West Virginia, statutorily create a presumption in favor of a tenancy in common unless a contrary intention is clearly expressed.[21]

The second resolution, like the first, is only a rule of construction that is applied in the absence of additional factors indicating a contrary intention of the testator.[22] For example, in *Talley v. Ferguson*,[23] a grant was made to a man "for the sole use and benefit of the wife and children" of another; the grant was declared to be a provision for the family. The West Virginia Supreme Court of Appeals declared that such a conveyance would create, in the wife and the children in being, a joint estate in equal portions.[24] The court, however, held that in view of the indications that the grant was a provision for the family, the more reasonable construction was a life estate in the wife with remainder to the children. This construction would allow any afterborn children to share in the gift and would provide the life tenant with sufficient income to support her children.

The result will be different in cases in which there is no indica-

[20] Dryer v. Crawford, 90 Ala. 131, 7 So. 445 (1889); Kelly v. Kelly, 176 Ark. 548, 3 S.W.2d 305 (1928); *In re* Utz's Estate, 43 Cal. 200 (1872); Moore v. Ennis, 10 Del. Ch. 170, 87 A. 1009 (1913); Whitfield v. Means, 140 Ga. 430, 78 S.E. 1067 (1913); Albers v. Donovan, 371 Ill. 458, 21 N.E.2d 563 (1939); Biggs v. McCarty, 86 Ind. 352, 44 Am. R. 320 (1882); Schlemeyer v. Mellencamp, 159 Kan. 544, 156 P.2d 879 (1945); Reddoch v. Williams, 129 Miss. 706, 92 So. 831 (1922); Hall v. Stephens, 65 Mo. 670 (1877); Kyte v. Kyte, 73 N.J. Eq. 220, 67 A. 933 (Ct. Ch. N.J. 1907); *In re* Parant's Will, 39 Misc. 2d 285, 240 N.Y.S.2d 558 (Sur. Ct. 1963); Buckner v. Maynard, 198 N.C. 802, 153 S.E. 458 (1930); Snowden v. Snowden, 187 N.C. 539, 122 S.E. 300 (1924); Clark v. Clark, 13 Ohio App. 164 (1920); Coogler v. Crosby, 89 S.C. 508, 72 S.E. 149 (1911); Smith v. Smith, 108 Tenn. 21, 64 S.W. 483 (1901); Rose v. Rose, 191 Va. 171, 60 S.E.2d 45 (1950); Fitzpatrick v. Fitzpatrick, 100 Va. 552, 42 S.E. 306 (1902); Wills v. Foltz, 61 W. Va. 262, 56 S.E. 473 (1907); Bently v. Ash, 59 W. Va. 641, 53 S.E. 636 (1906).

[21] SIMES & SMITH, *supra* note 3, at §§ 698-99; 5 AMERICAN LAW OF PROPERTY § 22.22 (A. J. Casner ed. 1952); W. VA. CODE ch. 36, art. 1, §§ 19-20 (Michie 1966).

[22] Casner, *supra* note 8, at 456.

[23] 64 W. Va. 328, 62 S.E. 456 (1908).

[24] *See* Wills v. Foltz, 61 W. Va. 262, 270, 56 S.E. 473, 476 (1907). A devise to three named daughters "and their children," there being children alive at the testator's death, confers a joint estate in equal portions upon the daughters and their children; it does not vest a fee simple in the daughters alone. The court held that "[t]he weight of authority sustains *Wild's Case*."

tion of a contrary intent and the second resolution is fully applicable. If the devise "to *A* and his children" takes effect at the death of the testator, any after-born children of *A* are excluded. The class of beneficiaries closes when the gift takes effect — the death of the testator being the point of distribution. For example, if *A* has one child at the date the devise becomes effective and subsequently has five other children, *A* and his first child will each take an undivided one-half interest in the property as tenants in common; the other five children will take nothing.[25] On the other hand, if the gift is postponed, as in "to *B* for life, remainder to *A* and his children," the gift is not limited to the children alive at the date of the devise but also includes any children born before the termination of the postponed period — the end of the preceding life estate. Any children born to *A* after the termination of the preceding life estate, however, are excluded from sharing in the gift; the class of beneficiaries closes at the point of distribution — the death of the intervening life tenant.[26]

In *Tharp v. Tharp*,[27] a life estate preceded the gift "to *A* and his children." The West Virginia Supreme Court of Appeals held that the interest created by the gift vested in the parent and his only child at the death of the testator. The child's interest was subject to divestment *pro tanto* upon the birth of other children prior to the expiration of the preceding life estate. The court departed from its decision in *Wills v. Foltz*[28] in which the parent and children took equal shares as tenants in common. In *Tharp*, the parent received a one-half share, and the other half was to be divided between all his children alive at the testator's death or born before the termination of the anterior life estate.

The exclusion of after-born children when the probable intention

[25] Bently v. Ash, 59 W. Va. 641, 53 S.E. 636 (1906). The testator devised land to his seven children, share and share alike. He further provided that the share of one daughter, who had one child at the date of the will and at the testator's death, was to be given "to her and her child or children." The court decided that by the use of the additional words "or children" when there was only one child living, the testator intended for after-born children to share in the gift. Not only the child living at the time of the testator's death, but all children born to the daughter thereafter took in fee equally with their mother.

[26] Casner, *supra* note 8, at 458; 36 MARQ. L. REV. 191, 192-93 (1952).

[27] 131 W. Va. 529, 48 S.E.2d 793 (1948). The only child of Earl M. Tharp survived the testator but predeceased the life tenant. The deceased child's mother brought suit claiming that she and her husband took their child's share of the vested remainder as his sole heirs-at-law. The court held that the plaintiff was entitled to a one-fourth undivided interest in the testator's estate, subject to divestment *pro tanto* in favor of other children born to her before the termination of the preceding life estate.

