18-P-1489 Appeals Court

LINDA DELL'OLIO & others[1] vs. ASSISTANT SECRETARY OF THE OFFICE OF MEDICAID & others.[2]

No. 18-P-1489.

Middlesex. October 2, 2019. - December 10, 2019.

Present: Milkey, Sullivan, & Ditkoff, JJ.

Will, Construction. Devise and Legacy, Real property, Remainder interests, Vested right. Real Property, Life estate, Remainder interests. MassHealth.

Petition for partition filed in the Middlesex Division of the Probate and Family Court Department on July 24, 2015.

Civil action commenced in the Middlesex Division of the Probate and Family Court Department on January 13, 2017.

The case was heard by Maureen H. Monks, J., on motions for summary judgment.

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[1] Andrew Dell'Olio and Richard Dell'Olio.

[2] Emily Buswell, Ann Camara, Karen Fuller, Linda Dell'Olio, in her capacity as personal representative of the estate of Emily Dell'Olio and the estate of Mary Dell'Olio, and the Commonwealth. For purposes of this appeal, Fuller is aligned with the plaintiff-appellees. Buswell, Camara, and Linda Dell'Olio as personal representative did not participate in the appeal.

Andrew J. Haile, Assistant Attorney General, for Assistant Secretary of the Office of Medicaid.
Paul D. Silvia for the plaintiffs.
Jonathan A. Barnes for Karen Fuller.

MILKEY, J. When he died in 1956, Andrew Dell'Olio owned two adjacent, triple decker residences in Cambridge. His will devised the properties to various family members as life tenants, and, after their deaths, to his grandchildren. The dispute before us concerns one of those grandchildren, Emily Dell'Olio (Emily),[3] who died intestate in 2008. At that time, some of the life tenants established by her grandfather's will were still alive. The question raised by this appeal is whether Emily's interest in the properties had vested by the time she died, in which case her interest would devolve to her heirs at law and be subject to claims brought by her creditors. Asserting that such vesting had occurred was the Massachusetts Office of Medicaid (MassHealth), which sought reimbursement pursuant to G. L. c. 118E, § 31, for significant medical expenses it had incurred on Emily's behalf. The six surviving grandchildren maintained that Emily's interest in the property instead was contingent on her surviving the life tenants, and thus was extinguished upon her predeceasing them. On cross motions for summary judgment, a

[3] Because several individuals share the last name of Dell'Olio, we refer to Emily Dell'Olio by her first name (while recognizing that other family members are also named Emily but have a different last name).

Probate and Family Court judge ruled in favor of the surviving grandchildren and awarded them each an undivided one-sixth interest in the properties. For the reasons that follow, we reverse.

Background. The relevant facts are undisputed. When he died in 1956, Emily's grandfather left a one-page will that he had executed one week earlier. The relevant portion of the will stated as follows:

> "All the real estate and more specifically number 27 Berkshire Street, Cambridge, Mass., and number 27 Plymouth Street, Cambridge, Massachusetts in the County of Middlesex, I leave to my wife Emilia Dell'Olio for the duration of her life, during which time she is to collect all rents from which she is to pay all bills for the upkeep of the buildings, except that she is not to collect from my son Richard Dell'Olio and my daughter Louise Camara, each of which is to have one flat free of rent so long as said Emilia Dell'Olio lives. Upon the death of my wife the aforementioned property is to pass to my son Richard Dell'Olio and my daughter Louise Camara for their lives and upon their death to their children in fee, each child to share and share alike. The Children are not to take by right of representation. In the event that either my son or daughter dies the widow or widower whichever the case may be is to have the same rights as their spouse until the said pro[p]erty vests in my grandchildren. I further direct that all life tenants are to keep the property in good repair at all times."

At the time of the grandfather's death, Emily was eight years old and, as such, the oldest of five grandchildren. A sixth grandchild was then in utero, born one month after the grandfather died. A seventh grandchild was born the following year.

Emily suffered from a mental disability unspecified in the record, and was institutionalized. Her care was subsidized by MassHealth, which incurred expenses on her behalf that exceeded $1.2 million.

