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Liebhardt v. Avison: Remainders and Revision

Dicta Editorial Board

LIEBHARDT V. AVISON: REMAINDERS AND REVISION

Three types of remainders will be involved in this comment on *Liebhardt v. Avison*:[1]

1. "To A for life, remainder to B and his heirs."

2. "To A for life, remainder to B and his heirs, if B survives A."

3. "To A for life, remainder to B and his heirs, but if B dies before A, then to C and his heirs."

The opinion bases the decision upon the distinction between type 1 and type 2. It would have been more orthodox had the same decision been based upon the distinction between type 1 and type 3. Type 1 is a vested remainder in fee simple *absolute.* Type 2 is a contingent remainder, that is, B's survivorship is a condition precedent to the vesting of the estate in him. Type 3 is a vested remainder subject to divestment by an executory limitation, that is, B's failure to survive A is an event which will divest the fee simple which has been vested in him.

The significance of the distinction between type 2 and type 3 has been stated by the American Law Institute as follows:[2]

> . . . In some controversies the rule stated [§250 (d)] becomes important because of the difference in the rules applicable respectively to future interests subject to a condition precedent [type 2] and to future interests vested subject to complete defeasance [type 3]. This situation exists often in problems of taxation; in questions involving the destructive operation of the rule against perpetuities; in determining the possibility of merger between a present interest and a remainder; in determining whether the interest in question is accelerated upon the failure of a prior interest, in ascertaining the person entitled to receive otherwise undisposed of income and in deciding the type of protection to be accorded to the future interest . . . also . . . in determining the type of reversionary interest left in the conveyor . . .

When such cases have to be decided in Colorado, the opinion in *Liebhardt* v. *Avison* may lead to unorthodox results because it classifies as contingent remainders [type 2], remainders which, it is believed, should have been classified as vested subject to divestment [type 3].

The court was using ". . . the rule of construction which we applied in *Williams v. Fundingsland,* 74 Colo. 315, 321, 221 Pac. 1084, that, 'The use of different words in a will applying to the same subject matter, indicates that the testator had in view different results'."

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[1] —Colo.—, 229 P. 2d 933 (1951). The case is not stated because it is assumed that the reader of this comment has read the opinion.

[2] RESTATEMENT OF THE LAW OF PROPERTY (1940) § 250, Comment j.

This rule was used by the court as a reason for concluding that since in paragraphs 15 (a), 15 (b), and 16 (b) the testator used words which created (type 2) contingent remainders, he intended something different, that is, a (type 1) vested remainder in fee simple absolute, by the different words of paragraph 16 (c).

The same rule could have been used to the same effect, but with less risk of leading to error in subsequent cases, if the court had concluded that since in paragraphs 15 (a), 15 (b), and 16 (b) the testator used words which created (type 3) vested remainders subject to divestment by executory limitations, he intended something different, that is, a (type 1) vested remainder in fee simple absolute, by the different words of paragraph 16 (c).

Paragraphs 15 (a) and (b) will be studied first. There are five reasons why the remainder which it creates should be classified as (type 3) vested subject to divestment by an executory limitation.

First: The remainder is "to the issue of Georgia . . . living at the time of my [the testator's] death . . .". The identity of each remainderman was therefore as definitely determined at the death of the testator as it would have been had he said, "to John, James, and Mary, the children of my niece Georgia." This "present identification" of existing persons as the intended takers of the remainder tends to establish that survival until the time of distribution is not a condition precedent.[3]

Moreover, the express requirement that the remaindermen be living at a certain time indicates that no such requirement is to be implied as of a later time. This follows from the rule of construction which the court was applying. With reference to the time of his death, the testator used words requiring survivorship; with reference to the time of distribution, he did not. "The use of different words in a will applying to the same subject matter, indicates that the testator had in view different results."

Second: The condition precedent which might be inferred from the words, "Upon the death of both Harry . . . and Georgia" is nullified by the the fact that life estates in the same property had been given to Harry and to Georgia.[4]

Third: The condition precedent which might be inferred from the words, "when they reach the age of twenty-six years" is

[3] RESTATEMENT, *supra*, § 256, Comment c.

[4] SIMES, THE LAW OF FUTURE INTERESTS (1936) § 74, note 26, citing twenty-six cases, (a list "by no means exhaustive") including Dowd v. Scally (Iowa) 174 N.W. 938, 940 (1919), "If there be any one proposition in the law of remainders which may be regarded as settled, it is the one here stated. '. . . Where the devise is to the remainderman "from and after" or "after" or "at" or *"on"* the death of the life tenant, or words of like import are used, the authorities quite generally declare that such words relate to the time of enjoyment, and that the remainder is vested.' "

nullified by the gift of income from the same property to the same persons until they reach the age of twenty-six years.[5]

Fourth: The words "I *give* to the issue of Georgia . . . living at the time of my death . . . for their *absolute* property when they reach the age of 26" afford the basis for inference that the gift was vested under the rule in *Clobberie's* Case, ". . . if money be *given* to one, *to be paid* at the age of twenty-one years; there, if the party dies before, it shall go to [his] executor."[7] Thus the vesting is immediate, only the enjoyment is postponed.

