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Recommended Citation

Stewart Chaplin, *Accumulation Death of the Minor*, 14 Cornell L. Rev. 289 (1929)
Available at: <http://scholarship.law.cornell.edu/clr/vol14/iss3/3>

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ACCUMULATION—DEATH OF THE MINOR

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Under a valid New York trust for accumulation, does the income, as it is received by the trustee, always and necessarily vest absolutely (subject only to the trust) in the infant beneficiary and thus, in case of his death during minority, constitute part of his estate? Or, may the trust instrument provide that upon his death during minority the fund then accumulated shall vest absolutely in some other designated person? These questions form the subject of this article.

The statutes¹ authorize trusts for accumulation, during minority, for the sole benefit of minors, and provide that all directions for the accumulation of rents, profits or income, except as authorized by statute, shall be void.² The statutes do not use the term "sole benefit of the minor," but such is their meaning. "We are satisfied that the policy and language of the statute require, in order to sustain a direction for accumulation under section 37,³ that the accumulation must be for the sole benefit of the minor, . . ."⁴ Therefore the questions stated above resolve themselves into this form: If an instrument creating a trust for accumulation provides that upon the death of the infant during minority the fund theretofore accumulated shall go over to some other person, can it be said that the accumulation is directed for the sole benefit of the minor, and that the gift over is valid?⁵

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¹N. Y. Ann. Cons. Laws (Cahill, 1923) c. 51, § 61; *Ibid.* c. 42, § 16.

²There are a few statutory provisions authorizing accumulation in other special instances. See, for example, (certain charities) N. Y. Ann. Cons. Laws (Cahill, 1923) c. 51, § 61; *Ibid.* c. 42, § 16; (certain insurance premiums) Pers. Prop. L. § 16; (certain stock dividends) Pers. Prop. L. § 17 a. These have no bearing here.

³1 R. S. 726, S 37, now N. Y. Ann. Cons. Laws (Cahill, 1923) c. 51, § 61; also *Ibid.* c. 42, § 16.

⁴*Pray v. Hegeman*, 92 N. Y. 508, 517 (1883); *Hascall v King* 162 N. Y. 134, 138, 56 N. E. 515 (1900).

⁵Various classes of cases which do not fall within the scope of this article include, for example, (a) cases where, for some reason not involved in the present discussion, an attempted trust for accumulation is wholly void, and the question is, what to do with the income that was to have been, or perhaps in fact has been, accumulated: *Pray v. Hegeman*, *supra* note 4, at 519-520; *Cook v. Lowry*, 95 N. Y. 103, 108 (1884); *Cochrane v. Schell*, 140 N. Y. 516, 537-538, 35 N. E. 971 (1893); *U. S. Trust Co. v. Soher*, 178 N. Y. 442, 70 N. E. 970 (1904); *Matter of Hoyt*, 116 App. Div. 217, 221, 222, 101 N. Y. Supp. 557 (1st Dept. 1906), *aff'd* 189 N. Y. 511, 81 N. E. 1166 (1907). Real Prop. L., N. Y. Ann. Cons. Laws (Cahill, 1923) c. 51, § 63, which is also applicable to personal property, *Mills v. Husson*, 140 N. Y. 99, 104, 35 N. E. 422 (1893); (b) cases where the

This question has been mentioned, and various remarks have been made about it, in a number of judicial opinions. Thus far the courts have not furnished any clear and decisive answer. The cases now to be referred to have been selected as representative.

In *Bolton v. Jacks*,⁶ the will provided that if Laura, the beneficiary of a trust for accumulation, should die during minority, "my estate" should go to P. B. Laura had not died during minority. It was not held that the gift over of the "estate" was intended to include any accumulated income. But the court, assuming for mere purposes of discussion that it was so intended, stated its view that such a gift over would be valid. The reason it gives may be summarized as follows: The accumulated fund cannot, in such a case, be paid to the infant; such a disposition has been rendered impossible by an act of God; yet the fund must go somewhere; unless the testator could provide for a payment of it to someone else, it would—the court says—"revert back" to the testator's estate; and the court adds: "But there is no reason why a testator should not have the power to anticipate such an event, and treat the accumulated fund as a part of his original estate, and devise it to such person as he chooses."

