

Wills--Deceased Residuary Legatee's Share Held Not to Pass by Way of Intestacy Where It Is Clearly Manifested That Surviving Residuary Legatees Should Share in the Residuum (In re Dammann's Estate, 12 N.Y.2d 500 (1963))

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argument against such an extension was rejected.⁵² Likewise, the presence of a compensation fund for prisoners was held not necessarily to preclude prisoner suits under the FTCA.⁵³ The Court found the compensation scheme to be non-comprehensive.⁵⁴ The government's contention that variations in state laws might hamper uniform administration of federal prisons, as it was feared they would with the military, was rejected. Admitting that prisoner recoveries might be prejudiced to some extent by variations in state law, the Court regarded no recovery at all as a more serious prejudice to the prisoner's rights.⁵⁵ In this connection, it is interesting to consider the desirability of spreading tort liability in the governmental area.⁵⁶

The impact of the principal case is, in some respects, clear. It sets to rest a controversy that has been present in the federal courts since the passage of the FTCA in 1946. It strengthens the prospects of compliance with the standards of care owed by the Bureau of Prisons to federal prisoners,⁵⁷ and provides them with much needed relief.⁵⁸

The holding that prisoners can sue the government may, indeed, prove to be the catalyst necessary for added waivers of sovereign immunity on the part of the state. Finally, the unanimity of the Court's decision indicates its firm determination to liberally construe the FTCA, a trend begun by the *Indian Towing Co.* and *Rayonier* cases.



WILLS — DECEASED RESIDUARY LEGATEE'S SHARE HELD NOT TO PASS BY WAY OF INTESTACY WHERE IT IS CLEARLY MANIFESTED THAT SURVIVING RESIDUARY LEGATEES SHOULD SHARE IN THE RESIDUUM — In this proceeding the petitioner requested the Court

⁵² United States v. Muniz, *supra* note 48, at 159.

⁵³ *Id.* at 160.

⁵⁴ *Ibid.* Only those federal prisoners engaged in Federal Prison Industries (18% of all federal prisoners) were covered by this prison compensation scheme. Woody, *Recovery by Federal Prisoners Under The Federal Tort Claims Act*, 36 WASH. L. REV. 338, 351 (1961).

⁵⁵ United States v. Muniz, *supra* note 48, at 162. Looking to New York's experience in allowing prisoner suits, the Court found no adverse effects on either prison regulation or prison discipline.

⁵⁶ McNiece & Thornton, *The Federal Tort Claims Act And Its Application To Military Personnel*, 5 VAND. L. REV. 57, 66-67 (1951-52).

⁵⁷ 18 U.S.C. § 4042 (1958).

⁵⁸ *Supra* note 48. From a sociological viewpoint the relief is important since "a permanently disabled prisoner with no financial resources cannot be expected to return to society as a useful and well-behaved person. On the contrary, he may well revert to crime in an attempt to survive. . . ." Note, *Denial Of Prisoners' Claims Under The Federal Tort Claims Act*, 63 YALE L.J. 418, 425 (1954).

to construe two paragraphs of decedent's will. In one, the entire residuary estate was bequeathed to eight named beneficiaries, one of whom predeceased the testatrix. The following paragraph provided that "no part of my estate shall go to any except those hereinbefore mentioned."¹ The Surrogate's Court determined that the one-eighth share of the deceased residuary legatee had lapsed and ordered such share distributed as intestate property to the next of kin of the testatrix, who had not been named in the will. The Appellate Division affirmed. The Court of Appeals reversed and *held* that the one-eighth share did not pass by way of intestacy since the intent was manifest that the survivors of the eight legatees should share the entire residuary estate. In *re Dammann's Estate*, 12 N.Y.2d 500, 191 N.E.2d 452, 240 N.Y.S.2d 968 (1963).