[28] 61 W. Va. 262, 56 S.E. 473 (1907).

of the testator was that they share in the gift is the reason advanced for the repudiation of the second resolution in Kentucky and Pennsylvania and the adoption of the life estate-remainder construction.[29] The reasons for adherence to the second resolution are that such a construction is in conformity with the plain import of the words "to *A* and his children"; that if the testator had intended a life estate and remainder, he could have expressed that intention; and that public policy, favoring the free alienation of land, is against the life estate and remainder construction.[30] The rationale behind the first reason is questionable. If at the time the gift became effective *A* was a young man and had only one child, the application of the second resolution would not be in conformity with the plain import of the words "to *A* and his children." Second, it has been argued that if the testator had intended to benefit only the children living at his death, he could have designated them by name as easily as he could have designated a life estate and remainder.[31] This argument ignores the fact that wills are drafted many years before the testator's death, in most cases without knowledge of how many children there may be at his death. The third reason — public policy — is a valid one. However, rules of construction are designed to give effect to the testator's probable intention if to do so would not violate any rule of law. The purpose of these rules would be defeated if the courts disregarded the testator's legally acceptable and probable intention in favor of a construction said to be more agreeable to public policy.

Although the Rule in *Wild's Case* has been adopted in West Virginia, judicial approval of its resolutions has been less than wholehearted. In order to include after-born children, the court, in *Talley v. Ferguson*,[32] indicated a willingness to follow any manifest indications that supported a reasonable construction of a life estate in the wife with remainder to the children. In *Wills v. Foltz*,[33] Judge Brannon declared that, although legally compelled to give effect to the second resolution, he believed that the testator never intended to give his grandchildren concurrent interests with his daughters. Rather, the

[29] Ramey v. Ramey, 195 Ky. 673, 243 S.W. 934 (1922); Virginia Iron, Coal & Coke Co. v. Dye, 146 Ky. 519, 142 S.W. 1057 (1912); Elliot v. Diamond Coal & Coke Co., 230 Pa. 423, 79 A. 708 (1911); Hague v. Hague, 161 Pa. 643, 29 A. 261 (1894). The UNIFORM PROPERTY ACT § 13 (1938), adopts the life estate and remainder construction. The RESTATEMENT OF PROPERTY § 283(a) (1940), advances the second resolution in *Wild's Case*.

[30] 36 MARQ. L. REV. 191, 194 (1952); 36 VA. L. REV. 985, 986 (1950).

[31] United States v. 654.8 Acres of Land, 102 F. Supp. 937, 941 (E.D. Tenn. 1952).

[32] 64 W. Va. 328, 62 S.E. 456 (1908).

[33] 61 W. Va. 262, 270, 56 S.E. 473, 476 (1907).

testator believed that he was giving his daughters either a fee simple or a life estate.

The fee tail estate created by the application of the first resolution is now an anachronism. The tenancy in common resulting from the application of the second resolution has been reluctantly accepted in many cases. For these reasons and for the purpose of achieving consistency in the interpretation of the phrase "to *A* and his children," both resolutions of the Rule in *Wild's Case* should be repudiated by the courts of West Virginia and a life estate-remainder construction adopted. There is no justification under modern property law for adherence to a construction creating a presumption that the testator intended to create a fee tail estate. Most states have statutorily converted what would have been a fee tail at common law into a fee simple or a life estate to the parent and remainder to the heirs of his body. It is therefore highly unlikely that such an estate would be purposely created today.[34] Adherence to the construction creating a concurrent estate in "*A* and his children" living at the time of the devise results in the exclusion of any children later born to *A*, unless the testator expressly indicates that they be included.[35] The life estate-remainder construction is more likely to give effect to the normal intention of the testator since a parent and his children are usually thought to enjoy property successively, rather than concurrently. Furthermore, a testator probably intends to benefit all of *A*'s children whenever born.

Although the life estate-remainder construction may successfully effectuate the testator's intent, the necessity for its use should never arise if the will creating the gift is properly drafted. To ensure that the wishes of the testator are fulfilled, the words "*A* and his children" should *never* be used to designate the beneficiaries of any disposition of property. Usually, when the testator wishes to make a gift to "*A* and his children," he has in mind one of the constructions discussed earlier. His real intention can be ascertained from a thorough questioning by his attorney.

The testator may wish to give the property to the parent absolutely, his reference to the children indicating that they should benefit, if at all, by inheritance. When this is the case, the parent should be expressly given a fee simple absolute. Second, the testator may desire for "*A* and his children" to share the gift equally as concurrent

[34] *See* note 10, *supra;* Casner, *supra* note 8, at 447-48.
[35] 59 W. Va. 641, 53 S.E. 636 (1906); note 25, *supra.*

owners. To effectuate this desire, it should be clearly stated that "*A* and his children" are to share as tenants in common. If after-born children are to be included, a provision to that effect should be made. Finally, the testator may intend for "*A* and his children" to enjoy the property as successive owners. To achieve this result, the language used should limit the interest of the parent to a life estate and state that the children are to take the entire interest in remainder. Another clause should specify how the property is to be distributed in the event of the death of a child prior to the termination of the life estate.[36] By specifically setting out the nature of the gift, the means of distribution, and a provision for contingencies, the attorney can be assured of having clearly expressed the intention of his client. The testator's intention will not be defeated by the use of a rule of construction because the attorney has prevented the need for its application.

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[36] Casner, *supra* note 8, at 468-69.