"THE LAUGHING HEIR" WHAT'S SO FUNNY?

John V. Orth*

Editors' Synopsis: Death is inevitable, yet people often die without adequately providing for the disposition of their assets. In such cases, inheritance laws often provide guidance for the distribution of a decedent's assets to relatives. Most states do not limit collateral succession—even among remote kindred. However, this Article questions whether the state, rather than the "laughing heir," is most deserving of the windfall.

> ***laughing heir.*** *Slang.* An heir distant enough to feel no grief when a relative dies and leaves an inheritance (generally viewed as a windfall) to the heir.
> **BLACK'S LAW DICTIONARY**[1]

The defining characteristic of an estate in fee simple is that it may last forever.[2] Because no human owner can possibly last that long, the fee simple began as an estate of inheritance[3] as indicated by the words of limitation—"and heirs"—once essential for its creation.[4] Traditionally, common law canons of inheritance determined such heirs, conveniently summarized by Sir William Blackstone in the mid-eighteenth century.[5] The canons excluded ancestors[6] and preferred lineal descendants over collaterals.[7] In the absence of

---

* William Rand Kenan, Jr. Professor of Law, University of North Carolina School of Law. A.B. 1969, Oberlin College; J.D. 1974, M.A. 1975, Ph.D. 1977, Harvard University.

[1] BLACK'S LAW DICTIONARY 742 (8th ed. 2004).

[2] Actually, this characteristic is defining of a fee, whether a fee simple absolute, a fee simple defeasible, or a fee tail. *See* 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW *4 ("No estate is deemed a fee, unless it may continue forever.").

[3] The fee simple did not become a devisable estate until the adoption of the original Statute of Wills. *See* Statute of Wills, 1540, 32 Hen. 8, c. 1 (Eng.).

[4] *See* 2 WILLIAM BLACKSTONE, COMMENTARIES 107 (Garland Publ'g, Inc. 1978) ("The word, heirs, is necessary in the grant or donation in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life.").

[5] *See id.* at 208–37.

[6] *See id.* at 208 ("The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seises, *in infinitum*; but shall never lineally ascend.").

[7] *See id.* at 216–17 ("[T]he lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.").

descendants, the estate passed to the nearest collateral relatives of the same degree. The number of possible collaterals is immense,[8] but there will always be a collateral relative unless the decedent is the last living person on Earth. The only limitation upon the right of a remote collateral to inherit was the difficulty of proving the relationship—a difficulty that modern DNA testing has greatly reduced. In a case of failure of proof, the estate escheated *propter defectum sanguinis*—"failure of blood."[9]

The history of American inheritance law over the last two centuries has been the steady modification of the common law canons. Surviving spouses have become heirs[10] and ancestors have been admitted, albeit only after spouses and descendants. But in many states succession by collaterals remains unlimited.[11] The chance of inheritance by a person so distantly related to the decedent as to feel no grief at the decedent's death is often the subject of the harshest form of criticism: ridicule. Such a lucky person is a "laughing heir," one who feels no sense of loss at the death but who laughs "all the way to the bank."[12]

In 1935, Professor David Cavers published an influential law review article, *Change in the American Family and the "Laughing Heir,"* criticizing unlimited collateral succession.[13] Over the following years, many states adopted limitations. Cavers proposed to limit collateral succession "to the

---

[8] Blackstone calculated that, disregarding the possibility of intermarriage, each person has "near two hundred and seventy millions of kindred in the fifteenth degree." *Id.* at 205.

[9] BLACK'S LAW DICTIONARY, *supra* note 1, at 1256; *see also* John V. Orth, *Escheat: Is the State the Last Heir?*, 13 GREEN BAG 2d 73, 75 (2009) ("from defect of heirs"). Escheat, originally limited to real property, has been extended to personal property. *See* Orth, *supra*, at 76–77.

[10] At common law, surviving spouses were provided life estates. *See* BLACKSTONE, *supra* note 4, at 129. The widow's portion was dower—one-third for life of all the estates of inheritance of which her husband was seised during coverture. *See id.* at 129–30. The widower's portion was curtesy, the entire estate for life on condition that the couple had produced live issue during the marriage. *See id.* at 126.

[11] *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 95 (8th ed. 2009).

[12] *Id.* at 94. The laughing heir is an example of argumentative jargon, defined by Professor Leach as items of jargon designed "to point out the absurdity of the designated doctrines." W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 991 n.78 (1965). For other examples, see JOHN V. ORTH, REAPPRAISALS IN THE LAW OF PROPERTY 117–25 (2010).