The basic issue presented in the *Dammann* case, that is, the method of disposing of a lapsed residuary legacy, was decided nearly two and a half centuries ago. In the case of *Bagwell v. Dry*,² the surplus of the testator's estate was bequeathed to four persons equally, but only three survived the testator. The court concluded that the one-fourth share of the deceased legatee became void, and since the surviving legatees were only given a fourth which could not be increased, the void share passed to the next of kin according to the statute of distribution. This doctrine, although accepted in later cases,³ did not become "firmly engrafted on our jurisprudence"⁴ until⁵ the case of *Skrymsher v. Northcote*,⁶ in which the Master of the Rolls pronounced the oft-quoted precept that there could be no residue of a residue, hereinafter referred to as the rule.

While the rule is applicable to lapsed residuary gifts, the courts have rarely hesitated to allow an ineffective *specific* legacy to augment the general residuum;⁷ the obvious reason being that the residuary gift is intended to be a "dragnet that will cover

¹ *In re Dammann's Estate*, 12 N.Y.2d 500, 506, 191 N.E.2d 452, 454, 240 N.Y.S.2d 968, 971 (1963).

² 1 P. Wms. 700, 24 Eng. Rep. 577 (Ch. 1721). For the purpose of this article no distinction will be made between residuary legacy and residuary devise, and hence the terms are used interchangeably.

³ See, *e.g.*, *Page v. Page*, 2 P. Wms. 489, 24 Eng. Rep. 828 (Ch. 1728).

⁴ *In the Matter of Bogardus*, 5 Misc. 2d 607, 608, 164 N.Y.S.2d 485, 487 (Surr. Ct. 1957).

⁵ 1963 N.Y. LEG. DOC. NO. 19, SECOND REPORT OF THE TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES 438.

⁶ 1 Swans. 566, 570, 36 Eng. Rep. 507, 509 (Ch. 1818).

⁷ See, *e.g.*, *Carter v. Board of Educ. of Presbyterian Church*, 144 N.Y. 621, 39 N.E. 628 (1895); *Schoen v. Siegmund*, 119 N.J. Eq. 524, 183 Atl. 292 (1936); 2 JARMAN, WILLS 1021-22 (8th ed. Jennings & Harper 1951).

every interest not effectively disposed of otherwise."⁸ Several reasons have been advanced why this "dragnet" principle does not apply to a residuary share which fails. Primarily it is argued that "one-half of the remainder of an estate each to A and B," could not possibly be construed as "the whole estate to B if A should die." The proportion of each is fixed and a court cannot, justifiably, revise the will.⁹ The second contention, given as the underlying motivation in favor of the rule, stems from the "set policy of English law . . . to keep the devolution of property in the regular channels, to the heirs and next of kin, whenever it can be done."¹⁰

In the United States, as in England, the rule rapidly became the majority rule, even though suggestions as to its value are noticeably scarce.¹¹ The New York courts adopted it because of their respect for the "authorities."¹² It has been said that the courts are "forced to realize that as a result of inheritance and frequent repetition the rule has become too firmly established to be disregarded."¹³

The courts have applied the rule of no residue of a residue to a great many situations wherein a residuary gift was found to lapse. Intestacy, however, most commonly results, in spite of the fact that other residuary legatees survive, when a residuary legatee predeceases the testator.¹⁴

⁸ *Oliver v. Wells*, 254 N.Y. 451, 457, 173 N.E. 676, 678 (1930); *accord*, *Owens v. Bank of Glade Spring*, 195 Va. 1138, 1151, 81 S.E.2d 565, 573 (1954).

⁹ *In re Moloney's Estate*, 15 N.J. Super. 583, 586, 83 A.2d 837, 838 (1951); see 6 PAGE, WILLS § 50.18, at 98 (rev. ed. Bowe & Parker 1962).

¹⁰ *In re Gray's Estate*, 147 Pa. 67, 74-75, 23 Atl. 205, 206 (1892); *accord*, *Aitken v. Sharp*, 93 N.J. Eq. 336, 342, 115 Atl. 912, 915 (1922).

¹¹ See PAGE, *op. cit. supra* note 9.

