

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF  
WILLIAM POWELL LEAR, A/K/A  
WILLIAM P. LEAR AND BILL R. LEAR.

No. 47379

JAMES L. MURPHY; TOMMY L.  
TUCKER; AND MICHAEL LEE,  
Appellants,

vs.

VANESSA BERTELLI; JESSE  
JACKSON; PATRICK CHRISTOPHER  
LEAR; LUKE JACKSON; CHLOE  
JACKSON; LORIN DAVIS LEAR;  
SHANDA LEAR-BAYLOR; JENNIFER  
LEAR; MARA BERTELLI AND  
VALENTE BERTELLI;  
Respondents.

**FILED**

JUN 17 2009  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF REVERSAL<sup>1</sup>

This is an appeal from a district court order instructing trustees that certain beneficiaries' interests are a vested rather than contingent remainder interest.<sup>2</sup> Second Judicial District Court, Washoe County; Peter I. Breen, Judge.

<sup>1</sup>The Honorable James W. Hardesty, Chief Justice, and the Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

<sup>2</sup>This is the second case in a series of three related cases. We refer to this case, In re Estate of Lear, Nevada Supreme Court Docket No. 47379, as "Lear II." We refer to the related case, the consolidated case of In re Estate of Lear, Nevada Supreme Court Docket No. 45856 and No. 46388, as "Lear I" and In re Estate of Lear, Nevada Supreme Court Docket No. 49684 as "Lear III."

This is the second appeal in a series of three that arise out of the administration of the Lear Family Trust. Following the first appeal in Nevada Supreme Court Docket Nos. 45856/46388, which declared that Patrick Christopher Lear is a contingent beneficiary, other remainder beneficiaries filed a motion requesting the district court re-evaluate their status as beneficiaries of the Trust. The district court accepted briefs, heard oral argument, and issued an order reversing its prior position by holding that the remainder beneficiaries, including Patrick, had a vested remainder interest subject to defeasance. The sole issue in this appeal is whether the remainder beneficiaries' interest in the Lear Family Trust's (LFT) principal is a vested interest subject to defeasance or a contingent interest subject to the condition precedent of survival.

For the following reasons, we conclude that the district court erred, and the remainder beneficiaries have a contingent remainder interest subject to the condition precedent of survival. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

#### Discussion

When reviewing a trust instrument, this court applies two types of review. Generally, this court owes no deference to the district court's interpretation, and therefore this court reviews the instrument de novo. See Matter of Estate of Chong, 111 Nev. 1404, 1407-08, 906 P.2d 710, 713 (1995) (applying the standard of review to a will). If, however, "the construction turns on the assessments of credibility or of conflicts in the evidence" then this court applies the substantial evidence standard. Id. at 1408, 906 P.2d at 713 (quoting Matter of Estate v. Meredith, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989)).

I. The grantors' intent

The trustees argue that the LFT instrument clearly demonstrates William, Sr.'s intent that the remainder beneficiaries' interest does not vest until the death of their income-beneficiary parent.

The cardinal rule of construction is that the grantor's intent controls any interpretation of a trust instrument. Barringer v. Gunderson, 81 Nev. 288, 302-03, 402 P.2d 470, 477-78 (1965). If the document clearly expresses the grantor's intent, then no construction is required. Id. at 302-03, 402 P.2d at 477.

The provision at issue is LFT Article Fifth(b), which states that upon the death of an income beneficiary, his interest in the LFT will pass to his then living issue.

The net income of the Richard Lear Trust, Valentina Lear Trust, Shanda Lear Bertelli Trust, William P. Lear, Jr. Trust and Patricia Lopez-Pereira Trust, described above shall be paid to the respective primary beneficiary thereof during his or her lifetime. Upon the death of a primary beneficiary, the principal and undistributed net income of his or her trust shall be paid to his or her lawful issue, in equal shares, or if there be no such issue then living, to grantors' then lawful issue, except John Olsen Lear, distribution in either case to be made in accordance with the principle of representation[.]

(Emphases added.) The provision clearly creates two types of interests. First, it creates a present interest in the LFT's income. Restatement (First) of Prop.: Future Interests § 153(3)(b)(i) (1936). Second, it creates a future interest in the fee simple ownership of the LFT's principal. Id. at § 153(1). Here, the future interest of the income beneficiaries' legal issue is a remainder interest because it does not become possessory until the expiration of the applicable income beneficiary's interest. Id. at § 156(1).

