Denver Law Review

Volume 28 | Issue 6 Article 7

June 2021

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FEENEY V. MAHONEY: RULES ON LAPSED LEGACIES

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Among the many cases decided by the Colorado Supreme Court in 1950 the case of *Feeney v. Mahoney*[1] should prove of interest to those members of the Colorado bar who come into contact with many wills problems.

Circumstances of the case follow: Joseph P. Boyle executed the will in question on March 23, 1943. He later became insane and died on October 21, 1948. His sister, Bridget Feeney, a beneficiary under the will, preceded him in death; however, her death occurred after Boyle had become insane. Relevant provisions of the will are as follows:[2]

> Second: To my beloved sister, Mrs. Bridget Feeney, . . . I give and bequeath the sum of SIX THOUSAND DOLLARS ($6,000.00) for herself, her heirs, personal representatives and assigns forever . . .
>
> Third: To my beloved brother, Mike O'Boyle, . . . I give and bequeath the sum of FOUR THOUSAND DOLLARS ($4,000.00) for himself, his heirs, personal representatives and assigns forever.
>
> Fourth: To my beloved brother, John O'Boyle, . . . I give and bequeath the sum of FOUR THOUSAND DOLLARS ($4,000.00) for himself, his heirs, personal representatives and assigns forever.
>
> Fifth: All the rest, remainder and residue of my property, of every kind and character, real, personal and mixed, and wheresoever situate, I give, devise and bequeath unto . . . Mrs. Bridget Feeney, . . . Mike O'Boyle, and . . . John O'Boyle, share and share alike and in equal portions, for themselves, their heirs, personal representatives and assigns, forever.

The executor petitioned the county court for a construction of the will. Judgment was given in the county court declaring that the general legacy given to Bridget Feeney under the second provision of the will lapsed and went into the residue of the estate upon her death prior to that of the testator. The county court further declared that Mike and John O'Boyle should each take one-half of the residuary estate including the lapsed general legacy and the lapsed share of the residuary estate given Bridget Feeney under the fifth paragraph of the will.

On appeal, plaintiffs in error were John Feeney, minor son of Bridget Feeney, and Patrick Feeney, her husband. The Supreme Court affirmed that portion of the county court judgment holding that the general legacy to Bridget Feeney lapsed and went into the residuum but reversed the part holding that the residue be divided equally between the surviving residuary legatees. The Supreme Court took the position the lapsed residuary legacy was part of the testator's intestate estate to be distributed under the statute of descent and distribution.

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[1] In Re Boyle's Estate, 121 Colo. 599, 221 P. 2d 357 (1950). The court construed the opinion in an appeal of the order and judgment of distribution based thereon and reported in 1950-51 CBA Advance Sheets 277 (No. 15 for April 21, 1951).

[2] From the opinion of Mr. Justice Holland. In the second case Justice Holland joined Justices Alter and Hilliard in dissent.

STATUTORY PROVISIONS AFFECTING LAPSED LEGACIES

In construing the will in question the Supreme Court had an opportunity to discuss amendments[3] to Section 45, Chapter 176, of 1935 Colorado Statutes Annotated.[4] Section 45, the "anti-lapse" statute, was amended to read as follows:

> Section 45. Whenever a devisee or legatee in any last will, being a *descendant* of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take per stirpes the estate devised or bequeathed, as the devisee or legatee would have taken had he survived the testator, and if there be no such issue at the time of the death of the testator, the estate disposed of by such devise or legacy shall be considered, treated and deemed a part of the residue of the estate of such testator. [Italics supplied].

The amendment substitutes the word "descendant" for the previous wording "child or grandchild." The court held that Bridget Feeney was not "a descendant of the testator as provided for in the statute to prevent a lapse of the legacy." By this holding the court limits, and not without precedent,[5] the meaning of the word "descendant" as used in the statute to describe persons proceeding from the body of the testator as opposed to a meaning descriptive of those upon whom property has been cast by descent which can be lineal or collateral. Because of this construction, the "anti-lapse statute" still applies only where the legacy is to issue of the testator or their *lineal* descendants only. An "anti-lapse" statute similar to the one in Colorado is found in the laws of New York.[6] However, the New York statute includes the words "or to a brother or a sister of the testator." There would have been no problem in applying the statute to the situation in the *Boyle* case had the legislature used the language added in the New York statute.

The second section of the amendment reads:

> If any devise or legacy under any will shall lapse, such devise or legacy shall be considered, treated and be deemed a part of the residue of the estate of the testator.

In the opinion of the Colorado Supreme Court ". . . the above quoted section refers to the lapsing of legacies outside the residue, and is not so all inclusive as to include the lapsing of a residuary legacy under any and all circumstances." Had the legislature intended "to include the lapsing of residuary legacies, it failed to employ available words to effectuate that intention."[7] The court feels that the use of the language "any devise or legacy" does not refer to residuary devises and legacies since it does not specifically say anything about them in so many words. This interpretation of the word "any" in a statute runs contra to many decisions in other courts including the United States Supreme

[3] COLO. LAWS, c. 254, §§ 1, 2 (1949).
[4] These sections were to affect pending as well as future estates by provision of Section 15, Chapter 254, '49 Session Laws.
[5] In re Tinker's Estate, 91 Okla. 21, 215 P. 779 (1923).
[6] New York Decedent Estate Law, Section 29.
[7] ..... Colo. ....., 221 P. 2d 357, 362 (1950).