By the time that Emily died in January of 2008, her paternal grandmother (the grandfather's widow) had died, as had Emily's father and aunt (the grandfather's two children). However, Emily's mother and her uncle by marriage (the grandfather's daughter-in-law and son-in-law respectively) remained living. The uncle died later in 2008, and Emily's mother -- the last of her generation -- died in 2013.

After the death of Emily's mother, the surviving grandchildren could not agree on how the properties should be divided.[4] Accordingly, in 2015, three of the six surviving grandchildren (all of whom lived at the properties) filed a petition in the Probate and Family Court to partition them. Named as objectors to the petition were the other three surviving grandchildren.

In the course of the partition proceeding, a title examiner noticed that Emily's estate had a potential interest in the

[4] The record indicates that at this time, some, but not all, of the grandchildren lived at the properties. Counsel for three of the grandchildren represented at oral argument that two of the grandchildren wanted to retain at least one of the houses, while the others wanted the properties sold and the proceeds divided.

properties against which MassHealth might collect. The title examiner passed this information along to petitioners' counsel, who in turn notified MassHealth. With title to the properties thereby placed in some doubt, the petitioners to the partition proceeding filed a declaratory judgment action in the Probate and Family Court. MassHealth -- and the Commonwealth generally -- were named as defendants in that new action.[5] MassHealth also moved to intervene in the related partition proceeding. The two actions effectively, if not literally, were consolidated.[6]

On cross motions for summary judgment, the judge allowed the surviving grandchildren's motions for summary judgment and

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[5] Also named as a defendant was Linda Dell'Olio in her capacity as personal representative of Emily's estate. See note 2, supra. Linda was Emily's sister and -- in her individual capacity -- is a petitioner in the partition proceeding and a plaintiff in the declaratory judgment action. Thus, Linda found herself on both sides of the litigation. This anomaly is addressed below. See note 11, infra.

[6] We note that there is at least one additional related action that was filed in the Hampden Division of the Probate and Family Court Department. See Estate of Emily Dell'Olio, Hampden Prob. & Fam. Ct., No. HD16P1888EA. That action involves the probating of Emily's estate. With Emily having died intestate in 2008 survived only by her mother, the probating of the mother's estate may also be implicated under G. L. c. 190, § 3 (since repealed, see St. 2008, c. 521, § 7), or the new Massachusetts Uniform Probate Code, see G. L. c. 190B, § 2-103, effective March 31, 2012. See also Crowl v. M. Chin Realty Trust, 700 F. Supp. 2d 171, 175 (D. Mass. 2010) ("Under Massachusetts intestacy law, if an intestate dies leaving no children and no father, only the mother will take from the estate" [quotation and citation omitted]).

entered a separate and final judgment in their favor pursuant to Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974). Although the judge issued no memorandum of decision, it appears -- and all parties contend -- that she accepted the surviving grandchildren's argument that under the grandfather's will, Emily's interest was contingent on her surviving the life tenants (and that her interest therefore lapsed upon her death). After MassHealth appealed, the judge allowed the property to be sold, with a share of the proceeds escrowed to cover MassHealth's potential interest.[7]

Discussion. This case presents a recurring issue: Do remainder interests created by a will vest when the testator dies, or do they remain contingent on the holders of those interests surviving the life tenants? A rich body of case law has developed to address this issue. We briefly review the guiding principles that emerge from the cases, and then turn to applying those principles to the facts of the case before us.

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[7] Although MassHealth was seeking a one-seventh share of the property, it nevertheless took the position that one-fifth of the proceeds should be escrowed pending appeal (on the theory that the two grandchildren who were born after the testator's death may not be entitled to any share). After the judge approved the escrowing of a one-seventh share, MassHealth filed an appeal from that order and continued to insist that a one-fifth share be escrowed. The surviving grandchildren acquiesced. However, while the case was on appeal, MassHealth concluded that its insisting on escrowing a one-fifth share was inconsistent with its theory of the case, and it therefore agreed that the difference could be released to the surviving grandchildren.

