
SENIOR ARTICLES

ACCELERATION OF FUTURE INTERESTS IN OHIO

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IN GENERAL

The Probate Code in Ohio gives the surviving spouse of a deceased person one-third or one-half of the deceased's estate in fee if such spouse takes by law and against the will of the deceased. This is a much more substantial interest than the former dower interest. Consequently, there is apt to be an increase in instances of a surviving spouse electing to take against the will of the deceased. Where the will provides for future interests to take effect at the termination of a preceding estate devised to the husband or wife, such renunciation by the surviving spouse gives rise to the problem of acceleration of future interests. For example, if the testator gives an estate to his wife for life with remainder to A, will A's future interest become a present one if the wife renounces? The problem may also arise where a life tenant beneficiary is a witness to the will and for that reason is unable to take under the will or where the grantee or devisee of a preceding estate is without capacity to take.

The problem of acceleration may well be divided into two parts. One where there is no distortion and the other where there is distortion. By distortion is meant an upsetting of the testator's scheme of disposition in a manner which affects interests created by the will other than the renounced interest and the future interest which followed the renounced interest. The meaning of distortion in acceleration cases may be explained with the aid of some illustrations. If the surviving spouse should renounce but refuse to take the distributive share permitted by law there is no distortion, since no other interests created by the will could be affected adversely. Again, if there were no other interests save the spouse's life estate and the remainder after it, there would be no distortion as no other interests would be affected even though testator's scheme of

disposition would be disturbed since the spouse would be entitled to part of the future interest under the Ohio law. Other interests will be disturbed by the renunciation in many cases. The significance of distortion in acceleration cases depends on how great the distortion is and whom it affects. If the loss to other prospective devisees is slight or if it falls upon a residuary devisee who apparently was not a primary object of the testator's bounty, the court is likely to disregard the loss and treat the case as one concerning acceleration where there is no distortion. On the other hand, if the loss falls upon a specific or residuary beneficiary where such beneficiary was intended to be a chief beneficiary the court is more apt to consider the loss and to permit its attitude toward the problem of acceleration to be influenced or controlled by the possible distortion.

Where there is no problem of distortion the most difficult question presented on renunciation by the surviving spouse is whether the court should look beyond the formal character of the future interest in deciding if it should be accelerated. It is sometimes supposed that if the future interest is vested it will be accelerated, but if it is contingent it will not be accelerated. If the future interest is vested in the sense that it will take effect whenever and however the preceding estate terminates, the courts generally have no hesitancy in saying that on renunciation the future interest takes effect as a present estate. This may be true even though the limitation is "to my wife for life and on the death of my wife to X." This latter phrase has been construed to mean any termination of the wife's estate, by death or otherwise. Simes, *Law of Future Interests* (1936), Sec. 752. Acceleration where there are vested interests ordinarily seems to accord with the testator's general intent. However, if the testator's expressed intent shows that an interest normally regarded as vested should not take effect presently, it should not be accelerated since an acceleration should not be permitted to defeat the testator's intent.

Courts have been reluctant to permit an acceleration of contingent interests. If it is clear that the testator intended a literal compliance with the stipulated condition, no acceleration should be permitted. But the general intent of the testator as gleaned from the entire instrument may support an inference that he did not intend a literal compliance with the condition at all events. Suppose, for example, we have a devise to the wife for life and on her death the remainder to the children then sur-

viving. If the wife renounces, the courts will normally accelerate the interest in the children. Simes, *op. cit.*, Sec. 756. According to accepted rules of construction, the above limitation would be considered contingent in form and so the children would have to survive the wife before they could take their interest in possession. Why do some courts accelerate such a remainder? In answering this question, it must be remembered that the testator probably had given no thought to the possibility of renunciation and that his specific intent in that event is not known. So the acceleration under such circumstances seems to be a process of re-construing the general intent of the testator in the light of an unanticipated event. If the testator intended the contingent remainder to be postponed only for the purpose of letting in the preceding estate, a means of providing for the surviving spouse, the court should not insist upon a strict compliance with the contingency set forth in the will, but should accelerate such a contingent future interest. In such a situation the court should not let the literal form of one clause in the will control over the general intention of the testator as evidenced by his scheme of distribution. So the true basis of acceleration is not the vested or contingent form of the future interest, but an estimate of the testator's general intent as found from a re-construction of the will in view of the unanticipated event of renunciation. A good many courts have taken this view; Simes, *op. cit.*, Sec. 756. The Ohio courts have not consistently done so.