¹² *Beekman v. Bonsor*, 23 N.Y. 298, 312 (1861); *cf. In re Moloney's Estate*, *supra* note 9, at 588, 83 A.2d at 839.

¹³ *Wright v. Wright*, 225 N.Y. 329, 341, 122 N.E. 213, 216 (1919).

¹⁴ *Hard v. Ashley*, 117 N.Y. 606, 616, 23 N.E. 177, 179 (1890); *Floyd v. Barker*, 1 Paige's Ch. Rep. 480 (N.Y. 1829); *In the Matter of Penrose*, 183 Misc. 226, 47 N.Y.S.2d 732 (Surr. Ct. 1944); *Dresel v. King*, 198 Mass. 546, 85 N.E. 77 (1908). Where the beneficiary dies before probate of the will, but after the testator, the gift does not lapse. *Tillson v. Holloway*, 90 Neb. 481, 134 N.W. 232 (1912).

The following cases illustrate other situations resulting in lapse of a residuary gift:

Wright v. Wright, 225 N.Y. 329, 122 N.E. 213 (1919) (gift to a charitable corporation which has consolidated with another corporation); *In re Niles' Will*, 99 N.Y.S.2d 238 (Surr. Ct. 1950) (charitable gift exceeding the statutory limit); *Booth v. Baptist Church of Christ*, 126 N.Y. 215, 245 (1891) (gift held void as suspending the power of alienation); *In re Baumann's Will*, 97 N.Y.S.2d 478 (Surr. Ct. 1950) (legatee was a subscribing witness whose testimony was essential for probate of the will—see N.Y. DECED. EST. LAW § 271); *In re Bradbury's Estate*, 53 N.Y.S.2d 948 (Surr. Ct. 1945) (residuary legatee rejected the gift); *In the Matter*

Notwithstanding the "authorities," the rule has been severely criticized, whenever it has been considered on its merits,¹⁵ primarily because it is "subversive of the great canon of construction—the carrying out of the intent of the testator."¹⁶ It is also contrary to another fundamental doctrine, that intestacy is to be avoided if possible,¹⁷ since the execution of a will is indicative of a desire to dispose of an entire estate.¹⁸ This is especially true where a residuary clause is present.¹⁹ Furthermore, the argument that the residuary legatees should not take greater shares than manifested by the will is answered by the following example. Assume a testator leaves his entire residuary estate to A, B, C, and D equally, and D predeceases the testator. Since A, B, and C were to take three-fourths of any part of the estate not otherwise disposed of, and since D's one-fourth is now undisposed of, A, B, and C should take three-fourths of D's one-fourth. Now there is still a fourth of a fourth remaining undisposed of, but three-fourths of this fourth can again fall into the residuary. This process can be repeated ad infinitum, and by doing so, the entire estate, minus a negligible portion can be disposed of by the residuary clause.²⁰

Another criticism of the rule is that, in reality, there should be no distinction between increasing the residuary legatee's share because of a failure of a specific legacy and increasing it because of a failure of a residuary devise.²¹ The cause of lapse (the reasons for which are manifold and most likely un contemplated by the testator) may be the same in either case and certainly the effect is equal, in that the remaining residuary legatees' shares are increased proportionately.

As a result of these criticisms it is doubtful whether the rule would be adopted today.²² The New York Court of Appeals has even stated that the reason for the rule "is not very apparent, satisfactory or convincing."²³ Several years later Chief Judge

of Doughty, 24 Misc. 2d 625, 194 N.Y.S.2d 50 (Surr. Ct. 1959) (trust in will held void); *In re Waln's Estate*, 156 Pa. 194, 27 Atl. 59 (1893) (testator revoked gift and made no other disposition).

¹⁵ *In re Moloney's Estate*, 15 N.J. Super. 583, 586, 83 A.2d 837, 839 (1951).

¹⁶ *Ibid.*; accord, *In the Matter of Rossiter*, 134 Misc. 837, 839, 236 N.Y. Supp. 443, 447 (Surr. Ct. 1929); *In re Zimmerman's Estate*, 122 Neb. 812, 814, 241 N.W. 553, 554 (1932).

