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## Future Interests

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### Discovery: Alcohol Test

In *Ex parte Rebersak*,<sup>12</sup> it was held that police officers may request but cannot demand that a person involved in an automobile collision take an alcohol test; and that where such person is an adverse party in an action for damages growing out of such collision and his deposition is taken as if on cross-examination, his reason for refusing to take such test is not material or pertinent to any issue in such action and he cannot, therefore, be lawfully required to state it.

CLINTON DEWITT

## FUTURE INTERESTS

### *Stirpes — Members of Nearest Class With Living Relatives*

Of the significant cases involving future interests only one, *Kraemer v. Hook*,<sup>1</sup> was decided by the Ohio Supreme Court. This case involved the construction of the will of Frederick A. Sterling, who died in 1920, four years after having executed it.

Sterling's will created a trust and provided that upon its termination the trustee should "distribute the trust estate per stirpes among my heirs at law, according to the laws of descent and distribution now in force in the State of Ohio, which heirs at law shall be determined and distribution made as though my death had occurred at the time of the final termination of the trust hereby created." Since no material change occurred in the Ohio laws of descent and distribution between the execution of the will in 1916 and the testator's death in 1920, the court did not have to determine whether the words "now in force" referred to the date of the execution of the will in 1916 or to the date of testator's death in 1920. However, the court by way of dictum stated that it would consider the phrase "now in force" as referring to the date of execution, i.e., 1916.

When the trust terminated in 1955 the only claimants were the testator's nephews and nieces and the descendants of deceased nephews and nieces. The portion of Ohio General Code<sup>2</sup> which was in effect on both crucial dates and which is applicable under the terms of the will reads:

If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives.

The Ohio Supreme Court has construed the phrase "their legal representatives" as used in the statute to include lineal descendants.<sup>3</sup>

12. 150 N.E.2d 869 (Ohio Ct. App. 1958). See discussion in CONSTITUTIONAL LAW section, *supra*.

Testator had a sister and four brothers, of whom only two were alive at his death in 1920. These two died prior to the termination of the trust in 1955. Appellants who would benefit by a distribution using testator's brothers and sisters as the stirpes naturally contended that the phrase "per stirpes" required such a construction. Appellees, on the other hand, who would benefit by a distribution using as the stirpes the testator's eighteen nephews and nieces (of whom eleven were living in 1955 and of whom seven had died leaving lineal descendants who were then living) contended that the nephews and nieces should be the stirpes. The probate court, the court of appeals and the Supreme Court all used the nephews and nieces as the stirpes. They divided the trust estate into eighteen parts. Seven of the eighteen parts were distributed per stirpes to the respective lineal descendants of deceased nephews and nieces.

Appellants objected to the use of the nephews and nieces as the stirpes, contending that when nephews and nieces are so used they do not take per stirpes but per capita. Appellant's position is of course, in accord with the early common law meaning of per stirpes which always used as stirpes the nearest relatives whether or not any members of such class were alive. In this case testator's brothers and sisters, under the early common law definition of per stirpes, would be the stirpes. It is somewhat odd that this same definition appears in a current loose-leaf service on wills, estates and trusts.<sup>4</sup> The court answered appellant's contention by stating that the shares taken by the nephews and nieces would have been smaller if there had been an equal per capita distribution among all takers.

If all of the claimants had been testator's nephews and nieces then the court probably would have divided the trust property among them in equal proportions. Such a distribution would have been per capita but consistent with the language of the will.

An analysis of the language used by the draftsman of testator's will is helpful in evaluating its construction by the court. First, the trust estate was to be distributed upon the termination of the trust to testator's heirs determined under the statute of descent and distribution in effect at the execution of the will, but on the assumption that testator died at the termination of the trust. This gift to testator's heirs determined as of a time after his death is ambiguous.<sup>5</sup> These heirs might take equally, i.e.,

1. 168 Ohio St. 221, 152 N.E.2d 430 (1958).
2. § 8574.
3. *Hasse v. Morison*, 110 Ohio St. 153, 143 N.E. 551 (1924).
4. 2 PRENTICE HALL, WILLS, ESTATES AND TRUSTS SERVICE § 2697.3.
5. 2 SIMES AND SMITH, THE LAW OF FUTURE INTEREST § 747 (2d ed. 1956).