ACCELERATION WHERE THERE IS NO PROBLEM OF DISTORTION

Future interests which are in form vested have presented very little difficulty to Ohio courts in the problem of acceleration. In *Millikin v. Welliver*, 37 Ohio St. 460 (1882) the testator left a life estate in all his property to his wife and the residue to relatives. The wife was held to take by law. The court made the "future interest" in the relatives a present interest dating from the time of testator's death subject to the wife's dower which was not assigned in the case as the wife died shortly after the testator. The future interest was vested so that the case is merely an illustration of the application of the general rule that vested future interests will be accelerated.

In *Davidson v. Miners and Mechanics Savings and Trust Co.*, 129 Ohio St. 418 (1935) the court accelerated a vested

interest. But they said in a dictum that the general rule was that a contingent remainder would not be accelerated. This statement was unwarranted by the facts of the case. The actual holding of the court seems inequitable. By the terms of the will the wife was given a life estate in one-half with remainder to a hospital and B was given a life estate in the other half with the remainder to a church. The wife renounced and was given one-half in fee. (This shows the possible advantage to a spouse in taking against the will under the present provisions of the Probate Code). The court gave B a life estate in one-half of the remaining one-half of the estate with remainder in that portion of the estate to the church. The court accelerated the remainder to the hospital so that it took a present interest in the one-half of the one-half remaining after the wife took her half of the entire estate. Though the interest in the hospital was vested, this would seem to be a situation where a formal vested remainder should not have been accelerated. If the question of acceleration is to be determined on the basis of reconstruction of the will according to what the testator would have done if he had known of the renunciation, it would not seem reasonable in the light of the provisions of the will that one of the charities should get more than the other. A result which would seem to have been more in accord with the testator's probable intent would have been to let B have a life estate in the entire one-half and to let the charities divide the remainder. In this case the interests of other beneficiaries, B, the hospital and the church, were disturbed by the wife's renunciation so that there was distortion; but the court did not regard this as sufficiently important to become a factor in the problem. The dissenting judges thought it was a factor since they based their holding on previous Ohio cases which definitely involved distortion as a factor in the case.

In *Holt v. Lamb* 17 Ohio St. 374 (1867) the testator gave a life estate to one G. S. and then provided that after the decease of G. S. the land should be sold and divided equally between G. S.'s four daughters, R, S, P, and M. The will was admitted to probate but later set aside in a contest suit to which the four daughters were not made parties. One year after G. S.'s death, they brought this suit to recover the land from defendant who acquired it by mesne conveyance from one who had purchased the land at a sheriff's sale in a partition suit among testator's heirs. The court held that the four daughters

were not bound by the decision which declared the will should be set aside as they were not parties to it. The court further said conceding that the contest suit terminated G. S.'s life estate still the daughters' interests did not arise until G. S.'s death. Therefore, a title by adverse possession was not acquired against them. The court said the daughters' estate was one to commence at the happening of a particular event, G. S.'s death, and could not become possessory during his life although his life estate terminated in the contest suit. The interest in the daughters seems to have been a vested remainder although the court spoke of it as an equitable right to have the land sold. Even though it was vested, the court's decision is correct if the general intent of the testator was that the event should happen before the daughters' estate was to take effect in possession. It is doubtful, however, if such was his intent.

