Wills -- "Next of Kin" -- Time of Determination

James L. Nelson

Wills—"Next of Kin"—Time of Determination

In *Central Carolina Bank & Trust Co. v. Bass*,[1] a residuary clause in a will posed serious constructional problems for the North Carolina Supreme Court. The residuary estate was given in trust and was to be divided between a son's fund and a granddaughter's[2] fund.[3] Basically it was provided that the incomes from the funds were to go to the son and the granddaughter in the trustee's discretion,[4] and the principal of the granddaughter's fund was to be paid to her when she reached twenty-five years of age.[5] Upon the son's death, any principal that might be remaining[6] in his fund was to be paid and delivered over to the testator's "next of kin."[7]

---

general rule that consent to accompany an officer to the police station to clear a matter up would bar any right to redress should the confinement subsequently be determined groundless. This appears distinguishable from the *Pierson* situation. See State v. Moore, 174 So. 2d 352 (Miss. 1965).

[1] 265 N.C. 218, 143 S.E.2d 689 (1965).

[2] The granddaughter was not the natural born child of the testator's son, and it was unsettled whether the testator knew of this fact at the time of his death. *Id.* at 232, 143 S.E.2d at 699. However, in prior litigation it had been determined that the child qualified as beneficiary regardless of any misrepresentations that were made to the testator, and subsequently the child was treated as the testator's granddaughter. *Id.* at 225, 143 S.E.2d 694.

[3] "To divide said residuary estate into two parts, one such part to consist of three-fifths (3/5) of said residuary estate and to be known and designated as 'Thomas L. Shepherd Fund' and the other such part to consist of two-fifths (2/5) of the said residuary estate and to be known and designated as 'Annie Moore Shepherd Fund.'"
Id. at 221, 143 S.E.2d at 690.

[4] "[T]he net income . . . to the said Thomas L. Shepherd and/or the said Annie Moore Shepherd . . . in such proportions, either part to each or all to one, as the said Trustee may, in its sole . . . discretion consider best calculated to achieve the purposes hereinafter set out."
Ibid.

"Upon and after the death of Thomas L. Shepherd or Annie Moore Shepherd the net income thereafter arising from that part of the trust estate not distributable upon the death of that one of them so dying shall be paid to the survivor . . . so long as he or she shall live and any part of the trust estate shall continue in the hands of the trustee as hereinafter provided."
Id. at 221; 143 S.E.2d at 691.

[5] It was further provided that if the granddaughter should die before reaching twenty-five years of age, the principal would go to "her child or children then living . . . but if there be no such child or children then living," the principal was to go to the testator's next of kin. *Id.* at 222, 143 S.E.2d at 691.

[6] The trustee was given the discretion to make distributions from the son's principal to the son upon certain conditions. *Id.* at 222, 143 S.E.2d at 692.

[7] "Upon the death of my son . . . the Trustee shall pay and deliver over the entire principal of the 'Thomas L. Shepherd Fund' . . . to my next of kin. . . ." *Id.* at 222, 143 S.E.2d at 691.

The testator died in 1939 and was survived by the son, the granddaughter, three sisters, and the issue of a brother and a sister who predeceased him. In 1950 the granddaughter reached twenty-five years of age, and the trustee distributed to her the corpus of her fund. On July 14, 1963, the son died leaving neither widow nor issue. Conflicting claims[8] subsequently arose, and the trustee instituted this action in the superior court under the Declaratory Judgment Act.[9]

On appeal,[10] there were three questions:

> (1) When the testator directed the trustee to distribute the remainder as then constituted "to my next of kin," did he mean his nearest of kin or those who would take from him under the statute of distributions? (2) Did testator intend to include . . . [the] granddaughter . . . in the class he designated as 'my next of kin'? (3) Are 'my next of kin' to be ascertained at the death of the testator or at the death of the life beneficiary?[11]

In answer to the first question, the court determined that the words "next of kin" mean "nearest of kin." There is strong authority in North Carolina[12] and elsewhere[13] in support of this conclusion.

