

TRUSTS AND SUCCESSION

SUPREME COURT REVIEW

TRUSTS

During the review period, the Nebraska Supreme Court decided one case which clarified the law concerning the jurisdiction over the supervision of the administration of testamentary trusts.

In *Johnson v. Hays*¹ the court held that section 30-1801 of the Nebraska statutes² granted concurrent jurisdiction to the district and county courts for the supervision of the administration of testamentary trusts.³ Although there appeared to be some confusion on the issue, the court merely was reaffirming old case law when it held that concurrent jurisdiction was vested in two courts for this purpose.⁴

WILLS

Of the cases decided during the review period which fall into this category, one followed traditional canons of interpretation in deciding how the death taxes should be paid,⁵ and one dealt with an interpretation of Nebraska's anti-lapse statute.⁶

In *Avery v. Evans*⁷ the court was called upon to determine the effect of Nebraska's anti-lapse statute on a will making a devise to several designated individuals comprising a group or a class, with a gift over to the survivors.⁸ The will of the testatrix devised

1. 193 Neb. 54, 225 N.W.2d 397 (1975) (hereinafter cited as *Johnson*).

2. NEB. REV. STAT. § 30-1801 (Reissue 1964).

3. *Johnson* at 55, 225 N.W.2d at 398.

4. See *In re Estate of Grblny*, 147 Neb. 117, 125, 22 N.W.2d 488, 493 (1946).

5. *Gretchen Swanson Family Foundation Inc. v. Johnson*, 193 Neb. 641, 288 N.W.2d 608 (1975).

6. *Avery v. Evans*, 193 Neb. 437, 227 N.W.2d 603 (1975) (hereinafter cited as *Avery*).

7. *Id.*

8. *Id.* at 437-38, 227 N.W.2d at 604-05. Nebraska's anti-lapse statute, NEB. REV. STAT. § 30-228.03 (Reissue 1964) provides:

When a devise or legacy shall be made to any child or other relation of the testator, either by name or by designation of such relationship singly or as one of a class, and the devisee or legatee shall die before the testator, . . . such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition should be made or directed by the will.

the residue of her estate to her daughter and three sons "share and share alike."⁹ The clause following this devise stated:

Should any of my said children die before my decrease I hereby give, will, devise and bequeath the share of said deceased child to the survivor or survivors of my said children, share and share alike.¹⁰

Testatrix executed her will in 1953. In 1965 her daughter died and was survived by five children. Seven years after her daughter's death the testatrix died.¹¹ The issue presented to the court was whether the above quoted clause was a "different disposition" as that phrase is used in the anti-lapse statute.¹² In holding that a different disposition was made the court stated that the language of the provision contemplated the possible death of one or more of the testatrix's children, and that in such an event the share of the deceased child was to pass to the survivor or survivors of her children.¹³ Furthermore, the court noted that the testatrix had made no provision for her granddaughter who was living at the time the will was executed. As a result, the court felt that this was further evidence of her intention that the anti-lapse statute should not apply.¹⁴

It is interesting to note that had the court simply chosen to interpret the word "survivors" in accordance with its generally accepted definition it could have solved its dilemma and prevented future litigation over clauses similar to the one in question here. The word "survivor" means to outlive another, thus, a gift to survivors after a life estate inures only to those who are alive at the time of distribution.¹⁵ However, the court declined to lay down any concrete rule as to the meaning of the clause in question, stating that in each case it would consider the factual situation and the language of the will before interpreting language similar to the clause in this case.¹⁶

9. *Avery* at 438, 227 N.W.2d at 605.

10. *Id.*

11. *Id.*

12. *Id.* at 439, 227 N.W.2d at 605.

13. *Id.* at 440, 227 N.W.2d at 606.

14. *Id.*

15. 3 PAGE ON WILLS § 1037, at 174-75 (3rd ed. 1941).

16. *Avery* at 441, 227 N.W.2d at 606.