In other words, William, Sr.'s grandchildren have a remainder interest in the LFT's principal because their interest does not become capable and certain of fulfillment until the end of the income beneficiary's lifetime interest. Id. at § 156(1), cmt. b.

Although William, Sr.'s grandchildren clearly have a remainder interest in the LFT, the issue in this case is whether the remainder beneficiaries have a vested interest. There are four types of remainder interests including: (1) indefeasibly vested, (2) vested subject to open, (3) vested subject to complete defeasance (or divestment), and (4) subject to a condition precedent (also called a contingent interest). Id. at § 157. Here, the trustees argue that the remainder beneficiaries have a remainder interest subject to a condition precedent of survival, whereas the remainder beneficiaries argue that they have a vested remainder interest subject to defeasance. Because William, Sr.'s intent regarding this issue is not facially clear, we look to the attendant circumstances surrounding the LFT instrument's creation.

## II. The attendant circumstances surrounding the drafting and execution of the LFT instrument

If the grantors' intent is not facially clear, then this court must consider the instrument "in the light of the attendant and surrounding circumstances." Barringer, 81 Nev. at 303, 402 P.2d at 478.

Here, William, Sr. died approximately two months after drafting the LFT instrument. At the time of drafting, William, Sr. had seven children and 17 grandchildren. Thus, when drafting the LFT instrument, William, Sr. was aware of both the LFT's income beneficiaries (some of his children) and remainder beneficiaries (some of his grandchildren).

The attendant circumstances surrounding the LFT's drafting directly affects whether the remainder interest is a vested interest subject to complete defeasance or contingent subject to a condition precedent. A vested remainder interest subject to complete defeasance may point to an identifiable person whose interest will take upon the ending of a prior present interest, but there is no certainty that the interest will become possessory. Restatement (First) of Prop.: Future Interests § 157 cmt. p (1936). There are a number of circumstances that create the uncertainty. Relevant to this case is the situation where the remainder interest may expire before the prior present interest ends, such as if a grandchild predeceases his parent.

On the other hand, a remainder interest subject to a condition precedent exists when "it is not possible to point to any person and to say such person would take, if all interests including a prior right to a present interest should now end." *Id.* at cmt. u. In other words, a remainder interest is generally limited to unborn or unascertainable persons. *Id.* at cmt. v. However, a remainder interest subject to a condition precedent can apply to a presently identifiable person if the uncertainty turns on whether some specified event will occur, such as the death of the income-beneficiary parent. *See id.* at cmt. w.

Based on these descriptions, the remainder beneficiaries' interest in the Trust could be two types: vested subject to complete defeasance or subject to a condition precedent. Thus, we look to the rules of construction in order to determine the applicable type of remainder interest.

### III. The construction of the LFT

The Restatement of Property section 250 states that if a limitation creating a remainder interest describes the remainder

beneficiary as a person “living” at the end of a prior interest, or similar language, then the description tends to establish a survival requirement that is a condition precedent to the remainder interest. Here, LFT Article Fifth(b) states: “Upon the death of a primary beneficiary [prior interest], the principal and undistributed net income of [the LFT] shall be paid to [the income beneficiaries] lawful issue, in equal shares, or if there be no such issue then living, to [William, Sr.’s] then lawful issue . . . .” (Emphasis added.) Thus, the LFT’s language suggests that the remainder beneficiaries’ must be “living” at the end of the income beneficiaries’ interest, and therefore the language suggests that survival is a condition precedent.

Further, section 250 applies when “the limitation describes the intended takers under a class designation,” such as “lawful issue.” *Id.* at cmt. c. In addition, comment e states that section 250 often applies to situations where some of the potential takers exist, while others are still unborn; in particular, when the instrument describes the takers as the issue of a person given a life interest in property. Finally, comment f states that section 250 applies to language that includes “a following conditional or descriptive clause, such as . . . ‘if any of them are then living’ . . . or ‘such of them as are then living.’” Again, the LFT Article Fifth(b) contained the following conditional or descriptive clause: “if there be no such issue then living,” which suggests the survival requirement is a condition precedent. (Emphasis added.)