[8] The conflicting claims arose from the following interests: (1) the granddaughter's contention that she should receive all the corpus and accrued income from the son's fund; (2) the contention of sole legatee under the son's will that he should get all income accrued before the son's death; (3) the contention of nieces and nephews of the testator that they should get the son's fund "to the exclusion of the issue of their deceased brothers and sisters," *id.* at 228, 143 S.E.2d at 696; and (4) the testator's grandnieces' and grandnephews' contention that "my next of kin" referred to persons living on the son's death "who are issue of testator's brothers and sisters." *Ibid.*

[9] N.C. GEN. STAT. § 1-253 (1953).

[10] The lower court concluded that the testator did not intend for either the son or the granddaughter to be included as his next of kin and that the testator used the term "my next of kin" to designate those who would take under the intestate succession laws at the time of the son's death. It also concluded that the granddaughter should get undistributed net income that accrued prior to the son's death. The appealing parties are the granddaughter, the son's legatee, and the nieces and nephews of the testator who were living on July 14, 1963.

[11] Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 230-31, 143 S.E.2d 689, 698 (1965).

[12] *E.g.*, Wallace v. Wallace, 181 N.C. 158, 106 S.E. 501 (1921), where the court said that "on this question it has been held in this jurisdiction, in a long line of cases in which the question was directly considered, that these words mean 'nearest of kin' . . . ." *Id.* at 163, 106 S.E. at 504.

[13] *E.g.*, Williams v. Fulton, 4 Ill. 2d 524, 123 N.E.2d 495 (1954); Clark v. Mack, 161 Mich. 545, 126 N.W. 632 (1910). See 95 C.J.S. *Wills* § 682 (1957).

Though this appears to be the general rule,[14] some jurisdictions hold that reference in a will to the testator's "next of kin" indicates those who would take by intestacy under the statute of distribution, and not the nearest relations in blood to the deceased.[15] A caveat to the North Carolina approach is that if a contrary intent is shown by the terms of the instrument, that intent, rather than the rule of construction, will prevail.[16] Indicia of a contrary intent are indicated in the following quote:

> If to the words "next of kin" these words had been added, "as in case of intestacy" or "as by the statute of distributions," or if the language of that statute had been adopted, "to the next of kin in equal degree, or to those who legally represent them," we might have included the grandchildren; but upon the words "next of kin," simply, they cannot be included.[17]

What are the consequences of holding that the words "next of kin" mean "nearest of kin?" The court in the principal case concluded that this prohibited operation of the principle of representation.[18] Thus, for example, a brother or sister would take to the exclusion of the children of a deceased brother or sister.[19] Further, though not mentioned in the principal case,[20] the North Carolina court has consistently construed "nearest of kin" to mean "nearest of *blood* kin."[21] This means that relationship by marriage is not within the scope of "nearest of kin," and thus a surviving husband or wife will be excluded[22] unless a contrary intention is shown.[23]

---

[14] See, *e.g.*, Redmond v. Burroughs, 63 N.C. 242 (1869). See generally 57 AM. JUR. *Wills* §§ 1375-76 (1948).

[15] *E.g.*, Union Trust Co. v. Kaltenbach, 353 Mo. 1114, 186 S.W.2d 578 (1945). See Annot., 32 A.L.R.2d 296, 307 (1953).

[16] Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 231, 143 S.E.2d 689, 698 (1965). "[A] court should not put rules of construction into competition with an intent which is clearly and fully found." ATKINSON, WILLS § 146 (2d ed. 1953).

[17] Simmons v. Gooding, 40 N.C. 382, 390 (1848).

[18] 265 N.C. 218, 231, 143 S.E.2d 689, 698 (1965).

[19] See, *e.g.*, Knox v. Knox, 208 N.C. 141, 179 S.E. 610 (1935); Redmond v. Burroughs, 63 N.C. 242, 246 (1869). See generally 95 C.J.S. *Wills* § 682 (1957).

