

The Coming Conflict Over Vested and Contingent Remainders

by John L. Pritchard, Esq.

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Trust provisions drafted by attorneys commonly contain a hidden land mine as to whether the remainder after a life estate is “vested” or “contingent”. Although the issue is obscure, it may present unexpected opportunities for a surviving spouse of a beneficiary, or a former spouse or even a creditor.

For an attorney preparing a trust for a living client, the insertion of a few key words will prevent the hidden problems, and protect the likely wishes of the client-testator.

Several hundred years ago, the common law began making arcane distinctions between "contingent remainders" and "vested remainders". These rules are still followed under New Jersey law, with consequences which would surprise and distress most testators and their family members.

Change may be coming, however, as the traditional common law is on a collision course with the principles of several important New Jersey Supreme Court cases.

Posit that Dad leaves a trust for the benefit of Mom for her life, with the remainder "then to be distributed to my Son or his descendants per stirpes." Posit further that Mom and Son both survive Dad, but then Son predeceases Mom, leaving his own wife and children.

The language in the instrument is ambiguous in that it is not perfectly clear whether the remainder goes to Son's descendants on Mom's death only if Son fails to survive Dad, or whether the Son's descendants take the remainder even if Son survives Dad but then predeceases Mom.

The common law is that any possible ambiguity is to be used to make the remainder “vested”. If Son has a "vested remainder", then on his death, his future right to the remainder interest from the trust upon Mom's later death is actually a current asset of his probate estate, even if Mom is still alive. On Mom's death, the remainder will then be distributed pursuant to Son's Last Will and Testament, or by intestacy.

If Son's will leaves everything to his wife in this example, then the trust assets will pass to the original couple's Daughter-in-Law alone, even if by the time of Mom's passing, Daughter-in-Law is already remarried to her next husband. If Son left debts, the remainder would be subject to the claims of his creditors. This is not what

most testators would want, and the outcome would probably surprise not only the descendants of Dad and Mom, but perhaps also the attorney who drafted the Dad's will.

Many attorneys preparing wills or trust agreements do not appreciate these ramifications, and do not follow the quirky wording in the form books which is usually intended to create a contingent remainder, which prefers the testator's descendants.

If the will or trust agreement provides that after the death of the life beneficiary, the remainder "will then vest, and pass to Son or his descendants", then the remainder will be contingent. This is probably what most testators desire.

The judges who developed the common law regarding vested and contingent remainders were well aware of the more common desire of testators, and they were hostile to it. This was only a part of the ongoing conflict between the deceased older generations, and the younger, living generations.

While the persons making wills were intent on preserving their posterity and tying up property based on their Darwinian impulses, the younger ones did not want to wait for their widowed mothers to die so that they could sell their rights, or more commonly, mortgage them. Selling or mortgaging their rights would not be possible when it could not be determined if they would ever live to inherit the remainder. If the remainders were vested, then the transfers of the interests would serve the commercial interests of society.

The desire of the living to make interests in property more alienable, regardless of the wishes of the dead, resulted in the invention of the Rule against Perpetuities, the Doctrine of Worthier Title, the Rule in Shelly's Case, the distinction between "words of purchase" and "words of limitation", and the distinction between vested remainders and contingent remainders.

New Jersey cases have long held that "by policy of the law" any ambiguity is to be resolved in favor of vesting the remainder in the remainderman. This assumption could be overcome only by clear and convincing evidence of an intent to create a contingent remainder. But a recent New Jersey case has held that the presumption can now be overcome by a mere preponderance of the evidence, given other developments in New Jersey caselaw.

In the 1960s the New Jersey Supreme Court began to interpret wills according to the testator's "probable intent", rather than just the strict construction of the actual words. This is now required by statute. N.J.S. 3B:3-33.

The doctrine of probable intent finally met the issue of vested remainders in the comparatively recent opinion by the late Judge Thomas Lyons, In re Estate of Reininger, 388 N.J.Super. 289 (Ch.Div. Probate Part 2006). Reininger faithfully

upheld the caselaw, except that because of the doctrine of probable intent, the presumption in favor of a vested remainder may now be overcome by “probable evidence” to the contrary, rather than clear and convincing evidence to the contrary.

In *Reininger* the Court noted that in the will provisions regarding successor trustees the testator had contemplated the possibility that the person who was the remainderman might predecease the others. The Court thus held that the testator must have considered the possibility of the remainderman dying before the life estate holder, and since the issue was not addressed there, the traditional presumption was not overcome.

At least in *Reininger*, the standard required to overcome the presumption was lowered. But the issue of what most testators would have wanted was not raised in *Reininger*.

The cases of our Supreme Court regarding the doctrine of probable intent have also held that even if there was no evidence that the testator had ever considered the issue at hand, the trial court should ascertain what would have been the testator’s wishes “had he envisioned the present inquiry.” *Fidelity Union Trust Co. v. Robert*, 36 N.J. 561, 565-566 (1962).

The determination of what the testator probably would have wanted, even if he never considered the issue, now includes following “those impulses which are common to human nature”. In *re Estate of Cook*, 44 N.J. 1, 6 (1965). Given the Darwinian imperative, this may some day move the presumption to one in favor of a contingent remainder, rather than in favor of a vested remainder, regardless of any supposed public policy. The predominant wealth of society is no longer agricultural land held in trust. Capital is created and mobilized now without trust arrangements being an impediment.

But for the present time, any situation in which a named remainderman predeceases the life estate holder should cause those persons with an interest in the named remainderman’s estate to carefully examine the trust provisions. There are probably many existing trusts where the issue of the vesting of the remainder could cause part of the trust administration to be reopened.

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