A somewhat similar situation arose where the testator gave his wife a life estate with remainder over to certain relatives. There was a power in the executor to sell after the death of the wife. She took under the will. She sold her life estate to the remaindermen who then desired to have the power of sale exercised though the wife was still living. The court of appeals in *Aldenderfer v. Spangler* 22 Ohio App. 123 (1926) held that the power to sell was independent of the estate and that it could not be accelerated. It correctly said that the sale of the life estate to the remaindermen was not such a termination of the life estate as to accelerate the remainder. That is a problem of merger, but the power to sell might still have been accelerated since it was apparently for the protection of the widow and it could not serve that purpose after she sold her life estate. In *Weller v. Weller, Extr.* 32 Ohio N.P. (N.S.) 329 (1934) the court of common pleas handled an acceleration problem nicely and seems to have reached a result not entirely consistent with the *Aldenderfer* case. The testator devised shares of stock in trust for his wife for life and provided that the trust should terminate at the death of the wife, the principal going to the trustee absolutely. There was a provision that the trustee could not sell without the consent of the wife during her life. The court in giving instructions to the executrix said if the wife renounced and took by law the beneficial estate in the trustee would vest immediately. In addition, the court said that the trustee could sell the stock during the wife's life without her consent. This disposition seems to accord with the

testator's probable general intent. It is not likely that the testator meant to require the consent of his widow to a sale of the property if the widow had no estate in the property. Although this decision would seem to be more in accord with the testator's general intentions than is the decision in the *Aldenderfer* case, there is some merit to the *Aldenderfer* decision as a matter of policy since in subsequent cases remaindermen would be less likely to try to induce a widow to part with her specific life estate if a similar power is not exercisable until the happening of the contingency for which the testator provided.

The case of the *Fourth & Central Trust Co. v. The Henderson Lithographing Co.* 21 Ohio App. 257 (1926) is especially interesting since it shows that the true approach to the problem of acceleration is one of construing the intention of a testator in the light of the unexpected termination of the preceding estate. The testator devised shares of stock to a trustee. The trustee was to vote the stock according to the wish of the testator's eldest son. The testator wished this son's influence to dominate the company. The trustee was to divide the dividends among all of the testator's children and at the death of the eldest son, the trustee was to divide the stock per stirpes among the testator's children and their issue. The company in which the stock was held was sold and dissolved with the consent of all the parties. The eldest son wished the trustee to invest the funds in legal securities and continue the trust. The other children wished immediate distribution. The court of common pleas in 26 Ohio N.P. (N.S.) 249 (1925) said that this was a situation analogous to the wife renouncing and so the final distribution could be accelerated. The court said "at the death" meant any termination of the eldest son's estate. The court further said that it would make no difference whether the future interest was vested or contingent; in either instance it could be accelerated. The court finally rested its decision on the ground that since the eldest son's influence could not be carried on in the company, the purpose of the trust failed and since the testator's other purpose was an equal distribution among all the children, the latter purpose should be carried out immediately. The court of appeals in 21 Ohio App. 257 (1926) affirmed the case on this latter ground not mentioning acceleration. The lower court by its suggestion of the possibility of accelerating either vested or contingent interests

illustrates the view which seems preferable. The decision shows that in the last analysis acceleration is a matter of construing the testator's intention with regard to the unforeseen termination of the preceding estate. The fact the court saw the analogy of the acceleration situation and rests its decision on the failure of the trust purpose — a pure intent question — bears out the suggestion that we must look to the testator's intention rather than merely to the formal nature of the future interest, whether contingent or vested.

Future interests which are in form contingent are the source of considerable confusion in the problem of acceleration. The difference of opinion as to whether a contingent interest can be accelerated was shown in the discussion of the dicta in the *Davidson* and *The Fourth & Central Trust Co.*, cases, *supra*.