1. General principles. As the Supreme Judicial Court stated in 1861, it is "well settled, that no remainder will be construed to be contingent which may, consistently with the intention [of the testator], be deemed vested." Blanchard v. Blanchard, 1 Allen 223, 225 (1861). Put differently, "[t]he ordinary presumption is, that all devises and bequests vest upon the death of the testator." Pike v. Stephenson, 99 Mass. 188, 189 (1868). "[T]he presumption that [a will] was intended to give vested interests, which the law favors, is strengthened [when] the provision is for the benefit of the direct descendants of the testator." Ryan v. McManus, 323 Mass. 221, 230 (1948). The force of the presumption is especially pronounced where, as here, the descendants at issue "were alive when [the testator] made his will." Marsh v. Hoyt, 161 Mass. 459, 461 (1894). Thus, where a testator devised a remainder interest to a direct descendent that he knew at the time the will was drafted, courts are to apply a strong presumption that the testator intended that interest to vest upon his death.[8]

Of course, a party may overcome that presumption upon a showing that "the provisions of the will manifest an intention

[8] Although remainder interests typically vest upon the testator's death, they nevertheless remain subject to partial divestment by the subsequent birth of new family members in the relevant class of beneficiaries (in the case before us, after-born grandchildren). See Barker v. Monks, 315 Mass. 620, 624 (1944).

that vesting should be postponed until the death of the life tenant." Bamford v. Hathaway, 306 Mass. 160, 161 (1940). By 1861, "usual and proper phrases" had developed to express such an intention by adding qualifiers to the remaindermen such as: "if they shall be living at [the life tenant's] death," or "to such of them as shall be living." Blanchard, 1 Allen at 226. Ambiguous language, without more, is insufficient to overcome the presumption of early vesting. See Welch v. Colt, 228 Mass. 511, 513 (1917) ("in cases of doubt in the construction of wills the law favors the creation of vested rather than contingent estates" [citation omitted]). Thus, it is not enough for a party to point to language in the will that could be interpreted as postponing vesting until the last life tenant died. See Blanchard, supra at 224, 226 (remainder interest granted to son held not to be contingent on his surviving mother, even though will referred to property at issue as "property . . . that may be left at the death of [the testator's] wife" and included "a proviso containing a limitation over of the estate thus devised to the children respectively, upon the contingency of either of them dying before their mother, either with or without issue").

With the passage of time, the presumption that remainder interests were intended to vest upon the death of the testator has survived. In fact, the (relatively) more recent cases, if anything, have stated the presumption in more robust terms. For

example, in 1970, the Supreme Judicial Court stated that "[i]t is a fundamental rule that a transfer of property to A for life, to B for life, and remainder to C vests upon the creation of the interest and goes to C whether or not C is living when the property vests in possession." Williams v. Welch, 358 Mass. 514, 518 (1970). "In order to change this result there must be a specific reference in the creating instrument indicating that the remainderman must survive the life tenant in order to take." Id.

One additional aspect of the case law bears noting. As one commentator has observed,

> "[T]he word 'vested' is used in two senses. Firstly, an interest may be vested in possession, when there is a right to present enjoyment, e.g. when I own and occupy Blackacre. But an interest may be vested, even where it does not carry a right to immediate possession, if it does confer a fixed right of taking possession in the future."

G.W. Paton, Jurisprudence § 65, at 305 (G.W. Paton & D.P. Derham eds., 4th ed. 1972). Thus, if remainder interests created by a will are not made contingent on future events, they are said to vest "in interest" upon the death of the testator. Blanchard, 1 Allen at 226. Then, once the beneficiary has gained the right to occupy and enjoy the property, her interest is said to vest "in possession." Id. As evidenced by the passage from Williams quoted above, the dual use of the term "vest" is so commonplace that the Supreme Judicial Court has employed both meanings in

the very same sentence.

2. The case at hand. We now turn to applying these principles to the case before us. Emily was eight years old when her grandfather died. The presumption that he intended his living granddaughter's interest in the properties to vest upon his death therefore lies at its most potent.