per capita, in which case each nephew, niece, grand-nephew and grand-niece would receive the same share. Or they might take per stirpes as at the common law so that all would take by representation with testator's brothers and sisters as the stirpes. Lastly, distribution might be per stirpes in accordance with the Ohio statute of descent and distribution in effect at the execution of the will. This latter type of distribution has been called per capita among the nephews and nieces (the nearest class of relatives with living members) and per stirpes among the issue of deceased nephews and nieces.<sup>6</sup> It was this type of distribution that testator apparently desired, though his intention might have been expressed more clearly.

The litigation in *Kraemer v. Hook* arose because of the evolutionary changing of the early and original meaning in English common law of the phrase per stirpes. At early common law per stirpes probably had only one meaning which when applied to the facts of *Kraemer v. Hook* would require a distribution using testator's brothers and sisters as the stirpes. This early meaning of per stirpes is evident in the following quotation from *Hasse v. Morison* decided in 1924:

In view of the fact that these next of kin of the intestate take by representation of their fathers and mothers, who were the brothers and sisters of the intestate, it might seem that they would take *per stirpes*, but legislative action has provided a different rule. . . .<sup>7</sup>

In 1958, thirty-four years after *Hasse v. Morison*, the Ohio Supreme Court assumes that the primary meaning of per stirpes is a distribution on an equal basis among the nearest living relatives with the issue of each deceased relative of this class taking their parent's share by representation. Furthermore, in 1958 the court criticizes its 1924 terminology. But it is careful to state that while some of its language and terminology may vary slightly from the language and terminology used in its earlier cases, "it can not be emphasized too strongly, however, that these slight variations do not affect any basic premises which have heretofore been followed by the court." Gifts to testator's "children per stirpes" or to testator's "issue per stirpes" undoubtedly appear in Ohio wills, inter vivos trusts, and insurance policies. The writer believes that in all of these cases the phrase per stirpes should be construed as meaning that the stirpes are determined by the nearest class of which there is a living claimant and whenever all claimants are equally related to the testator or the settlor, as the case may be, they should take equally or per capita. This method of distribution should more accurately have been called per capita with right of representation to distinguish it from early common law

6. *Hasse v. Morison*, 110 Ohio St. 153, 143 N.E. 551 (1924).

7. *Id.* at 166.

per stirpes distribution and straight per capita distribution.<sup>8</sup> Perhaps, legislation so defining the phrase "per stirpes" might be timely.

Another timely problem for legislators and lawyers is whether an intestate, a testator or settlor today would desire an unequal distribution among grandchildren who take as representatives of their deceased parents. For example, assume that at intestate's death, his heirs are two children and six grandchildren. One of the six grandchildren is the child of one of the two deceased children of the intestate; five grandchildren are children of the other deceased child. Under any form of per stirpes distribution the two living children would receive one-fourth each. One grandchild would receive one-fourth also, but five grandchildren would receive one-twentieth each. There is reason to believe that a testator normally would want all grandchildren treated equally.<sup>9</sup> If this were done in our illustration each grandchild would receive one-sixth of one-half, or one-twelfth. The writer believes that the various states should change their statutes of descent and distribution to provide for equal distribution among grandchildren in situations where they now take unequally as representatives of their deceased parents. Draftsmen of wills and trusts, however, need not wait for statutory change. It is important that each testator and settlor be asked to state clearly how he wants his property distributed when certain members of a class are dead but survived by descendants.<sup>10</sup>

### ***Failure of Remainderman to Survive Life Beneficiary***

The case of *In re Estate of Morton*,<sup>11</sup> decided by the court of appeals, involved the construction of a will in which testatrix first gave all the residue of her property to her husband for his life if he survived her. Testatrix disposed of the remainder as follows:

... then at the decease of my husband, or at my decease if he shall not survive me, all my estate, real, personal or mixed, shall go to and be equally divided between my two children, M. O. Devers, and Rosamond D. Moak, the issue of a deceased standing in the place of the parent.<sup>12</sup>

Testatrix was survived by her husband, her son and her married daughter. The son who predeceased his father gave all his property to his widow by will. The son, however, was also survived by three children

8. ATKINSON, WILLS 68 (2d ed. 1953).

9. ATKINSON, WILLS 65 (2d ed. 1953); Wormser, *Planning for Your Children's Future*, U. S. NEWS & WORLD REPORT (Nov. 21, 1958) 60, 130.