Also, the Restatement of Property section 253 and comment c of that section state that a survival requirement is a condition precedent if the disjunctive “or” is used to separate the remainder beneficiaries and the default takers. In other words, if the disjunctive “or” separates the clause

applying to the initial remainder beneficiaries from the clause addressing the default beneficiaries, then the entire limitation is considered a condition precedent, which makes the remainder beneficiaries' interest contingent. Here, the relevant portion of LFT Article Fifth(b) states: "the principal and undistributed net income of [the LFT] shall be paid to [the income beneficiaries'] lawful issue, in equal shares, or if there be no such issue then living, to [William, Sr.'s] then lawful issue." (Emphasis added.) Thus, the provision uses the disjunctive "or" to separate the initial beneficiaries—the income beneficiaries' lawful issue—from the default takers—William, Sr.'s surviving lawful issue—which suggests the survival requirement is a condition precedent.

Therefore, we conclude that the remainder beneficiaries' interest is a remainder interest subject to a condition precedent of survival. In other words, the remainder beneficiaries are contingent remainder beneficiaries. This conclusion is also consistent with the overall scheme of the trust.

In determining the grantors' intent, this court must construe the LFT instrument as a whole, considering the grantors' objective and the circumstances of its drafting and execution. See Ringle v. Bruton, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004) (applying the same rules of interpretation to an employment contract). According to the LFT instrument, if William, Sr.'s children do not have lawful issue at the time of their death, then the remainder interest defaults to William, Sr.'s remaining children. The Restatement of Property sections 266 through 272 discuss the American preference for a definite failure of issue construction, which essentially holds that a remainder beneficiary's interest is determined at the death of the ancestor without issue. In other

words, the default gift to William, Sr.'s children either vests or fails to vest at the time that their income-beneficiary parent dies without issue. Therefore, the focal point is not the existence of a remainder beneficiary at the time of William, Sr.'s death, but the existence of a remainder beneficiary at the time of the relevant income beneficiary's death.

Here, holding that the remainder beneficiaries' interest vested at the time of William, Sr.'s death makes the default gift unessential, and such an interpretation is inconsistent with the LFT instrument's language and fails to effectuate William, Sr.'s distributive scheme. Further, the LFT Article Tenth refers to both unborn and contingent beneficiaries, and therefore the instrument contemplates the existence of contingent beneficiaries who are separate from any unborn beneficiary. Thus, the LFT's default gift and the instrument as a whole support the conclusion that the remainder beneficiaries' interest is subject to the survival condition precedent.

We further conclude that our holding is consistent with the decisions of at least one other court. In Schlosser v. Schlosser, 618 N.E.2d 360 (Ill. Ct. App. 1993), the Illinois Court of Appeals addressed a similar issue. In Schlosser, a decedent created a nontestamentary trust and a pour-over will, and following her death two disinherited grandchildren challenged the trust's validity. Id. at 361. The trust named other grandchildren as beneficiaries, and the will expressly revoked a prior will that gave the disinherited grandchildren a portion of the decedent's estate. Id. The trial court held that the disinherited grandchildren had no standing because the prior will only gave them a contingent interest subject to a condition precedent, which required that the grandchildren survive their father. Id. at 361-62.



In Schlosser, the relevant trust provision stated that “[a]t the death of a son, the trustee shall divide [the son’s] trust . . . one for each then living child of his [i.e. the grandchildren] and one for the then living descendants [of the son].” Id. at 363. The Illinois court held that the sons had life estates while the grandchildren and the descendants had contingent remainders because the “then living” language was a survival condition precedent. Id. at 364-65. The court discussed a number of cases that held the “then living” language created a contingency because until the death of the life beneficiary, it could not be known which remainder beneficiary survived and, therefore, shared in the property. Id. at 364. In other words, the taking remainder beneficiaries are not ascertainable until the termination of the prior life estate. Id. The court also noted that holding that the remainder interest was a vested interest would nullify the default gifts in the instrument. Id. at 364.

Similarly, the LFT instrument uses the phrase “if there be no such issue then living,” which we conclude is a following conditional or descriptive clause. Although the Schlosser instrument contained a prefixed adjective “then living,” we note that the survival condition precedent may be achieved by using either a prefixed adjective or a following conditional or descriptive clause. Restatement (First) of Prop.: Future Interests § 250 cmt. f.

In addition, the Schlosser instrument contained a default gift to the “then living descendants,” and holding that the grandchildren’s remainder interest was a vested interest would make this default gift irrelevant. 618 N.E.2d at 364-65. Similarly, the LFT instrument contains a default to William, Sr.’s remaining children, which would be irrelevant if this court held that the grandchildren’s remainder interest is a vested

interest subject to defeasance. Thus, we reject the argument that the income-beneficiary parents' deaths are certain events and the grandchildren are ascertainable. Such an interpretation ignores the language of the instrument and William, Sr.'s distributive intent.