The same effect should be given to a subsequent phrase, "before receiving the fee title to said real estate and before receiving the principal of said property protective fund and the accumulations thereof." This is paraphrased in the opinion as, "before receiving the trust property." It is believed that this is a correct paraphrase. "Recieving the title to said real estate" seems to refer not to the vesting of the interest, but rather to receiving the legal title from the trustees; and so also as to receiving the personal property which had been held in trust.

Furthermore, the term "absolute property" seems more properly to point to a distinction between property that is absolute (type 1) and property that is subject to defeasance (type 3), rather than to a distinction between absolute property (type 1) and no property at all (type 2).

Fifth: The gift over "in case of Georgia['s] issue living at my death dying *without issue* before reaching the age of twenty-six years" strongly indicates a vested interest subject to divestment (type 3).

The testator has said that there shall be a gift over if the remaindermen die *without* issue before reaching twenty-six. But what if they die *with* issue before twenty-six? In such an event there is no gift over. The inference is that the interest has already been vested and that it will be a part of of the estate of the remainderman.[8]

It is hoped that this discussion will have pointed out the significance of the italicized words in paragraphs 15 (a) and 15 (b).

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[5] RESTATEMENT, *supra*, § 258, Comment m, "The rule stated in this section is one of the most potent factors in construction. . . . when this rule is applicable a condition precedent of survival is thereby eliminated unless extremely strong counterbalancing factors are present . . . the rule is sufficient to change the effect of limitation, which apart from the gift of income would clearly include a condition precedent of survival."

SIMES, *supra*, § 356, note 44, citing seventeen cases, including Fidelity Union Trust Co. v. Rowland, 132 A. 673 (N.J., 1926). ". . . $50,000 in trust . . . to . . . apply net income to maintenance, support and education of Charles . . . until he attain the age of thirty years, and upon [Charles] attaining the age of thirty years, I give [Charles] . . . principal sum of $50,000."

"The authorities are agreed in holding that legacies in terms of the one under consideration are vested. . . . The trustee is advised that the legacy vested in Charles . . . and upon his death passed to his administrators . . . although [Charles] would not now be thirty had he lived."

[6] 2 Vent. 342 (1677).

[7] See also in accord, with respect to land as well as to personalty: RESTATEMENT, *supra*, § 257, particularly illustration 1, and SIMES, *supra*, § 355, note 37, citing fifteen cases.

[8] RESTATEMENT, *supra*, § 254, particularly, illustration 3 and comment b, "The force of the tendency stated in [§ 254a, that 'the restricted requirement of survival . . . is a basis for the defeasance of such interest rather than a condition precedent thereof] is very strong, being counteracted only in rare situations."

SIMES, *supra*. § 358.

(a) The net income of said real estate I give, devise and bequeath to Harry G. Liebhardt and Georgia Liebhardt Temple, share and share alike, *for their natural lives.*

Upon and after ten (10) years from the date of my death, the net income from the said property protective fund and the accumulations thereof I give, devise and bequeath to Harry G. Liebhardt and Georgia Liebhardt Temple, for their natural lives, share and share alike.

In the event that Harry G. Liebhardt dies before Georgia Liebhardt Temple, then and in that event the entire net income of the said property protective fund and the accumulations thereof, after ten (10) years from the date of my death, and the entire net income of said real estate, I give, devise and bequeath to Georgia Liebhardt Temple, for her natural life.

Upon the death of Georgia Liebhardt Temple, either before or after the death of Harry G. Liebhardt, her share of said *net income* of said real estate and of the said property protective fund and the accumulations thereof, *I give, devise and bequeath to her issue living at the time of my death*, share and share alike.

All of said income herein bequeathed and devised shall be paid to the beneficiaries quarter-annually.

Upon the death of both Harry G. Liebhardt and Georgia Liebhardt Temple, all of said above described real estate and the income therefrom, and the said property protective fund and the accumulations thereof, *I give, devise and bequeath to the issue of Georgia Liebhardt Temple living at the time of my death*, share and share alike, *for their absolute property, when they reach the age of twenty-six* (26) *years.*

(b) Upon the death of said Harry G. Liebhardt and Georgia Liebhardt Temple, and in case of Georgia Liebhardt Temple's issue living at the time of my death dying *without issue* before reaching the age of twenty-six (26) years and *before receiving the fee title* to said real estate and *before receiving the principal* of said property protective fund and the accumulations thereof, then the share of the income theretofore received by said issue of Georgia Liebhardt Temple I give, devise and bequeath, as follows: one-half thereof to the German Protestant Churches of Denver, Colorado and the English Lutheran Churches of Denver, Colorado, share and share alike, and the other one-half thereof to the Evangelical Lutheran Sanitarium located in Jefferson County, Colorado. If said German Protestant Churches of Denver have ceased to exist, then the said share of said income bequeathed to them I give, devise and bequeath to said English Lutheran Churches of Denver, share and share alike.