Now in any ordinary use of the words, the accumulated fund was not a part of the testator's "original estate." It was not in any sense in existence when he died. It is true that in many connections the law does permit a testator to direct the disposition of income to arise after his death. But from this it does not necessarily follow that in trusts for accumulation it does permit him to direct that in case of the death of the infant beneficiary during minority the accumulated fund shall go over to some other person. And here, on the question whether it does or does not give him that power, comes in the feature that it is only under a special statutory provision that the accumulation itself can be directed at all. And that provision strictly confines such directions to accumulations for the sole benefit of an in-

creator of the trust has attempted to direct the disposition of the accumulated fund *after* the infant has attained majority: *Pray v. Hegeman*, *supra*; *Barbour v. De Forest*, 95 N. Y. 13 (1884); and (c) cases where the trust instrument merely directs an accumulation for the infant during minority, and does not attempt to make any gift over. The question of apportionment of income is also not in point here. See *matter of Tuillard*, 238 N. Y. 499, 510, 144 N. E. 772 (1924).

⁶ Robt. 166, 230 (N. Y. 1868). See also *Gilman v. Healy*, 1 Dem. 404, 408 (N. Y. 1882). In *Harris v. Clark*, 7 N. Y. 242, 260 (1852), the court held that such a gift over was not allowable: "the accumulations directed are not for the benefit of minors exclusively." But for various reasons the decision should perhaps be regarded as more or less indecisive.

fant. That this "sole benefit" feature does exclude any authority thus to make a gift over of the accumulated fund, receives a certain amount of support from express decisions which, though not involving an attempted gift over in case of the infant's death during minority, have held that the statutory term "benefit of a minor," in the accumulation statutes, is to be strictly and literally construed to exclude any benefit directed for other persons, and to involve absolute vesting of the accumulations in the infant, subject only to the trust while it lasts.

For it is now settled that a direction to accumulate until an infant's majority or earlier death, for the benefit of an infant and another person—for example its mother—is void, because not for the sole benefit of a minor;⁷ that a gift over of an accumulated fund in case the beneficiary dies *after* coming of age is void, because the direction for accumulation would not be for the sole benefit of an infant;⁸ and that if the creator of a trust for accumulation does not attempt to make any gift over in case of the infant's death during minority, the accumulations—as being permitted only for his sole benefit—vest absolutely, subject only to the trust, in the infant as they are received by the trustee, and upon his death during minority form part of his estate.⁹

An argument somewhat similar to that offered by the court in *Bolton v. Jacks*,¹⁰ might be stated as follows: The accumulated fund must go somewhere; if not disposed of by the creator of the trust, the law will dispose of it to others; such a disposition by the law would not contravene the requirement concerning the sole benefit of the infant; then why should it contravene that requirement to allow the creator of the trust, upon the same contingency, to dispose of it by a gift over? One defect in that argument is this: It is not true that just because "the law" will dispose of property on a given contingency, therefore the creator of the trust is also at liberty, upon the same contingency, to dispose of it. For all the statutes relating to suspension of alienability and to postponement of vesting deal solely with what may or may not be *directed* by a grantor or testator. They forbid him to *do* certain things. But naturally they

⁷Matter of Rogers, 22 App. Div. 428, 431, 48 N. Y. Supp. 175 (2d. Dept. 1897), *aff'd* 161 N. Y. 108, 55 N. E. 393 (1899); Matter of Murphy, 213 App. Div. 319, 322, 210 N. Y. Supp. 531 (2d Dept. 1925).

⁸Pray v. Hegeman, *supra* note 4, at 517-519; Barbour v. De Forest. *supra* note 5.

⁹Smith v. Parsons, 146 N. Y. 116, 40 N. E. 736 (1895), *aff'g* 75 Hun, 155, 26 N. Y. Supp. 1087 (Sup. Ct. 1st Dept. 1894), *sub nom.* Smith v. Campbell,

¹⁰*Supra* note 6.

do not prohibit results that occur automatically under the general law of the land. For example, if property is devised or bequeathed absolutely to an infant, he is under a legal disability which effects, in a sense, a suspension of the full power to alienate, but the statute relating to suspension is not aimed at such a case. It "is aimed only at suspension by the terms of the will."¹¹ And under a grant in fee determinable on a remote contingency, the law may recognize an interest of a reversionary nature in the grantor. A reversion is not created by the grantor. But if the grantor had attempted to create a remainder to vest upon the happening of the remote contingency, it would be void.¹² And if, under a valid trust for accumulation, the infant does come of age and so acquires actual possession of the accumulated fund as his absolute property, and later dies without disposing of it, "it must go somewhere," and "the law" gives it to his next of kin. But the creator of the trust could not have directed its disposition in that event.¹³ And this distinction is observed in the statutes relating to accumulations. The statutes say that all *directions* for accumulation, except as allowed by statute, shall be void; that an accumulation may be *directed* as there provided. Thus the fact that where there is no direction for the disposition of the accumulated fund upon the infant's death during minority it must in fact pass automatically to others, does not in any way imply that the creator of the trust could have directed that in that event it should pass to persons designated by him.