In *Stevens, Exr. v. Stevens*, 121 Ohio St. 490 (1929) there was a trust in which the widow was given a life estate. At her death the land was to be sold and the proceeds distributed as follows: \$1,500 to A should he then be living, \$1,000 to B should he then be living, \$500 each to C and D. The widow renounced. In a suit by the executor for instructions, the court said that the interests in A and B could not be accelerated since by the use of the words "should he then be living" the testator meant that A and B should not take unless they were alive at the widow's death. Apparently the court allowed C's and D's interests to be accelerated since their interest was not subject to such an expressed contingency. The testator had expressed no intention as to what distribution should be made if the widow renounced. Inasmuch as A and B were the principal beneficiaries other than the widow, it is reasonable to suppose that the testator would have given them an immediate estate if he had known that the widow would not take a life estate. Here, because the remainder was contingent in form, the court compelled the chief beneficiaries to bide the event, but allowed the secondary beneficiaries to take a present interest because the limitation to them was in form vested. The court failed to realize that the remainder was only contingent in form but was probably not intended to be contingent should the wife renounce. It did not reconstrue the testator's intent in the light of the unforeseen event.

In contrast with the decision in the *Stevens* case, the court of appeals in *Blocker v. Trick*, 8 Ohio App. 222 (1917) accel-

erated an executory estate. In this case there was an estate for ten years in the widow. The property was then to be sold and the proceeds distributed to the testator's children. The widow renounced. The court held this accelerated the enjoyment of the children's estate subject to the widow's dower. The court stated that the children took the entire estate by intestacy. The holding that the children took by intestacy seems clearly wrong. The children took a future interest under the will which interest by acceleration became a present interest. However, the decision is equitable because the result accorded with what the testator probably would have intended under the circumstances. Usually courts have been reluctant to say that an executory estate will take effect in possession on any other event than that stipulated by the testator. The principal case seems to be the better approach.

The court of common pleas in *Dymond v. Dymond*, 12 Ohio N.P. (N.S.) 506 (1912) rendered a decision which permitted the acceleration of a remainder which was contingent in form. The widow was given a life estate. After her death the property was to go half to the testator's brother and half to the brother's children then living and to the issue of the children who had died. The wife renounced. The plaintiff argued that only those children living at the wife's death could take under the terms of the will. Consequently, the estate in the children must remain a future interest until the widow's death. The court accelerated the remainders saying that by "death", the testator meant any termination of the life estate. He said that the remainder was merely postponed for the purpose of benefiting the widow during her life. The purpose being defeated by the renunciation, the remainders should become present interests since that is the result that testator would probably have intended. Although the court said the brother's children had a vested remainder it would have made no difference if in form they had a contingent remainder. In either instance, the purpose for postponing the remainder ceased when the widow renounced.

ACCELERATION WHERE THERE IS A PROBLEM OF DISTORTION

Probably the most difficult problem involved in acceleration occurs where there is the distortion described above. While it is true that where such distortion appears, the decision of each

case must rest upon its particular facts, yet it is believed that a fundamental theory can be applied which will harmonize in principle with the acceleration cases where there is no distortion and which will tend to make possible an equitable disposition of all cases. The usual theory presented by the cases is that where there is distortion the future interest will not be accelerated but the court of equity will sequester the interest renounced by the surviving spouse and apply it to satisfy the disappointed devisees and legatees on a theory of equitable compensation. Such a theory is inconsistent with the theory of acceleration where there is no distortion in several respects. In the latter situation, the courts say that on renunciation there is no life estate. Consequently, if none exists, there could be no interest for the court to sequester for the disappointed devisees and legatees. Again, the mere fact that certain beneficiaries are disappointed would not seem to be a conclusive reason to prevent a future interest from becoming a present interest if it would do so if there was no distortion. Then too, the usual theory of equitable compensation is not really applicable to help the disappointed beneficiaries in a situation of renunciation. It applies only where a beneficiary has taken an interest under a will and then tries to retain another interest already held by him when the will has disposed of this second interest to someone else. The effect of the doctrine of equitable compensation is that the beneficiary cannot have both interests and the court of equity will take the second interest to compensate the beneficiary, who, according to the terms of the will, was to have had it. But where a widow renounces, not only is there no estate to sequester for the compensation of the disappointed beneficiary, there is also no one trying to take two interests under the will. The widow is merely taking by law. She is not taking under the will at all. Furthermore, if the equitable compensation theory is followed any property remaining after the disappointed beneficiary is compensated should go to the widow, but most all American cases say that such property goes to the remainderman.