[20] Evidently because the court was not faced with a blood relation problem.

[21] *E.g.*, Wallace v. Wallace, 181 N.C. 158, 106 S.E. 501 (1921); Jones v. Oliver, 38 N.C. 369 (1844). See Annot., 32 A.L.R.2d 296, 305 (1953).

[22] Jones v. Oliver, 38 N.C. 369 (1844).

[23] "This Court has repeatedly held that the intent of the testator is the polar star that must guide the courts in the interpretation of a will." 265 N.C. 640, 644, 144 S.E.2d 857, 860 (1965). See generally 57 AM. JUR. *Wills* § 1376 (1948).

Principle-of-representation and nearest-of-blood-kin questions of recent vintage should be approached cautiously in light of North Carolina's new Intestate Succession Act.[24] Though the principle of representation is still recognized for some purposes in the new provisions,[25] there are interesting questions that would appear to pose serious problems for the North Carolina courts when faced with these inquiries in a will executed subsequent to July 1, 1960.[26]

In regard to whether the granddaughter should be included among the "next of kin," the court answered in the negative. The court in reaching that conclusion first decided that the testator also intended to exclude the son from that class. The fact that a prior taker is at the death of the testator a member or the sole member of the class to which a limitation over is made is not in itself enough to exclude the prior taker from participating in the gift over.[27] The court in the principal case appropriately considered additional factors[28] and clearly seems to have arrived at the testator's real intention.

It has been stated that where the prior taker is a next of kin

[24] N.C. GEN. STAT. ch. 29 (Supp. 1965).

[25] See generally McCall, *North Carolina's New Intestate Succession Act*, 39 N.C.L. REV. 1 (1960).

[26] The new provisions became effective July 1, 1960, and abolished the distinction between real and personal property as to those who take by intestate succession. Since the phrase "next of kin" was peculiarly applicable to the distribution of personal property, perhaps in the light of the new law consideration should be given to revising the meaning of the phrase. Also, the new provisions make the wife a statutory heir. *Ibid.* See McCain v. Womble, 265 N.C. 640, 144 S.E.2d 857 (1965). This case was decided subsequently to the *Bass* case, but involved a will executed prior to 1960. The court repeated its position by saying, "For at least 120 years . . . the words 'next of kin' have had a well-defined legal significance. . . ." *Id.* at 645, 144 S.E.2d at 861.

[27] See, *e.g.*, Thomas v. Castle, 76 Conn. 447, 56 Atl. 854 (1904); Smith v. Winsor, 239 Ill. 567, 88 N.E. 482 (1909). See also Annot., 13 A.L.R. 615 (1921).

[28] The testator imposed several restrictions on the trustee's discretion to pay any part of the principal to the son before the son's death. The testator prohibited payment from the principal for five years after his death and at anytime after his death that the son filed a suit disputing the fifth article of the residuary clause. Also, no amount of the income was to be paid to the son if such payment would discourage a sober life. The son had a serious drinking problem, which was well known to the testator. The principal of the granddaughter's fund was to go to the testator's "next of kin" and not to his son specifically if the granddaughter died before reaching twenty-five without children surviving her. These factors were considered by the court in determining intent. Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 232-33, 143 S.E.2d 689, 699 (1965).

and there has been a limitation over to the next of kin, two questions arise:

> First, whether such circumstance supports the inference of an intention that the members of the class to take under the gift over are to be ascertained upon the termination of the particular estate, rather than at the time of the testator's death; and second, whether, where the class is to be ascertained at the death of the testator, the first taker is to be excluded from taking as a member of the class.[29]

In *Bass*, the court stated similar issues in the opposite sequence.[30] By doing so, it seems that the court used a more appropriate order of determination because, as will be shown later, the intent to exclude the first taker from the class is an important factor in deciding when to determine the next of kin.