The general drift of judicial opinion, however, in cases where the question of power to direct a gift over has been mentioned, appears to favor the existence of such a power in the creator of the trust.

In *Willets v. Titus*,¹⁴ the will created a trust to "hand out" the property to the beneficiary during minority, and provided that whatever was left, at majority, was to be hers, or, if she died during minority, then "said real and personal property" was to go to her issue if any, and otherwise to other persons. The infant did die during minority, leaving no issue. Some income had been accumulated. The court did not decide that this testamentary scheme

¹¹Matter of Trevor, 239 N. Y. 6, 16, 145 N. E. 66 (1924).

¹²See Matter of Wilcox, 194 N. Y. 288, 87 N. E. 497 (1909); Walker v. Marcellus & C. Ry., 226 N. Y. 347, 123 N. E. 736 (1919).

¹³Pray v. Hegeman, *supra* note 4, at 517; Barbour v. De Forest, *supra* note 5. See also Livingston v. Tucker, 107 N. Y. 549, 552, 14 N. E. 443 (1887).

¹⁴14 Hun, 554 (1878).

involved any direction for the accumulation of income,¹⁵ but merely assuming, for purposes of argument, that it did so, it said that in that case a provision for a gift over of the accumulated fund to others, upon the infant's death during minority, would be valid.

In *Goebel v Wolf*,¹⁶ property was devised in trust to hold it in four separate shares representing the testator's four children, and to accumulate for each child, during its minority, the income of its respective share.¹⁷ The shares themselves were, subject to the trusts, given also, as of the testator's death, to the respective children. One of them died during minority. For this contingency, the will made no express provision. The court held¹⁸ that the income already in fact accumulated for the benefit of the deceased infant, passed at his death to his "next of kin."

In *Roe v. Vingut*,¹⁹ there was a testamentary trust to accumulate the income of separate shares for the benefit of several infants during their respective minorities. As construed by the court the will provided that if a minor should die during minority, his share, including its accumulated income, should then go outright to his issue, if any, and otherwise to the surviving beneficiaries of the other shares. The court said: "Such a provision for the disposition of an accumulation for the benefit of an infant, in case of his death, is good." It is to be noticed, however, that none of the infants had died; and that the "questions propounded"²⁰ did not involve the validity of the gift over of the accumulations, but only the point whether, on an infant's death, they would vest absolutely somewhere, free of the trust.²¹

We come now to *Smith v. Parsons*.²² In that case there was a testamentary trust to receive the income of two separate shares;

¹⁵See *Matter of Hoyt*, *supra* note 5; *Bloodgood v. Lewis*, 209 N. Y. 95, 102 N. E. 610 (1913); *Hill v. Guaranty Trust Co.*, 163 App. Div. 374, 148 N. Y. Supp. 601 (1st Dept. 1914); *Crawford v. Dexter*, 178 App. Div. 764, 166 N. Y. Supp. 376 (1st Dept. 1917), *aff'd* 224 N. Y. 586, 120 N. E. 860 (1918).

¹⁶113 N. Y. 405, 415, 21 N. E. 388 (1889). This was an action for construction of the will.

¹⁷Special further provisions concerning the trust term and its validity were excluded from consideration, and have no bearing here.

¹⁸*Supra* note 16, at 415.

¹⁹117 N. Y. 204, 217, 22 N. E. 933 (1889). This was an action for construction of the will.

²⁰As stated by the court, at 211.

²¹Also, the court cite as authority for their statement above quoted, the case of *Manice v. Manice*, 43 N. Y. 303, 375 (1870), where the opinion does not say anything about any gift over of any accumulated fund, but deals with the disposition of the corpus.