With respect to this part of the will the court said, "It thus becomes evident . . . that he [testator] could, and did, by apt language, defer the vesting of a remainder to a time subsequent to his own death, making such vesting dependent upon the survival of the remaindermen until such time, and direct the disposition of the remainder in the event of the death of the remaindermen prior to the time fixed for such vesting. We can only conclude that the testator himself had fully in mind the difference between a contingent [type 2] and a vested [type 1] remainder."

It would have involved less risk of error in future cases if the court had said, " It thus becomes evident . . . that he [testator] could, and did, by apt language provide for the *divesting* of a remainder at a time subsequent to his own death, making such *divestment* dependent upon the failure of the remaindermen

to survive until such time, and direct the disposition of the interest in the event of the remaindermen without issue prior to the time fixed. We can only conclude that the testator himself had fully in mind the difference between an *absolutely* vested remainder [type 1] and a remainder *subject to divestment* [type 3].

So far this comment has been confined to the court's reference to paragraphs 15 (a) and 15 (b). The same sort of comment should be made concerning the court's reference to paragraph 16 (b).

The court treats paragraph 16 (b) as a type 2 contingent remainder, whereas it would have been orthodox to treat it as a type 3 vested remainder subject to divestment by an executory limitation. There are four reasons for this conclusion.

First: The remainderman is identified (by name) at the death of the testator.[9]

Second: The condition precedent which might be inferred from the phrase, "Upon the death of Georgia," is explained by referring it to that part of the property in which Georgia had been given an estate for life.[10]

Third: The condition precedent which might be inferred from the words, "when . . . Jack . . . shall have reached the age of thirty years," is nullified by the gift of income, part to be paid to him, and the excess to be accumulated for him until he reached the age of thirty. [11] The rule is the same even though only a part of the income is to be given for maintenance.[12]

Fourth: The gift over "upon the death of Jack . . . *without issue,* before being entitled to receive and before receiving said property" justifies the inference that an interest has been vested in Jack upon the death of the testator, and that it is to be divested only by his death before thirty, *without issue.*[13]

The language of paragraph 16 (b) is as follows: (The words which have been discussed are italicized.)

> Upon the death of both Minnie K. Liebhardt and Laura L. Liebhardt, I give, devise and bequeath *the net income* of the undivided one-half interest in and to said Lots seventeen (17), eighteen (18) and nineteen (19), Block one hundred sixty-one (161), East Denver, to my niece, Georgia Liebhardt Temple, for and during her natural life and *to her son Jack Liebhardt Temple,* share and share alike, to be paid as hereinafter provided. The share of said net income belonging to Georgia Liebhardt Temple shall be paid to her by said successors in trust quarter-annually. The share of said net income belonging to Jack Liebhardt Temple shall be paid to him by said successors in trust at the rate of Three Hundred Dollars ($300.00) per month, until he reaches the age of twenty-six (26) years, and between the age of twenty-six (26) and thirty (30) years, the said share of said net income shall be paid to him by said successors in trust at the rate of Six Hundred Dollars ($600.00) per month.
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> The excess of said net income belonging to Jack Liebhardt Temple over and above said Three Hundred Dollars ($300.00) per month, and over and above said Six Hundred Dollars ($600.00) per month, respectively, shall be invested and held in trust for him by said

[9] See *Supra,* first reason as to paragraphs 15 (a) and 15 (b).
[10] See *Supra,* first reason as to paragraphs 15 (a) and 15 (b).
[11] See *Supra,* third reason as to paragraphs 15 (a) and 15 (b).
[12] SIMES, *supra,* § 356, note 45.
[13] See *Supra,* fifth reason as to paragraphs 15 (a) and 15 (b).