Professor Simes has suggested that acceleration should take place as where there is no distortion, the future interest becoming a present one. Then equity should impose a trust on the property in the hands of the remainderman, now the holder of the present interest, for the benefit of the disappointed

beneficiaries. The process of compensating the disappointed beneficiaries would then amount to a matter of marshalling the assets. 41 Yale L.J. 659 (1932), *Simes, op cit.*, Sec. 761. Such a theory would be consistent with the absence of an estate to sequester on renunciation and with the fact that the remainderman takes the property after the disappointed beneficiaries are compensated. Compensation should be given to both residuary and specific beneficiaries. It should be given, however, only if on construction of the testator's intent in view of the unforeseen circumstances it could be said that the beneficiary was still to take. If in the construction of the testator's intent in the new setting, it should seem that he would not have intended the disappointed beneficiary to take, no compensation should be given.

The few Ohio cases involving a distortion all follow the generally stated rule that there will be no acceleration where there are disappointed beneficiaries.

In *Jennings v. Jennings*, 21 Ohio St. 56 (1871), the court refused to accelerate the reversion which the widow inherited as heir at law where she renounced her life estate which preceded such reversion. The court said it would sequester the life estate to compensate the disappointed devisees. So the dower was assigned out of the sequestered estate. The court said the widow had no equitable right to insist that the benefit intended by the testator as a compensation for her dower — the renounced life estate — should be treated as a lapsed devise and go to her, the heir, as intestate property. The decision is probably equitable. The disappointed devisees should have been compensated. But the court's reasoning is somewhat confused. As the plaintiff pointed out, if the widow renounced there was no life estate to go by intestacy. It had been extinguished or rather had never been created. The court should have accelerated the widow's reversion but should have imposed a trust upon it for her dower interest and thus compensate the disappointed devisees who otherwise would have had the dower appointed from their devised interests. Thus the court would have carried out the testator's general scheme of distribution. Further there was no room for the doctrine of equitable compensation since the widow was not claiming under the will.

Similarly in *Holdren, Admr. v. Holdren*, 78 Ohio St. 276 (1908), the court refused to accelerate a future interest where

there was distortion. The widow was given one-sixth for life with remainder in her son in fee. She renounced and her dower interest exceeded the value of a life estate in one-sixth. The court held that the son's remainder would not be accelerated but that the renounced one-sixth life estate would be sequestered to compensate the disappointed devisees of the other five-sixths. Again an equitable result is reached, but with the same inconsistency of sequestering a non-existent estate, the renounced one-sixth life estate. The court should have accelerated the remainder and impressed it with a trust for the benefit of the disappointed devisees. Then, if the assets were marshalled according to the intention of the testator, the remainderman while holding the present legal title could get no more in value than the testator intended for him and the disappointed devisees would get more nearly the value the testator intended them to have.

The supreme court in *Trustees of Kenyon College v. Cleveland Trust Co.*, 130 Ohio St. 107 (1935), reach a similar result and with similar reasoning and so the same criticism is applicable in this decision. The facts of the case were that testatrix gave her husband a life estate in all her property. She gave comparatively small legacies in remainder to certain specific beneficiaries. She gave the bulk of the remainder to the College by means of the residuary clause. It will thus be seen that the husband, as life tenant, and the college as the residuary legatee, were intended to be the chief beneficiaries. The husband renounced the will and took one-half of the estate as his distributive share. The specific beneficiaries desired their interests to be construed as present ones. The court refused to accelerate their interests, however, and said it could sequester the husband's life estate for the college since the husband took a large part of his distributive share from the portion given by the residuary clause to the college. The court said the testatrix intended the college to take a large share by the will and by this method the intention of the testatrix could be approximated. This case shows that the residuary devisee or legatee may be as much entitled to compensation as a specific beneficiary. Compare, *Dunlap v. McCloud*, 84 Ohio St. 272 (1911).