²²*Supra* note 9.

to apply to the use of the testator's two infant daughters respectively the income of one share or so much thereof as the trustees might deem necessary; and to accumulate the rest of the income of each share until the majority or earlier death of its beneficiary; at the majority of each to pay to her the fund accumulated on her share; and on the death of either during minority to pay her "share" to her sister if then surviving, and otherwise to other persons. Martha, one of the daughters, died during minority, unmarried and intestate. Income had been accumulated on her share. The question was, whether this accumulated fund had vested absolutely in the deceased infant, and so passed, through her administratrix, to her mother and sister; or had, in the event that had occurred, been given over by the testator's will as part of the "share," to the infant's sister alone.²³ As to this latter point, the court held that the word "share," as used in the will, referred to principal only, and was not intended to include any accumulation of income. Thus the case did not present any question of the validity of a gift over. No such gift had been attempted. What was decided was, that the income had vested absolutely (subject to the trust) in the infant as it accrued, and therefore formed part of her estate. But the court did also consider the question whether the creator of such a trust *could* make a gift over of the accumulated fund. It is important, therefore, in reading the portions of the opinion now to be quoted, to distinguish between what was decided, on the question before the court, and what was said concerning a question not before the court for decision.²⁴ For convenience of reference the following passages from the opinion are numbered, and a few words are italicized.

(1) "The single question presented by this appeal is whether the accumulations of income upon Martha's share *vested* as they were paid in, or was the vesting postponed until she attained the age of twenty-one years."²⁵ The opinion proceeds to consider (a) the testamentary intent, and (b) the policy of the statute. The court held that it was the testator's intention that all accumulations of income during minority should vest in the infant at once, and that only the time of payment or enjoyment was postponed. They add:

(2) "We do not, however, share the doubts expressed by the learned General Term²⁶ as to the testator's *power* to make such dis-

²³See the opinion below, 75 Hun, 155, 157, 26 N. Y. Supp. 1087 (Sup. Ct. 1st Dept. 1894).

²⁴"It is always to be remembered that broad general statements in any opinion are to be read in connection with the facts of the particular case before the court." *Matter of Green v. Miller*, 249 N. Y. 88, 97 N. E. 593 (1928).

²⁵*Smith v. Parsons*, *supra* note 9, at 119.

²⁶*Supra* note 23, at 161.

position of the accumulated income of an infant dying during minority as he might see fit; there is *no legal objection* to bequeathing the same to any person whether a minor or of full age, and such a provision in a will *would not violate the statute* which provides that accumulations must be for the benefit of minors.²⁷ When a minor dies, for whose benefit accumulations of income have been directed, *it is competent* for the testator to dispose of them in the same manner as any other portion of his estate, *provided they have not vested* in the infant as paid in.²⁸

(3) "While we rest our decision in this case on the provisions of the will, we are also of opinion that *it is the policy of the law* permitting the accumulations of personal property for the benefit of a minor (1 R. S. 773, S 3)²⁹ *that they should vest in the infant beneficially when received*, and it is only payment over that is postponed until the expiration of the minority.³⁰ This construction of the statute finds confirmation in the provision (1 R. S. 774, S 5) [Pers. Prop. L. S 17; Real. Prop. L. S 62] to the effect that where any minor, for whose benefit a valid accumulation of the interest or income of personal property shall have been directed, shall be destitute of other sufficient means of support or of education, the chancellor may cause a suitable sum to be taken from the moneys accumulated, or directed to be accumulated, to be supplied to the support or education of such minor."³¹

Thus the opinion says that it is competent for a testator so to dispose of the accumulations, on the infant's death during minority, *provided* they have not vested in the infant as paid in; and also, that it is the policy of the law that they *shall* so vest, and that it is only payment that is postponed. The net result of these two statements is obscure. They may mean, for example, (a) that the policy of the law applies to all directions for accumulation, and does not permit any gift over; or, (b) that the policy of the law applies only where, as in *Smith v. Parsons*, there is no gift over, and that the power of the creator of the trust to make such a gift over is absolute.³² In any

²⁷See also *Hodgman v. Cobb*, 202 App. Div. 259, 266, 195 N. Y. Supp. 428 (3d Dept. 1922).

²⁸*Smith v. Parsons*, *supra* note 9, at 120.

²⁹N. Y. Ann. Cons. (Cahill, 1923) c. 42, § 16; *Ibid* c. 51, § 61.