[13] *See* David F. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203 (1935). For the source of the phrase, the laughing heir, Cavers mentions without citation, "the German's pungent phrase, '*der lachende Erbe*.'" *Id.* at 208.

decedent's brothers and sisters and their children"[14]—to first-line collaterals. But the Uniform Probate Code is typical of most modern legislation, drawing the line at grandparents and their descendants—second-line collaterals.[15]

"[T]he notorious *Wendel* case,"[16] involving the estate of Ella Wendel, a recluse who died in 1931 leaving most of her $40 million estate to charity, may have inspired Cavers to make his proposal.[17] Seeking to establish standing to contest the will, more than 2,300 persons claimed to be her next of kin.[18] In the depths of the Great Depression, the prospect of remote relatives cashing in on the chance succession looked particularly unappealing. Cavers wrote: "[S]uccession by one who is so loosely linked to his ancestor as to suffer no sense of bereavement at his loss arouses a certain resentment in society. His good fortune is begrudged as undeserved."[19] Inheritance by "the laughing heir" was a "social injustice."[20]

Cavers supported his proposal to limit collateral succession by reference to changing patterns of American family life. Using data from the 1930 census, Cavers documented the shift from rural to urban life and the mobility of American workers.[21] From this data, he concluded that dispersion diminishes the "sentiment of relationship" and "[f]amily pride," making succession by remote collaterals "increasingly incongruous."[22] Of course, internal migration has always been a feature of American history,

---

[14] *Id.* at 212. Cavers would have extended succession to second-line collaterals for a decedent who died in infancy: "[I]n all probability his property was acquired through gift or inheritance from his ancestors." *Id.* at 213. And he advocated judicial discretion to provide '"for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision,'" *id.* (quoting Administration of Estates Act, 1925, 15 & 16 Geo. 5, c.23, § 46(vi) (Eng.)), similar to the family maintenance systems operative in England and many Commonwealth countries today.

[15] *See* UNIF. PROBATE CODE § 2-103(a) (amended 2008), 8 U.L.A. 104–05 (2013).

[16] Cavers, *supra* note 13, at 210 (referencing *In re Wendel*, 257 N.Y.S. 87 (Sur. Ct. 1932), *and party dismissed*, 262 N.Y.S. 41 (Sur. Ct. 1933), *and application to vacate the decree denied*, 287 N.Y.S. 893 (Sur. Ct. 1936)). The Wendel estate was still in litigation at the time Cavers wrote, and he relied on newspaper accounts. *See id.* at 210 n.6. The case was finally settled after prolonged litigation. For other estates that attracted attention—and fortune hunters—in the 1930s, see DUKEMINIER, *supra* note 11 (summarizing litigation concerning the estates of Henrietta E. Garrett, who died in 1930, and Ida Wood, who died in 1932).

[17] *See* DUKEMINIER, *supra* note 11.

[18] *See id.*

[19] Cavers, *supra* note 13, at 208.

[20] *Id.* at 209

[21] *See, e.g.*, *id.* at 206 n.8.

[22] *Id.* at 207.

and in some societies, even today, ties of kinship are carefully preserved.[23] David Cameron, British Prime Minister, is a fifth cousin twice removed of Queen Elizabeth II—a fact mentioned in the last British election.[24]

But even in modern America, several things are odd about the exclusion of the laughing heir. For one, emotional reaction to the ancestor's death is not generally a qualification for intestate succession. Many dry-eyed persons attend the funeral of their "loved one" and eagerly await the settlement of the estate. Children, and even spouses, who suffer no sense of bereavement at the decedent's death are not unheard of; in some cases they even feel relief or enjoyment. The egregious Mr. Peachum in the *Beggar's Opera* instructed his daughter that "[t]he comfortable Estate of Widowhood, is the only Hope that keeps up a Wife's Spirits."[25]

Also, in most discussions of the proper design for an intestate succession act, attention is paid to what the ordinary person would want done with remaining assets.[26] Intestacy is "an estate plan by default"[27]—the kind of will this imaginary person would have made. Careful will drafters do often make provisions for the remote possibility that all the closely related objects of the testator's bounty will predecease, perhaps by provisions in favor of a friend or favorite charity. Few testators, I believe, choose the state government as their ultimate devisee.[28]

Finally, the question of what to do in case the next of kin is remote—whether the limit is first or second-line collaterals—comes down to who is more entitled to the property. Excluding more remote collaterals increases the chance that the state will receive a windfall. Today "the primary

---

[23] Cavers admitted that in some states "the process of disintegration of the clan has not proceeded apace . . . ." *Id.* at 212.