¹⁷ *In the Matter of Kempe*, 191 Misc. 993, 996, 78 N.Y.S.2d 830, 832 (Surr. Ct. 1948).

¹⁸ *In re Gray's Estate*, 147 Pa. 67, 74, 23 Atl. 205, 206 (1892).

¹⁹ *Lamb v. Lamb*, 131 N.Y. 227, 234, 30 N.E. 133, 134 (1892).

²⁰ *Commerce Nat'l Bank v. Browning*, 158 Ohio St. 54, 63-64, 107 N.E.2d 120, 125 (1952).

²¹ *Ibid.*

²² *In re Gray's Estate*, *supra* note 18.

²³ *Wright v. Wright*, 225 N.Y. 329, 340, 122 N.E. 213, 216 (1919).

Cardozo, speaking for the same court said: "There is indeed a technical rule, reluctantly enforced by courts when tokens are not at hand to suggest an opposite intention. . . ." ²⁴

The courts of several jurisdictions have expressly rejected the rule and allowed the surviving residuary legatees to share in the undisposed portion.²⁵ However, it has been indicated by a small number of courts that only the legislature has the power to abrogate the common-law rule,²⁶ and in six states the rule has in fact been abolished by statute.²⁷ In an attempt to avoid intestacy where a will has been executed, many of the remaining states have passed anti-lapse statutes which fall, basically, in one of three groups: (1) where the beneficiary is a lineal descendant of the testator, and he dies before the testator leaving lineal descendants;²⁸ (2) where the beneficiary is a relation of the testator, and he dies leaving lineal descendants who survive the testator;²⁹ and (3) where the beneficiary, who may or may not be a relative of the testator, predeceases the testator.³⁰ While these statutes have been held applicable to residuary gifts,³¹ it is evident that many contingencies are not provided for because of their limited scope.

In 1957 a bill was proposed in New York which attempted to remedy the situation,³² but it was never passed because of the bill's silence as to disposal of the ineffective legacies.³³ Even though the legislature has been unable to act,³⁴ the rule has

²⁴ *Oliver v. Wells*, 254 N.Y. 451, 457, 173 N.E. 676, 678 (1930).

²⁵ *Schroeder v. Benz*, 9 Ill. 2d 589, 138 N.E.2d 496 (1956); *West v. West*, 89 Ind. 529 (1883); *Hedges v. Payne*, 85 Ind. App. 394, 154 N.E. 293 (1926); *Corbett v. Skaggs*, 111 Kans. 380, 207 Pac. 819 (1922); *Commerce Nat'l Bank v. Browning*, *supra* note 20.

²⁶ *In the Matter of Bogardus*, 5 Misc. 2d 607, 608, 164 N.Y.S.2d 485, 487 (Surr. Ct. 1957); *In re Moloney's Estate*, 15 N.J. Super. 583, 589, 83 A.2d 837, 839 (1951).

²⁷ ILL. ANN. STAT. ch. 3, § 49 (Smith-Hurd 1961); KY. REV. STAT. § 394.400 (1960); N.J. STAT. ANN. §§ 3A:3-13, 3A:3-14 (1953); OHIO REV. CODE ANN. § 2107.52 (Page 1953); PA. STAT. ANN. tit. 20, § 180.14 (1950); R.I. GEN. LAWS ANN. § 33-6-20 (1956).

²⁸ ARIZ. REV. STAT. ANN. § 14-133 (1956).

²⁹ N.Y. DECED. EST. LAW § 29; CAL. PROB. CODE § 92; FLA. STAT. ANN. § 731.20 (1956).

³⁰ GA. CODE ANN. § 113-813 (1959); VA. CODE ANN. § 64-65 (1949).

³¹ *In the Matter of Mott*, 137 Misc. 99, 244 N.Y. Supp. 187 (Surr. Ct. 1930).

³² N.Y. Senate Bill Int. No. 236, Print No. 236; N.Y. Assembly Bill Int. No. 392, Print No. 392 (1957).