³⁰See also *Draper v. Palmer*, 27 N. Y. S. R. 510 (Sup. Ct. 1st Dept. 1889).

³¹*Supra* note 9, at 121. See also *Pray v. Hegeman*, *supra* note 4, at 516.

³²In *Hodgman v. Cobb*, *supra* note 27, at 266, the court seems to understand the opinion in this sense (b). But the reference above quoted from *Smith v. Parsons*, to the statutes permitting application of accumulations for the infant's support and education appears to support the meaning stated in view (a).

event, it is certain that on the question of power to make a gift over, *Smith v. Parsons* does not furnish any actual decision, for no such gift over had been attempted.

Perhaps some light may be thrown on the general subject under discussion, by casting in a novel form an attempted gift over of the accumulated fund, as follows: "The trustee shall accumulate the income until the majority or earlier death of A (the infant), and upon the termination of the trust to accumulate he shall pay over and convey the property, including the fund so accumulated, to B (an adult), except upon the contingency that A does in fact attain his majority, in which latter case the trustee shall convey and pay the property, including the accumulations, to A." It is very probable, to say the least, that such a provision—at any rate so far as concerns the provisions for the adult—would be held invalid as not being for the sole benefit of the infant. And yet it will be noticed that the imagined form undertakes, in every possible contingency, to dispose of the accumulated fund in exactly the same manner as if it had been made payable to the infant at his majority, or, if he should earlier die, to the adult. Now it would not seem likely that the law, as between two forms of provision for the adult, identical in operation, would on a bare difference in phraseology hold one void and the other valid.³³

The foregoing review of the cases indicates that the question here under discussion has not as yet received any final answer. It also indicates that the courts have leaned, more or less indecisively, to the view that the creator of a trust for accumulation may provide for a gift over of the accumulated fund if the infant dies during minority.

But when the question does come up squarely for decision, it is quite possible that such a gift over will be held void. The several reasons on which such a conclusion might well be based, are gathered together and separately restated in the successive remaining paragraphs of this article, as follows:

That under the statutes the accumulation must be directed for the sole benefit of the minor; and that one element of sole benefit consists in absolute and indefeasible vesting of the accumulations (subject only to the trust) in the infant as received by the trustee, with the resultant right to have the accumulated fund, if he dies even before majority, go to his next of kin as such, or, if he is old

³³See *Pray v. Hegeman*, *supra* note 4, at 517.

enough, though a minor, to make a will of personal property,³⁴ to those to whom he may bequeath it.

That the effect of a gift over would be, in real substance, to direct the accumulation upon only one contingency for the minor and upon another contingency for another person; that such a construction of the statute would open the door to evasions of its obvious purpose.³⁵

That the fact that on the minor's death the accumulated fund must go somewhere, has no bearing on the question whether the creator of the trust may direct where it shall go.

That it is already settled, where no gift over is attempted, that the accumulations do (subject only to the trust while it lasts) vest absolutely in the infant, and on his death form part of his estate; and that the reasons on which this conclusion is based apply with equal force where a gift over is attempted, and thus render that gift void.

That such indefeasible vesting in the minor readily answers to a simple and natural reading of the statutory requirement.

That an opposite view must be supported, if at all, by reading something into the statute which it does not express. It would interpret the statute as if it said: "for the benefit of a minor or, in case of his death during minority, for the benefit of any person, minor or adult, designated by the trust instrument to then receive the accumulated fund." None of the familiar reasons which sometimes warrant the reading in of words, has any application to this case.

That if the legislature had intended to permit a gift over, it could readily have said so. It did not say so.

That the supposed status of the fund as a part of the original estate of the creator of the trust is illusory. He never owned it. It did not exist at his death. No statute provides that he can create or dispose of it at all, except for the sole benefit of the infant.

That exceptions to sweeping statutory requirements representing a broad public policy should be based only upon considerations which are highly persuasive and fairly controlling.

That the statutes providing for applications from the accumulations, to the infant's use in case of need, lend important support to the absoluteness, subject to the trust, of his ownership of the fund as it arises, and to the view that upon his death it passes to his estate, and that accordingly, and pursuant to the general policy of the law, any attempted gift over to another person is void.

³⁴N. Y. Ann. Cons. Laws (Cahill, 1923) c. 13, § 15.

³⁵See Pray v. Hegeman, *supra* note 4, at 517.