10. WORMSER, *Planning for Your Children's Future*, U. S. NEWS & WORLD REPORT (Nov. 21, 1958) 60, 131.

11. 105 Ohio App. 438, 152 N.E.2d 683 (1957).

12. 105 Ohio App. 438, 439, 152 N.E.2d 683, 684.

who claimed their father's share of the remainder given to him by the testatrix' will. The court had to determine first whether the son took an indefeasibly vested remainder when he survived his mother. It decided that under the terms of testatrix' will he did not. The position taken by the court is in accordance with the majority view that when a will either expressly or by implication provides for survival by a remainderman, the remainderman to take must survive the life beneficiary and not merely the testator.<sup>13</sup> This is true whether survival to the termination of the life estate is a condition precedent or nonsurvival is an event of defeasance, i. e. a condition subsequent. The court then should have considered the question whether the son and the son's issue took alternate contingent remainders with survival by the son to the time of distribution, i.e. the death of the life beneficiary, a condition precedent to his taking or whether the son took a vested remainder which would be divested in favor of his issue's executory interest if he predeceased the life beneficiary and was survived by issue.<sup>14</sup>

After the court decided that the son, who predeceased the life beneficiary survived by issue, did not acquire an indefeasible fee simple estate in remainder by surviving the testatrix, his mother, it would necessarily follow that the son's issue would take under either of the two possible constructions. Therefore, the possible explanation available to the court in support of its decision in favor of the son's issue might have been that since the son's issue would take under either of two possible constructions the court found it unnecessary to choose between these two. Unfortunately the court of appeals did not clearly see the question before it as is evident from this quotation:

The question at issue is whether M. O. Devers, during his lifetime, acquired a vested interest in the other one-half of the remainder. If so, that interest passed by will to his widow . . . but if he had only a contingent remainder, then, at the death of the life tenant, his surviving children would take.<sup>15</sup>

A possible construction of the language before the court is that the son received a vested remainder subject to complete divestment in favor of his issue if he predeceased the life beneficiary and was survived by issue. The words "shall go to and be equally divided between" normally would be construed as referring to enjoyment or possession and not to vesting in interest.<sup>16</sup> Of course if testatrix had made the gift to her "surviving children and to the issue of any child who predeceases the life benefi-

13. 2 SIMES AND SMITH, LAW OF FUTURE INTERESTS § 577 (2d ed. 1956).

14. Annot. 109 A.L.R. 5 (1937); annot. 47 A.L.R.2d 902 (1956).

15. 105 Ohio App. 438, 439, 152 N.E.2d 683, 685.

16. RESTATEMENT, PROPERTY § 260 (1940); SIMES AND SMITH, THE LAW OF FUTURE INTERESTS §§ 144, 593, 657, 658 (2d ed. 1956).

ary," the construction by the court of appeals that survival by the son to the death of his father was a condition precedent would have been in accordance with accepted rules of construction.<sup>17</sup> Also, survivorship as a condition precedent might have been implied if the gift of the remainder had been in the alternative, that is, to the son or his issue.<sup>18</sup> There is certainly confusion in the cases involving the implication of survivorship as a condition precedent.<sup>19</sup> But, the writer believes that when there is a gift of a remainder to a named person with a gift to this person's issue if he does not survive the life beneficiary and the gift to the issue is not clearly substitutional, the remainder to the named person should be construed as vested subject to divestment.<sup>20</sup>

When in a will there is a gift by "T to B for life then to C and D in fee simple and on the death of either survived by issue to his issue," there are several questions in addition to those already considered which might arise and which the draftsman should have considered. First, if either C or D or both of them predecease B survived by no issue, who takes?<sup>21</sup> If either C or D predeceases B survived by issue, must the issue survive B to take?<sup>22</sup>

Draftsmen should certainly be aware of these questions and should state gifts of future interests in language that clearly provides for the disposition of the subject of the gifts whatever the facts may be at the time for distribution.