The third question posed in the *Bass* case—the time next of kin are to be ascertained—seems to have presented the most difficulty. There are two general rules of construction in this area. First, in the absence of a contrary intent, "where the gift is to the heirs or next of kin of another than the testator it ordinarily refers to the death of such other. . . ."[31] Secondly, and also in the absence of a contrary intent, "the death of the testator is the time at which the members of a class are to be ascertained in case of a gift to the testator's . . . next of kin. . . ."[32] The second rule is the one of concern in the principal case.

What are the factors in the present case that show an intention contrary to the general rule, *i.e.*, that the class should be determined at the death of the life tenant? The court pointed out the following factors: (1) the provision in the residuary clause that upon certain conditions the trustee could make payments to the son from the principal; (2) the testator instructed the trustee to "pay and deliver over"[33] the principal of the son's fund to the testator's next of kin upon the son's death; (3) the son, at the testator's death, was the only member of the class designated in the gift over, *i.e.*, next of kin; (4) the court's determination that the son was excluded from

---

[29] Annot., 13 A.L.R. 615, 616 (1921).

[30] *Supra* note 11.

[31] Witty v. Witty, 184 N.C. 375, 379, 114 S.E. 482, 484 (1922).

[32] *Ibid.* A reason given for this rule is the preference for early vesting of estates. SIMES, FUTURE INTERESTS § 80 (1951).

[33] Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 222, 143 S.E.2d 689, 691 (1965).

the next of kin; and (5) if the son should subsequently have a child born to him, the testator would probably prefer the child to have the whole principal rather than to share it with the estates of deceased sisters who survived the testator.

According to the court's analysis, none of the above factors alone would be sufficient to overcome the general rule of construction. Also, factors (1) and (2) together would not be sufficient.[34] Further, standing alone, factor (3) plus the use of words of plurality in designating the class to take the gift over would not be sufficient.[35] The court held that the next of kin should be determined in this case at the death of the son. Thus, what combination of factors was sufficient to overcome the general rule? It appears that it required all of the above listed factors and that if factor (3) had been missing, the court would have reached a contrary result.[36]

In utilizing this factor type of analysis, the court followed the general approach to the problem[37] and appears to have reached a sound result. The court possibly indicated that in a similar situation, it might reach the same result with less factor analysis. After indicating that "my nearest of kin" cannot mean "my *next* nearest of kin," the court made the following statement:

> Where the remainder is limited to a testator's next of kin, *i.e.*, his nearest of kin, and where the life tenant is himself the sole nearest of kin, it seems to us impossible to determine the takers of the remainder during the life tenancy, if the life tenant is himself to be excluded.[38]

In other words, if the determination were made before the life tenant's death, the next nearest of kin and not the nearest of kin

---

[34] *Id.* at 239, 143 S.E.2d at 704.

[35] *Id.* at 241, 143 S.E.2d at 705.

[36] In form and phraseology the devise under consideration here is indistinguishable from that in *Witty v. Witty* . . . and, but for the fact that the life tenant here was the sole representative of the class, testator's next of kin, this case would in fact be indistinguishable from *Witty v. Witty*. This fact, however, makes the difference between the vested remainder in *Witty* and the contingent remainder here.

Id. at 242, 143 S.E.2d at 706. There may be some doubt whether *Witty v. Witty*, 184 N.C. 375, 114 S.E. 482 (1922), involved all the factors the court said it did.

[37] Annot., 49 A.L.R. 174 (1927). Another factor mentioned in this annotation that the court failed to consider *directly* in *Bass* is that at the death of the testator an alcoholic would have been the sole member of the class to take the gift over.

[38] Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 242, 143 S.E.2d 689, 706 (1965).

would be determined. Such a rule might save a great deal of judicial effort, but it also might be hard to reconcile with the preference for vestedness.[39]

JAMES L. NELSON

[39] "The law favors the construction of a will which gives to the devisee a vested interest at the earliest possible moment that the testator's language will permit." Elmore v. Austin, 232 N.C. 13, 19, 59 S.E.2d 205, 210 (1950).