[24] *See* Andrew Pierce, *Cameron's Royal Link Makes Him a True Blue*, TIMES (London) (Dec. 5, 2005), www.thetimes.co.uk/tto/news/politics/article2031748.ece. In the popular television series *Downton Abbey*, Matthew Crawley is the Earl of Grantham's third cousin once removed—they share great-great-grandparents. *See* Kelly Greene, *Money Lessons from* 'Downton Abbey,' WALL ST. J. (March 1, 2013), http://online.wsj.com/article/SB10001424127887323293704578330243703304194.html.

[25] JOHN GAY, THE BEGGAR'S OPERA act 1, sc. 10, ll. 22–23 (Peter Elfed Lewis ed., 1973) (1728).

[26] "In designing an intestacy statute, the primary policy is to carry out the probable intent of the average intestate decedent." DUKEMINIER, *supra* note 11, at 75 (citing numerous empirical studies to determine popular preferences).

[27] *Id.* at 71.

[28] Worthy of noting is that Justice Oliver Wendell Holmes left the sizeable remainder of his estate to '"the United States of America.'" G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 472 (1993) (citation omitted).

rationale" of escheat, as one candid court admitted, is "as a revenue raising device."[29] The New Deal's impact on restoring American's faith in government may have influenced Cavers:

> The state, which would be the most immediate beneficiary of the reform, has come to achieve a place less antagonistic to the individual citizen than it has occupied since the breakdown of the feudal organization of society. It is paternalistic in a sense lacking the invidious connotations of that term.[30]

Cavers claimed that the preference for the state over remote collaterals would promote social justice, noting that "[t]he eleemosynary and educational institutions" that the state supports "contribute directly to the welfare of the citizen" and are "scarcely distinguishable from those which have traditionally been the objects of testamentary bounty."[31] He proposed that escheats "be earmarked for the use of such institutions."[32] In fact, over a third of all state constitutions dedicate escheats to educational purposes—almost all of them to public schools.[33] The difficulty here is that no guarantee is (or can be) made so that the money earmarked will be in addition to, and not in place of, state appropriations.

To the extent that the state's use of escheats does not replicate the preference of an ordinary person who contemplated the possibility of being

---

[29] La. Health Serv. & Indem. Co. v. McNamara, 561 So. 2d 712, 716 (La. 1990).

[30] Cavers, *supra* note 13, at 210.

[31] *Id.*

[32] *Id.*

[33] *See, e.g.*, ALA. CONST. art. XIV, § 258 ("the furtherance of education"); ARIZ. CONST. art. 11, § 8 ("[a] permanent State school fund"); COLO. CONST. art. IX, § 5 ("[t]he public school fund"); IDAHO CONST. art. IX, § 4 ("[t]he public school permanent endowment fund"); IND. CONST. art. 8, § 2 ("[t]he Common School fund"); MO. CONST. art. IX, § 5 ("the state school fund"); MONT. CONST. art. X, § 2 ("[t]he public school fund"); NEB. CONST. art. VII, § 7 ("perpetual funds for common school purposes, including early childhood educational purposes operated by or distributed through the common schools"); NEV. CONST. art. 11, § 3 ("for educational purposes"); N.M. CONST. art. XII, § 4 ("the current school fund"); N.C. CONST. art. IX, § 10(2) ("to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State"); N.D. CONST. art. IX, § 1 ("a perpetual trust fund for the maintenance of the common schools of the state"); OKLA. CONST. art. X, § 32 ("a State Public Common School Building Equalization Fund"); OR. CONST. art. VIII, § 2 ("the Common School Fund"); S.D. CONST. art. VIII, § 2 ("a perpetual fund for the maintenance of public schools in the state"); WASH. CONST. art. IX, § 3 ("the common school fund"); WIS. CONST. art. X, § 2 ('"the school fund"'); WYO. CONST. art. 7, § 2 ("perpetual funds for school purposes").

survived only by remote collaterals, the sole justification of the limitation on succession is the belief that the government is better able to make use of the property than private individuals. Even in the depths of the Great Depression a consensus on this point was nonexistent, and none has emerged in the eight decades since then—witnessed by the fact that almost half the states continue to allow unlimited collateral succession.[34] Perhaps the time has come to ask whether to allow the state the last laugh.

[34] *See* DUKEMINIER, *supra* note 11.