Based upon the foregoing,, we conclude that the remainder interest is subject to a condition precedent, which is consistent with the following attendant circumstances: (1) William, Sr.'s knowledge of his children and grandchildren's existence; (2) the LFT language, which tracks the language of the Restatement; (3) William, Sr.'s distributive scheme, which includes a default gift to his remaining children; and (4) viewing the LFT instrument as a whole. Therefore, we conclude that the district court erred when it concluded that the remainder beneficiaries' interest was a vested remainder interest. Instead, we are convinced that the remainder beneficiaries have a contingent remainder interest subject to the condition precedent of survival.

#### IV. The district court erroneously applied the doctrine of early vesting

The district court's order also stated that "the better policy for Nevada law is the early vesting of interests in trust." We agree with the trustees' argument that the policy of early vesting is inapplicable in Nevada and elsewhere because the reasoning behind the rule of destructibility and the rule against perpetuities no longer apply.

Both the Restatement (Third) of Property section 11.3(a) and comment d (2003) and Nevada caselaw hold that the constructional rule of early vesting yields to the grantor's intent. Barringer v. Gunderson, 81 Nev. 288, 302, 402 P.2d 470, 477 (1965). As discussed above, the LFT contains a contrary intent to the early vesting rule of construction, and therefore the LFT's intent controls. According to the LFT, the remainder beneficiaries' interest does not vest until the beneficiary survives his or

her respective income-beneficiary parent. Thus, the rule of construction yields to the LFT's intent.

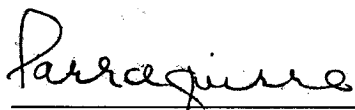
Likewise, regarding single-generation class gifts, the grantor's intent and the language of the instrument override the constructional preference for including a remainder beneficiary who fails to survive the distribution date. Restatement (Third) of Prop.: Wills and Other Donative Transfers § 15.4 (Tentative Draft No. 4, 2004). Here, each income beneficiaries' issue is a distinct class, and the LFT instrument postpones the class' gift until the death of the relevant income beneficiary. *Id.* at § 15.3, cmt. b. Thus, William, Sr.'s gift, via the LFT, creates multiple single-generation class gifts and the modern policy is that the remainder beneficiaries who fail to survive the death of their income-beneficiary parent lose their remainder interest. Further, comment d to Section 15.4 clearly states that “[n]either the constructional preference for vested interest nor that for vesting at the earliest possible time is endorsed in this Restatement.” Traditionally, these constructional preferences sought to avoid the now defunct rule of destructibility and the now statutorily modified rule against perpetuities. As stated in the Restatement, we conclude that the traditional rule of early vesting is no longer applicable to Nevada law.

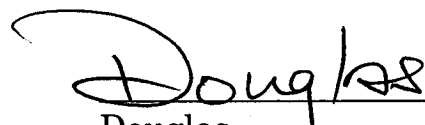
Thus, William, Sr.'s intent and the language of the LFT control the interpretation of the remainder beneficiaries' interest. Further, the district court's reasoning is no longer consistent with the modern approach. Therefore, we hold that Nevada no longer prefers vested over contingent interests or early vesting, and pursuant to the LFT's intent and language, the remainder beneficiaries' interest is contingent on the survival condition precedent.

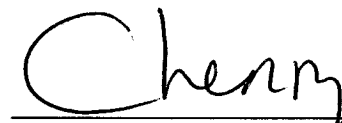
Conclusion


We conclude that the district court erred, and the remainder beneficiaries have a remainder interest subject to the condition precedent of survival. William, Sr.'s intent, the LFT's language, and the attendant circumstances surrounding the drafting and execution of the LFT instrument do not conclusively determine whether the remainder beneficiaries' have a vested or contingent interest. However, the construction of the LFT, the LFT's distributive scheme, and the LFT viewed as a whole, support the conclusion that the remainder beneficiaries' interest is contingent on their survival of their income beneficiary parent. Further, the district court's reliance on the doctrine of early vesting is erroneous because the historical rationale behind the doctrine is now defunct. Accordingly, we

ORDER the judgment of the district court REVERSED.

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Second Judicial District Court Dept. 7, District Judge  
Cooke Roberts & Reese  
Morris Peterson/Reno  
Holland & Knight LLP  
Law Office of Lisa Rasmussen  
Patrick Christopher Lear  
Shanda Lear-Baylor  
Lewis & Roca, LLP/Reno  
Washoe District Court Clerk