³³ 1963 N.Y. LEG. DOC. No. 19, SECOND REPORT OF THE TEMPORARY STATE COMM'N ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES 439.

³⁴ In March, 1963, another bill was proposed (N.Y. Senate Bill Int. No. 2574, Print No. 4586; N.Y. Assembly Bill Int. No. 3898, Print No. 4013 (March, 1963)), which would have abolished the rule. 1963 N.Y. LEG. DOC. No. 19, SECOND REPORT OF THE TEMPORARY STATE COMM'N ON THE

lost much of its vitality and has been deliberately evaded where "tokens of a contrary intent" can be found. For instance, if a gift can be construed as to a class, then there will be no lapse since the class is not determined until the death of the testator.³⁵ There is also a tendency to seek words implying a gift-over, the result of which allows the substituted legatee to take.³⁶ An intent that the lapsed residuary legacy should again fall back into the general residuum will also be respected.³⁷

Another method of circumventing the rule is by applying the *cy pres* doctrine, which permits a court in the exercise of its equitable jurisdiction to substitute one charitable beneficiary for another which has become unable to take under the will.³⁸ In their haste to avoid intestacy, courts have found intent where none in fact existed.³⁹

In spite of this aversion for intestacy, mere words of disinheritance are not considered sufficient tokens of intent to prevent the operation of the rule.⁴⁰ It is well established that in order to prevent intestacy there must be a valid disposal of the property.⁴¹ A negative intention, no matter how strong or clear, will not deprive a distributee of his natural right to inherit.⁴²

Hence, unless a court can find "tokens of a contrary intent" or determine that the particular factual situation presents an exception to the rule, it will be consistently applied.

In the present case the Court places emphasis on the fact that the paragraph providing "no part of my estate shall go to any except those hereinbefore mentioned,"⁴³ directly follows the residuary paragraph of the will. The Court concludes that

MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES 436. In a personal conversation with a representative of the Temporary Commission on Estates, the author learned that the bill had not been passed, the reasons for this are unavailable as of the date of this publication.

³⁵ *In re Long's Estate*, 121 N.Y.S.2d 183 (Surr. Ct. 1953); *In re Dunster*, 1 Ch. Div. 103 (Eng. 1909).

³⁶ *In the Matter of Friend*, 283 N.Y. 200, 28 N.E.2d 377 (1940); *In the Matter of Sutton*, 150 Misc. 137, 268 N.Y. Supp. 458 (Surr. Ct. 1934).

³⁷ *In re Pearsall's Will*, 140 N.Y.S.2d 71 (Surr. Ct. 1955); *In the Matter of Clonney*, 189 Misc. 542, 71 N.Y.S.2d 587 (Surr. Ct. 1947); *Aitken v. Sharp*, 93 N.J. Eq. 336, 115 Atl. 912 (1922).

³⁸ *In re Smith's Will*, 70 N.Y.S.2d 797 (Surr. Ct. 1947); *In the Matter of Walter*, 150 Misc. 512, 269 N.Y. Supp. 400 (Surr. Ct. 1933).

³⁹ *Roberts v. Trustees of Trust Fund for Town of Tamworth*, 96 N.H. 223, 225, 73 A.2d 119, 121 (1950).

⁴⁰ *In re Trumble's Will*, 199 N.Y. 454, 465, 92 N.E. 1073, 1076 (1910).

⁴¹ See, e.g., *Gallagher v. Crooks*, 132 N.Y. 338, 30 N.E. 746 (1892); *In the Matter of Penrose*, 183 Misc. 226, 47 N.Y.S.2d 732 (Surr. Ct. 1944).

⁴² *Gallagher v. Crooks*, *supra* note 41.