> sucessors in trust until he reaches the age of thirty (30) years, and when he reaches the age of thirty (30) years, said excess of income, and the accumulations thereof, shall be paid to him as his own property.
>
> *Upon the death of Georgia Liebhardt Temple, and when said Jack Liebhardt Temple shall have reached the age of thirty* (30) *years, then the* entire undivided one-half interest in and to said Lots seventeen (17), eighteen (18) and nineteen (19), Block one hundred sixty-one (161), East Denver, shall be turned over and conveyed to said Jack Liebhardt Temple as and for his absolute property.
>
> Upon the death of Georgia Liebhardt Temple, and upon the death of Jack Liebhardt Temple *without issue*, before being entitled to receive and before receiving said property as above provided, then the net income of said undivided one-half interest in said Lots seventeen (17), eighteen (18) and nineteen (19), Block one hundred sixty-one (161), East Denver, shall be distributed, and I give, devise and bequeath the said net income as follows: one-eighth of said net income to the City and County of Denver, Colorado, to maintain a water and field lily garden in Washington Park; five eighths of said net income to the Protestant Orphanages of Denver, Colorado, share and share alike, and one-fourth of said net income to be paid, yearly, to the Town of McGregor, Iowa, for park purposes.

As to this the court said, ". . . testator indicated that he knew how to provide for an estate which should not vest immediately . . . Thus in section (b) there is a provision for deferment of vesting (type 2). Jack Liebhardt Temple had to live to be thirty years of age before taking. Then follows a provision for conveyance over if the conditions for the deferred vesting are not fulfilled."

It would have been less conducive to error if the court had said, ". . . testator indicated that he knew how to provide for an estate which would not vest absolutely . . . Thus in section (b) there is a provision for divestment (type 3). Jack Liebhardt Temple had to live to be thirty years of age or had to die with issue in order to prevent divestment. Then follows a provision for conveyance over if the conditions for the divestment are fulfilled."

It seems strange that this idea of vesting subject to divestment (type 3) as opposed to absolute vesting does not appear in the court's reasoning. It quotes the conclusions of law of the trial court wherein the idea is twice expressed: ". . . Fred . . . and Harry . . . each took an *indefeasibly* vested remainder . . .;" and ". . . Fred . . . and Harry . . . each took an *indefeasibly* vested interest."

Furthermore, the Brief and Argument of Defendants in Error contained this language: "We shall now demonstrate that the language of this subparagraph (c) is the language of immediate and *absolute* vesting . . . ;" and ". . . unless the expressed intention of the testator clearly appears in the will to the contrary, an *absolute*, rather than a *qualified*, a vested rather than a contingent, interest or estate is created."

There is another part of the opinion from which an erroneous inference may be drawn:

> Counsel argue that the interest which Harry . . . took should be treated as a lapsed legacy . . . This argument could only be applicable in the event that Harry ['s] . . . interest . . . was a contingent, instead of a vested remainder. It cannot apply as long as Harry

> . . . has a vested remainder, because if it is the latter it then becomes part of his estate and is disposed of by his will. . ."

This seems to be based upon the assumption that no contingent remainder can be inherited or devised. There is much authority to the contrary.[14] Of course if the contingency is the survival of the remainderman until some future time and he dies too soon, the contingency can never happen, and it is for that reason that no remainder goes to his heir or devisee.

A similar observation should be made with reference to the apparent implication that every vested remainder goes to the heir or devisee of the remainderman. Not so, obviously, if the remainder were an estate for the life of the remainderman; and for the same reason, not so if the vested remainder were divested by the death of the remainderman under circumstances which fell within the terms of the executory limitation, as, for example, the death of Jack before thirty without issue.

One more point. The court says, ". . . We believe also that the rule laid down in our statute, section 4, [article 1], chapter 40, '35 C. S. A. . . . is applicable here . . . We recently applied that rule in *Garvin v. Ruston,* 121 Colo. 494, 218 P. 2d 1064." But section 47, article 1, chapter 40, '35 C. S. A. says, "This article shall *not* be so construed as to embrace last wills and testaments." This case, *Liebhardt v. Avison,* involves a will. *Garvin v. Ruston* involved a partnership agreement, not a will.

If anyone should read this far prior to 1953, it might be well for him to ask some member of the Commission on Statute Revision to read the preceding paragraph.

T. G. M.

PERSONALS

Bernard E. Engler has removed his law offices from the Equitable Bldg. to the Majestic Bldg. Benjamin C. Hilliard, Jr., and Barkley L. Clanahan will continue as partners at 242 Equitable Bldg. under the firm name of Hilliard & Clanahan, with James J. Delaney and Robert L. Knous as associates.

John L. Griffith, formerly Clerk of the Denver County Court, is resuming the practice of law in partnership with Mary C. Griffith in the Midland Savings Building. Judge David Brofman appointed William B. Miller to be Clerk of the Court following Mr. Griffith's resignation.

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[14] SIMES, *supra,* § 732, note 12, ". . . at the present time, with the exception of Maryland, it is everywhere held that remainders, whether vested or contingent . . . descend in the same manner and to the same persons as possessory interests in land . . .'

§ 731, note 10, reads, "It is clear that, with the exception if possibilities of reverter and rights of entry for condition broken, all varieties of future interests whether vested or contingent are alienable by will in the United States."

RESTATEMENT, *supra,* § 164 and § 165.