In arguing that the grandfather nevertheless intended Emily's interest to be contingent on her surviving the life tenants, the surviving grandchildren rely principally on the following sentence in the will: "In the event that either my son or daughter dies the widow or widower whichever the case may be is to have the same rights as their spouse until the said pro[p]erty vests in my grandchildren" (emphasis added). According to the surviving grandchildren, the reference to when the "pro[p]erty vests" evinces the grandfather's unambiguous intent that his grandchildren's remainder interests vest only after the last life tenant has died. As noted, however, the term "vest" is commonly used to refer both to when a property interest vests "in interest" and when it vests "in possession." While it is true that the language the grandfather chose does not explicitly refer to the property vesting "in possession," neither does it speak in terms of the remainders vesting "in interest." The will's shorthand reference to when the "pro[p]erty vests" readily can be interpreted -- as MassHealth

maintains -- to refer to when the grandchildren's right to possess and enjoy the properties went into effect.[9] Whatever else can be said about such language, it does not reflect a manifest intent that the remainder interests created by the will be contingent on the grandchildren's surviving the life tenants (as would be necessary to overcome the presumption that those interests vested on the testator's death).[10]

Nor do we discern such an intent in other provisions of the

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[9] In this respect, the case before us is quite similar to that of Marsh, 161 Mass. 459. In that case, the testator's will left his estate to trustees, to pay the net income to his wife during her lifetime, and then left a specified share to his niece during his niece's lifetime "and, to take effect at [the niece's] decease, [gave], bequeath[ed], and devise[d] said [share] to her children in equal shares . . ." (emphasis added). Id. at 460. The court held that despite the highlighted language, the property vested in his niece's four children at the time of the testator's death (with the result that a one-fourth share of the property passed to the surviving husband of one of the grandnieces who predeceased her mother). The court explained as follows: "Upon the whole, we are of opinion that the testator, by the words 'to take effect at her decease,' intended only to say that the [specified share of the trust property] which he gave to the [niece's] children should then be taken out of trust, and be theirs in right of possession, as well as in interest, and that in accordance with his intention, a right to one fourth of the trust estate vested in each of the children at his death." Id. at 461-462.

[10] Additionally, as MassHealth highlights, the vesting language does not appear in the core operative provision delineating the grant to the grandchildren, but in a separate sentence that focuses on the rights of the grandfather's son-in-law and daughter-in-law, should they survive their respective spouses. The presence of such language is not rendered superfluous under MassHealth's interpretation, because it adds clarity as to how the rights of the grandfather's son-in-law and daughter-in-law interact with the rights of the grandchildren.

will, its overall focus, or the surrounding circumstances. To be sure, the will does appear to reflect the grandfather's desire to keep the adjacent properties available as a family homestead for his wife, his children and their spouses, and his grandchildren. However, it hardly follows that he therefore must have intended to deprive a grandchild's heirs of an interest in the properties should that grandchild predecease the life tenants. Indeed, had Emily had children, the surviving grandchildren's interpretation would disinherit any such children, a result that seems inconsistent with the grandfather's intent of creating a family homestead to be shared by his descendants.

None of the cases relied upon by the surviving grandchildren requires a different result, because each can be distinguished on the facts. For example, in Harding v. Harding, 174 Mass. 268, 271 (1899), the will referenced the future deaths of the testator's children, and then stated that the property would go to their children "then and not till then." The court reasoned that this "emphatic" language signaled that "the testator placed especial stress on the . . . happening of some particular event in the future. That time or event was plainly the death of his son." Id. In Crapo v. Price, 190 Mass. 317, 320-322 (1906), the court ruled that the testator intended the remainder interests to be contingent on the remaindermen

surviving the life tenant where they were not family members and could not be determined until the life tenant died.

In sum, we conclude that on the undisputed facts, the surviving grandchildren have not made a showing sufficient to overcome the strong presumption that Emily was granted a vested interest in the properties when her grandfather died. We therefore reverse the judgment and remand for further proceedings consistent with this opinion.[11]

So ordered.

[11] Given the nature of MassHealth's claims against Emily's estate and the size of the debt the agency is seeking to collect, the surviving grandchildren appear to concede that if Emily's interest vested prior to her death, then the remaining escrowed one-seventh share of the proceeds should be disbursed in its entirety to MassHealth. However, as we have noted, the designated personal representative of Emily's estate does not appear to have actively participated in that role in the current action (and her participation in her individual capacity lies in at least theoretical conflict with her role as personal representative). In addition, there appears to be an open case in a different county involving the probating of Emily's estate, and the probating of Emily's mother's estate may also be implicated. We leave any such potential unaddressed issues for the judge to consider, as appropriate, on remand.