⁴³ *In re Dammann's Estate*, 12 N.Y.2d 500, 506, 191 N.E.2d 452, 454, 240 N.Y.S.2d 968, 971 (1963).

the residue should "go to no one outside the list of eight chosen relatives,"⁴⁴ since tokens are at hand to suggest this result. Chief Judge Desmond declared, in answer to the contention that disinheritance alone will not cut off a rightful heir or distributee: "but we reach a point where a clearly and unmistakably expressed negative is as complete and unavoidable a statement of intent as if cast in the affirmative."⁴⁵

In a strong dissent,⁴⁶ Judge Scileppi emphasized the fact that words of disinheritance cannot prevent intestacy as long as the rule of no residue of a residue is applicable. Since such words leave uncertain who should take under the will, an express gift-over is required.

Even if the majority opinion is to be construed narrowly, it is of major importance in two respects. First, there can be no doubt that the Court of Appeals has acknowledged and approved of the trend toward an avoidance of the application of the rule with its concomitant results. This may have the effect of abolishing the rule for all practical purposes, since a slight indication of intent would seem sufficient. The simple declaration by the testator that a paragraph is to be construed as a residuary clause may be all that is necessary for a lapsed residuary gift to fall back into the residuum.⁴⁷ In fact, with the liberal view the Court has taken, it would not be illogical to hold that the words "all the rest, residue and remainder" show an intent to die testate as to all property owned by the testator at the time of death. Of course, this is in keeping with many well reasoned lower court decisions⁴⁸ as well as with legislative thought. Secondly, the Court seemed to have adopted the position taken by Surrogate Wingate in the case of *In the Matter of Weissman*,⁴⁹ that the statute of distribution is only a presumption that one dying intestate would wish his worldly goods

. . . to go to those nearest and presumably dearest by reason of ties of blood or marriage. . . . Where, however, the decedent has spoken, the whole fundamental basis for such presumption fails to the extent that it runs counter to the spoken word; wherefore the result of this rule is to do, deliberately, the very thing with testator's property which he solemnly inhibited. [U]nquestionably . . . a clearly expressed negative intention is entitled to equal weight with a positive one . . . where such negative

⁴⁴ *Ibid.*

⁴⁵ *Id.* at 507, 191 N.E.2d at 454, 240 N.Y.S.2d at 972.

⁴⁶ *Id.* at 507-08, 191 N.E.2d at 454-55, 240 N.Y.S.2d at 972-73 (dissenting opinion).

⁴⁷ In the Matter of Clonney, 189 Misc. 542, 71 N.Y.S.2d 587 (Surr. Ct. 1947).

⁴⁸ See notes 37-38, *supra*.

⁴⁹ 137 Misc. 113, 243 N.Y. Supp. 127 (Surr. Ct. 1930).

indication of intention is the only one expressed . . . [it] should . . . prevail over the artificial statutory presumption. . . .⁵⁰

It can be inferred that the Court did, in fact, adopt this view and hence, the rule that mere words of disinheritance are insufficient to deprive a distributee of his rightful share would seem to be no longer the law in New York. A negative intent can always be construed as an affirmative command in these circumstances. For example, the words "I am not unmindful of the fact that I have other relatives than those hereinbefore referred to . . ." could be construed as meaning that if the testator wanted those other relatives to take, he would not have excluded them from the will. Therefore, testator wanted only those mentioned in the will to inherit any property that is not otherwise disposed of. Suppose that testator executed a will naming only one beneficiary, but expressly disinheriting his son. If the beneficiary died before the testator, would all the eligible heirs take excluding the son? Certainly this can be construed as an affirmative disposition, in case of intestacy, to all the heirs except the son.

The *Dammann* case presents new problems which make it incumbent upon the draftsman of a will to select terms intended to show testamentary capacity, if they are to be used at all, and other indicia of intent, which can leave no room for misinterpretation. And while the Court does not take a definitive position with respect to the rule of no residue of a residue, it does modify this harsh common-law rule. In addition, the paramount law of wills, giving effect to the intent of testator, is better served by allowing a court to honestly seek out intent without being hindered by strict rules of construction.

⁵⁰ *Id.* at 116, 243 N.Y. Supp. at 131. (Emphasis added.)