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MULLINS v. SIMMONS: THE EARLY VESTING RULE AND THE "DEATH WITHOUT ISSUE" CLAUSE

by Lynda L. Butler

In a recent decision, Mullins v. Simmons, the Supreme Court of Virginia clarified the effect of the "death without issue" clause on future interests created by a conveyance. 235 Va. __, 4 VLR 2141 (March 4, 1988). Simmons involved a conveyance by a father ("O") to his daughter ("A") "during her natural life, and at her death to her children, if any, and if the said ... [daughter] shall die without issue, then to the next of kin on her fathers side." 4 VLR at 2141. The daughter had one child ("B"), who in turn had a daughter ("C"). The child B predeceased the life tenant A, but C survived A.

Prior to their deaths, the life tenant A, her child B, and B's husband ("H") conveyed a portion of the land acquired from A's father O. The grantees of the conveyance later conveyed that portion to the defendants, the Simmons. After B's daughter C died testate, leaving her estate to her husband Mr. Mullins, he then brought an ejectment action against the Simmons. Plaintiff claimed that he owned the land that had been conveyed to the Simmons because his wife C was a taker under the original deed from O — either as a child, as issue, or as next of kin. Plaintiff further argued that the remainder in the children of A could not vest until A's death. Thus, the conveyance from A, B, and H could convey only a life estate, which ended when A died.

The court rejected plaintiff's arguments, concluding instead that B had a vested remainder which had not been divested and which she could convey. Defendants thus acquired a valid fee estate from A, B, and H. The court explained that "unless a contrary intent clearly appears from the instrument under consideration, the law favors early vesting of estates." Id. at 2142. O's conveyance thus created a life estate in A and, once A had a child, a vested remainder in that child subject to open. Because of the early vesting rule, the remainder vested as soon as a child was born to A. Id. at 2142-43. Further, the remainder was not divested because the life tenant A died with issue (C). Id. at 2143.

In applying the early vesting rule, the court rejected plaintiff's argument that Va. Code § 55-13 delayed the vesting of the remainder until the death of the life tenant. Section 55-13 provides: "Every limitation in any deed or will contingent upon the dying of any person without ... issue ... shall be construed a limitation to take effect when such person shall die not having such ... issue ... living at the time of his death, or born to him within ten months thereafter...." Va. Code § 55-13 (1986). The provision did not delay vesting of the children's remainder because, as the court explained, the provision applied to the contingent limitation of the estate in the next of kin, not to the creation of an estate in the children. 4 VLR at 2144.

Nor was C, the grandchild of the life tenant, an original taker under O's conveyance. C clearly could not qualify as a child of the life tenant A under the common meaning of that word since C was a grandchild of A. Id. at 2143. Further, although C clearly was an issue of A, O's conveyance did not grant an interest to the issue. Id. at 2143-44. Finally, C could not take as next of kin because the kin could take only if A died without issue, and under the facts of Simmons A had died with issue surviving her. The gift over to the next of kin thus failed once the condition divesting the children's remainder could no longer occur. Id. at 2144; see also Disney v. Wilson, 190 Va. 445, 457, 57 S.E.2d 144 (1950).
Although the Virginia Supreme Court appears to have reached the correct result in Simmons, the court's analysis is at times vague and incomplete. The early vesting rule may indeed be the rule in Virginia and many other jurisdictions. But that rule is only a general guideline to be used in deciding whether a future interest is a contingent or vested remainder. In addition to considering that rule, the court also needs to examine the language of the conveyance to determine if there is any condition precedent to vesting. See generally L. Simes, Handbook of the Law of Future Interests §§ 90, 91 (2d ed. 1966). One possible condition precedent is an implied condition of survivorship. See id. §§ 90, 93. In Simmons the court failed to address that possibility in construing the conveyance. Because of this failure, some may question the court's decision.

The possibility of an implied survivorship condition arises in Simmons because of the language creating a remainder in A's children "if any" and because of the existence of an alternative gift over in case the life tenant dies without issue. It is not clear whether the phrase "if any" just means a child has to be born or whether it ties in the children's interest to the "death without issue" clause. The existence of an alternative gift over to the kin arguably implies a condition that the children must survive the life tenant to take. See T. Bergin & P. Haskell, Preface to Estates in Land and Future Interests 130 (2d ed. 1984). If a survivorship condition is implied, then O's conveyance would create a life estate in A, an alternative contingent remainder in A's children, and an alternative contingent remainder in O's next of kin. If the condition is not implied, then A still would have a life estate, while A's children would have a vested remainder in fee simple subject to divestment by a shifting executory interest and O's next of kin would have the shifting executory interest.

The court in Simmons adopted the second classification scheme without ever indicating that it was choosing between two schemes by deciding against an implied survivorship condition. See 4 VLR at 2143. Perhaps the court did not realize that the survivorship issue existed or that two classification schemes were possible. But even if it had recognized and addressed the matter, it still could have reached the same result. Under Virginia law implied survivorship conditions generally are not preferred, apparently because of the constructional preferences for early vesting and for condition subsequents rather than condition precedents. See Renolds v. Branch, 182 Va. 678, 687-91, 29 S.E.2d 847 (1944); T. Bergin & P. Haskell, supra, at 130 & n.29. See generally L. Simes, supra, §§ 90-96. The court's treatment of the vesting issue thus is troubling because of its incomplete analysis, and not because of its result.

Similar problems exist with the court's treatment of Va. Code § 55-13. Although the court's result seems correct, its analysis is awkward and difficult to understand. The court's description of the statute as "focusing upon contingent limitations to estates" does little to clarify the meaning and effect of the statute. See 4 VLR at 2144. Nor is the court's distinction between "a contingent limitation of an estate" and "the creation of an estate" particularly helpful. Id. Given the complexity of future interest law, these problems may be understandable. But understandable or not, the court's opinion does little to provide attorneys with meaningful rules and guidelines for analyzing future interest issues.

Section 55-13 adopts the definite failure of issue approach to interpreting the meaning of the clause "death without issue." When such a clause is used, two possible interpretations exist. One interpretation, known as the indefinite failure of issue approach, construes the phrase "die without issue" as meaning that, if at any time in the future the line of descent dies out, the gift over takes effect. See T. Bergin & P. Haskell, supra, at 236. The second interpretation, the definite failure of issue approach, construes the phrase as referring only to the time of death of the named party (A in
Simmons): if that party has issue surviving him, then the gift over fails. Id. at 236-37. Virginia and most other American jurisdictions prefer the definite failure interpretation because it minimizes uncertainty about vesting and avoids problems under the Rule against Perpetuities. See generally L. Simes, supra, §§ 97-100.

Section 55-13 thus establishes a rule of law for construing and classifying future interests involving the "death without issue" clause. Under the facts of Simmons, the statute would not affect the vested remainder in A's children because the phrase "die without issue" is not part of the language creating the remainder. But the statute would apply to the contingent interest of O's next of kin. Under the statute their interest must vest, if at all, at the time of A's death, and not at some indefinite time in the future. Because issue (C) existed at the time of A's death, the gift over failed.

In conclusion, Mullins v. Simmons appears to reach the correct result but with analysis that is incomplete and difficult to understand. Because of the problems with the court's analysis, attorneys may have difficulty accepting Simmons. Perhaps more importantly, they may have difficulty understanding all the issues and rules of law implicated by the Simmons dispute.