### *Life Tenant — Effect of Power of Sale and Disposition*

There is in Ohio a long line of decisions holding that powers of sale and disposition in life tenants which appear to be unlimited are impliedly restricted to sales of the property for the support of the life bene-

17. RESTATEMENT, PROPERTY § 250 (1940); 1 SIMES AND SMITH, THE LAW OF FUTURE INTEREST § 153 (2d ed. 1956); 3 PAGE ON WILLS § 1281 (3d ed. 1941).

18. RESTATEMENT, PROPERTY § 252 (1940); 2 SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 581, (2d ed. 1956).

19. 2 SIMES AND SMITH, THE LAW OF FUTURE INTEREST § 576 (2d ed. 1956).

20. *Millison v. Drake*, 123 Ohio St. 249, 174 N.E. 776 (1931); RESTATEMENT, PROPERTY § 254 (1940); 2 SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 583 (2d ed. 1956); 3 PAGE, WILLS § 1266 (3d ed. 1941).

21. If there is an implied condition precedent that C and D must survive B to take, then if they predecease B *survived by no issue* the subject of the gift will pass under any residuary clause in T's will or as T's intestate property when there is no residuary clause. On the other hand if C and D received vested remainders subject to divestment only upon their predeceasing the life beneficiary survived by issue, when either or both die survived by issue the subject of the gift passes either under their respective wills or, if they died intestate, to their respective heirs. 2 SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 581 (2d ed. 1956); RESTATEMENT, PROPERTY § 254 (1940).

22. 2 SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 659 (2d ed. 1956).

ficiaries.<sup>23</sup> These early cases probably represent the general construction prevalent at the time of the execution in the nineteenth century of the documents which set forth the powers. Today the attitude toward powers of sale and disposition is not the same as it formerly was. In view of the substantial tax savings which result from the marital deduction when the surviving spouse has a life estate and complete power of disposition, courts today should not be inclined to restrict by implication broad powers. Perhaps *Windnagel v. Windnagel*<sup>24</sup> represents the conflict between the modern and the older approach to the construction of grants of broad powers to life tenants.

The *Windnagel* case involved a will executed in 1910 by Gottlieb Windnagel who obviously had no thought of any marital deduction. The pertinent portion of the will reads as follows:

ITEM I

I give, devise and bequeath to my wife, Fredericka Windnagel all my estate, both personal, real and mixed, hereby authorizing and empowering her to sell and convey by proper instruments, of conveyance, any and all personal property which I may leave, and to re-invest the proceeds thereof, and to change said investments from time to time in such manner and form as she may desire, and authorizing and empowering her to use and dispose of for her own welfare and benefits, and for such purposes as she may wish, all of said property both real, personal and mixed, without being required to account for said property or the disposition of the same to any other person or persons, hereby giving and granting unto her as full and complete power and authority to control, manage and deal with my estate as I now personally possess.

ITEM II

After the death of my said wife, Fredericka Windnagel, I give, devise and bequeath all of my said estate, and the proceeds thereof, which may be in the possession and under the control of my said wife at the time of her death, to my children. . . .

Testator died in 1913. In 1936 testator's widow conveyed by separate deeds to two sons and a daughter some of the land which she received under her husband's will. None of these grantees paid any valuable consideration. After the widow's death the heirs of another deceased son brought an action for partition in the common pleas court, claiming an undivided one-fourth interest in all the land conveyed by testator's widow as gifts to the two sons and daughter. The lower court held for the defendants but the court of appeals, on the basis of the long line of decisions restricting broad powers of sale, reversed the common pleas court.

The *Windnagel* case should be a warning to all draftsmen who seek to obtain for their clients the tax benefits of the marital deduction to use

23. *Huston v. Craighead*, 23 Ohio St. 198 (1872); *Johnson v. Johnson*, 51 Ohio St. 446, 38 N.E. 61 (1894).

24. 104 Ohio App. 22, 146 N.E.2d 457 (1957).