Court.[8] The usual definition of the word in legal terminology gives it the full meaning of "every" or "all."[9] However, the meaning of the word is not constant, and there is authority to the effect that it can mean "some," "either," and many other things according to the context of the statute.[10]

The law is well-settled that a legacy lapses by the death of the legatee prior to that of the testator unless there are words of substitution or some other provision in the will or a statute preventing such lapse.[11] The main reason given for such a rule is that a will is ambulatory and does not take effect until the death of the testator, so the legacy never vests until the testator dies. If the legatee dies before the testator, there is no one in whom the legacy can vest.

Thus it appears that the decision in *Feeney v. Mahoney* was in accord with the common law in so far as the lapsing of the legacies to Bridget Feeney was concerned. The will provided that the legacy in question in both provisions affected should go to Bridget Feeney ". . . for herself, her heirs, personal representatives and assigns . . ." This language would indicate a gift to Bridget Feeney alone since the words follow the usual pattern of those used to indicate limitation rather than substitution. This is especially true in view of the fact that nowhere in the will is a contrary intent shown.

DISPOSITION OF LAPSED LEGACIES

The next question to be considered is the disposition to be made of the legacies since they have lapsed. Under the prevailing common law rule a general legacy, such as the one under clause 2 of the will which lapses because of the prior death of the legatee, falls into the residue, if there is nothing in the will providing for an alternative disposition of the legacy and the residuary clause itself is not void.[12] The validity of the residuary clause here involved is not questioned since it follows the customary language and is to specific persons. The main complication arises from the fact the legatee is also a residuary legatee. There are several ways in which the "intent of the testator" might be determined. One rule is that the legacy will not fall into the residue when the legatee is also a residuary legatee, but goes immediately as intestate property. Another rule is that the lapsed legacy falls into the residue and is to be divided between the surviving residuary legatees. Still another rule is that the legacy, having lapsed, falls into the residue, but the share of the legacy which would have gone to the deceased legatee goes as intestate estate. The Colorado Supreme Court is here following the last rule, the so-called Massachusetts rule.[13]

[8] MacMurray v. Brown, 91 U.S. 265 (1876).
[9] Logan v. Small, 43 Mo. 254 (1861).
[10] Citizens Rwy. Co. v. Foxley, 107 Pa. St. 539 (1884).
[11] Gibson v. Hills, 84 Colo. 596, 272 P. 660 (1928).
[12] Hickey v. Costello, 80 Colo. 461, 251 P. 595 (1927). Roe v. Kavanaugh, 81 Colo. 152, 154, 254 P. 161 (1927).
[13] Worcester Trust Co. v. Turner, 210 Mass. 115, 96 N.E. 132 (1911).

The question as to the disposition of the residuary legacy is a close one. The general rule says the gift will go as intestate estate where one of the residuary legatees cannot take his share due to his prior death. It is significant in this case that the gift was to the three named legatees, "share and share alike." This shows a desire on the part of the testator that each one of the legatees take one-third of the residue rather than a share in the residue as a member of a class. Following this view the Supreme Court determined that the residuary legacy to Bridget Feeney went as intestate estate to be distributed under the law of descent and distribution.

The contrary view, followed in the courts of only two states,[14] holds that to allow the gift to go as intestate estate is contrary to the policy of effectuating the intent of the testator. This view furthers itself in the logic that a reduction in the number of legatees does not effect the force of the grounds upon which a lapsed legacy falls into the residuum, and if the rule is applicable to one, it should be applicable to both general and residuary legacies.

AUTHORITY CONTRA TESTATOR'S INTENT?

It is clear that the decision in *Feeney v. Mahoney* follows the great weight of authority. The decision is in accord with a New York case[15] decided in the same month. The New York court held a lapsed residuary legacy would not further lapse into the residuum but went on to say that "the rule is not one of strongly prevailing type and yields readily to any fairly tenable indication that a testamentary intent may be derived and established from some intimation of a secondary or standby residuary provision."[16] In the Colorado case there seems to be no secondary provision as evidenced by the will. Therefore the cases are in apposition.

In rendering the decision in *Feeney v. Mahoney* the Supreme Court ruled the amendments to the statute did not affect the case. The court went on to declare that the prevailing common law rules governed the disposition of the legacies. The effect was to prevent the heirs of Bridget Feeney from gaining any benefit which might have accrued to them by the will. The other legatees received a larger sum than that intended by the testator. Still another result was to take from the testator the right to designate the disposition of that part of the estate declared intestate. However, since there was no alternative put forth by the will, that part of the estate had to go without the will. It is plain that the intent of the testator as expressed by the will could not be followed since the circumstances under which the will was written had changed.

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[14] Corbett v. Skaggs, 111 Kan. 380, 207 P. 819 (1922); West v. West, 89 Ind. 529 (1883).

[15] In Re Bowman's Will, 97 N.Y.S. 478 (May, 1950).

[16] *Ibid*, p. 481.