

Just when it seems that every issue concerning the concept of vested versus contingent interests under a will or trust has been litigated, another case pops up. The Supreme Court of Virginia dealt with the question of the vesting of remainder interests under a trust in the recent case of *Harbour v. Sun Trust Bank*, 278 VA 514, 685 S.E. 2d 838 (2009).

The grantor of the trust, Mollie Boaz Johnson, directed that the income and the corpus of the trust be used for her benefit during her lifetime and for the benefit of her husband, Harry B. Johnson, for his lifetime, provided he survived the grantor. The grantor then provided as follows in section 7 of the trust, entitled "disposition of the Trust":

C. Payment of Estate Tax at Spouse's Death. Upon the death of the Grantor's spouse, the Trustee shall divide the trust res, including any undistributed income and the remaining principal, into four equal shares to be distributed as follows:

One such share shall be paid and delivered to my brother, James Clayton Boaz; the second such share, shall be paid and delivered to my brother, Herbert Alan Boaz; and the third such share shall be paid and delivered to my sister, Hazel Boaz Harbour.

The fourth such share shall be delivered to the Stuart Baptist Church in a separate trust account entitled "Mollie Boaz Johnson Educational Found", to be used for scholarships for deserving students from Patrick County in accordance with... My Last Will and Testament.

If any of my brothers or sister shall fail to survive me, his or her share shall lapse and such share shall be added to the trust fund for Stuart Baptist Church, previously mentioned.

The grantor died in 1999 and was survived by her husband and two of her siblings, Hazel Boaz Harbour and James Clayton Boaz. These siblings predeceased the grantor's husband, who died in 2007. Harbour was survived by one child, Steven M. Harbour, and Boaz was survived by one child, James Aubrey Boaz; these individuals were thus nephews of the grantor.

The trustee, SunTrust Bank, filed a complaint seeking guidance in interpreting the trust. The action pitted Stuart Baptist Church against the nephews. The church claimed that it was entitled to all of the remaining trust assets on the basis that the shares of all the grantor's siblings lapsed because none of the siblings was alive at the time of the husband's death. The nephews contended that, under the plain language of the trust, each was entitled to the share that his parent would have received if the parent had survived the grantor's husband, because the parent's survival of the grantor prevented the lapse of those interests. The circuit court found that, based on a reading of the trust in its entirety, the church's position was the more compelling.

On their appeal, the nephews contended that the circuit court had erred in failing to adopt the plain meaning of the trust language, which they contended vested the remainder interests in their parents upon their survival of the grantor. As quoted by the court, the news relied on the following portion of the trust provision, with the requirement of survival of the grantor and not of the husband:

"If any of my brothers or sister shall fail to survive *me*, his or her share shall lapse and such share shall be added to the trust fund for [the] church."

Alternatively, the nephews argued that under the rule of construction favoring the early vesting of estates, the remainder interests of their parents vested at the grantor's death because the trust agreement did not manifest a clear intent to postpone vesting. The church countered that the rule of early vesting did not apply, because the plain language of the trust manifested the grantor's intent that the remainder interests vest at the husband's death, when the trust assets were to be distributed.

The court, in finding for the nephews, recognized the rule of early vesting, but made the important point that such rule, a rule of construction, was not to be resorted to if the matter in question could be resolved by the plain meaning of the grantor's words. As the court stated:

"The language chosen by the grantor referenced her own death, not the death of the husband, as the event determined whether the share of a sibling would lapse. Thus, under this language, a sibling's share would lapse only if that sibling failed to survive the grantor."

"At the time of the grantor's death, both Hazel B. Harbor and James C. Boaz survived the grantor, thereby having the present capacity to take possession of their remainder interests should the husband's existing possession become vacant. Accordingly, under the trust language, those surviving siblings received a vested remainder interest in the trust assets when the grantor died..."

"The church's contrary position would require us to add the phrase " and my husband" to the grantor's directive that "[i]f any of my brothers and sisters fail to survive me ..." A court has no authority, however, to insert words into a trust document."

The case highlights the importance of precision in drafting a will or trust. Precise drafting would have provided for the intent of the grantor and avoided this litigation.