The circuit court in *Wilson, Exr. v. Hall*, 6 Ohio C.C. 570 (1892), aff'd without opinion in 53 Ohio St. 679 (1895), reached quite an inequitable result in following the theories

generally accepted in distortion cases. There the testatrix's will gave the husband a life estate. After his death the executor was to sell the property and distribute the money as follows: "1. Should my sisters or either of them surviving myself and my husband, I give either or each of them surviving five hundred dollars." There were gifts to other specified legatees. The husband renounced. The court held that his life estate should be sequestered for disappointed beneficiaries and that if after compensating them there should be any of the life estate left that it should descend by way of intestacy. The court further held that the executor could not sell the property while the husband was alive though he had renounced and that the sisters had to survive him to take. Though it was reasonable to compensate the disappointed beneficiaries, it was not reasonable to say that the remainder of the life estate after the beneficiaries were compensated should descend by way of intestacy. This is carrying the fiction of sequestering an estate which does not exist entirely too far. Most courts would have given the property remaining after the disappointed beneficiaries were compensated to the remainderman, *Simes, op. cit.*, Sec. 761. This shows that there was no life estate sequestered for if there were, the remaining property would of logical necessity have gone to the renouncing spouse from whom it is theoretically sequestered. As far as the sisters' share and the power to sell are concerned, it would have been much better to have said that the testatrix was merely postponing the remainder until the termination of the life estate. Since the life estate was terminated by renunciation, it might reasonably be supposed that the testatrix would have given the sisters a present interest subject only to the compensation due to the disappointed beneficiaries. This last could be done by imposing a trust on the accelerated interests. On the same reasoning the power to sell should have been exercisable after the renunciation.

In *Bates, Admr. v. Creed, Admr*, 2 Ohio App. 59 (1913), aff'd in 90 Ohio St. 280 (1914), the husband was given a life estate in one property and a charity was given the remainder. The husband was also given a fee in another property. There were other specific beneficiaries. The husband renounced. The court held that the remainder in the charity should be accelerated to become a present interest and that the fee which the husband renounced should be sequestered to compensate the

disappointed legatees. This seems entirely correct. There was no need to impress the charity's interest with a trust when full compensation could be attained from other property. Since the husband renounced there was no fee created in him and the property which the court said it sequestered descended to the heirs as intestate property. In their hands the court should have imposed a trust for the benefit of disappointed legatees. This result accords with the testatrix's probable general intent, as she demonstrated by making a will that the heirs were not to get any more than they obtained by that instrument. The case is a striking illustration of how far a court may go in revising the expressed dispositions of the will on the basis of the court's impression of testatrix's general intent.

CONCLUSION

It is believed that acceleration should be treated as a problem of reconstruing the intention of the testator as gathered from the provisions of the will in the light of an unforeseen event which usually is renunciation. The mere character of a remainder, whether vested or contingent, should have bearing on the question only in so far as the testator's intent can be gleaned from such form. This is the tendency of most of the courts today. The Ohio courts have in most of the cases reached an equitable result but certain dicta and a few holdings seem to embrace an incorrect rationale. In distortion cases the Ohio courts have been confused in theory. This is particularly apparent when we compare that theory with the theory of the acceleration cases where there is no distortion. It is submitted that the courts should treat both parts of the acceleration problem as a reconstruction of the testator's probable intent. Since the renunciation extinguishes the surviving spouse's estate created by will, the court in most instances should accelerate any future interest following the spouse's estate since in the majority of instances this is what the testator would have intended. The only distinction which should be drawn between cases where there is no distortion and those where there is such a factor, is that in the latter cases the accelerated interest should be impressed with a trust for the benefit of disappointed beneficiaries to the extent that this is necessary to carry out the testator's general scheme of distribution.