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Ascertaining Testator's Intent: The Nebraska Supreme Court Adopts the Rationale of *Restatement of Property* § 308: *Hanley v. Craven*, 200 Neb. 81, 263 N.W.2d 79 (1978)

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Note

Ascertaining Testator's Intent: The Nebraska Supreme Court Adopts the Rationale of *Restatement of Property* § 308

Hanley v. Craven, 200 Neb. 81, 263 N.W.2d 79 (1978).

I. INTRODUCTION

In construing a will, the court gives effect to the true intent of the testator,[1] to the extent it can be ascertained from the whole instrument,[2] if that intent is consistent with applicable rules of law.[3] Subordinate only to this cardinal principle of will construction is the dual faceted rule that the law favors the vesting of estates at the earliest possible moment[4] and will construe a remainder as vested whenever reasonable under the circumstances.[5]

1. *E.g.*, Gretchen Swanson Family Foundation, Inc. v. Johnson, 193 Neb. 641, 228 N.W.2d 608 (1975); Rudy v. Wagner, 188 Neb. 508, 198 N.W.2d 75 (1972); First Nat'l Bank & Trust Co. v. Oeltjen, 175 Neb. 345, 121 N.W.2d 816 (1963); Wall v. Wall, 157 Neb. 360, 59 N.W.2d 398 (1953); Salmons v. Salmons, 142 Neb. 66, 5 N.W.2d 123 (1943), *aff'd*, 142 Neb. 66, 8 N.W.2d 517 (1943).
2. *In re* Estate of Coryell, 174 Neb. 603, 118 N.W.2d 1002 (1963); Scriven v. Scriven, 153 Neb. 655, 45 N.W.2d 760 (1951); Baldwin v. Baldwin, 140 Neb. 823, 2 N.W.2d 23 (1942); *In re* Estate of Hart, 137 Neb. 843, 291 N.W. 502 (1940); Worley v. Wimberly, 99 Neb. 20, 154 N.W. 849 (1915); *In re* Estate of Willits, 88 Neb. 805, 130 N.W. 757 (1911).
3. NEB. REV. STAT. § 30-2341 (Reissue 1975). *E.g.*, *In re* Estate of Bock, 198 Neb. 121, 251 N.W.2d 872 (1977); *In re* Estate of Kriter, 196 Neb. 482, 243 N.W.2d 773 (1976); *In re* Estate of Anderson, 194 Neb. 41, 230 N.W.2d 182 (1975); Dover v. Grand Lodge of Neb. Independent Order of Odd Fellows, 190 Neb. 169, 206 N.W.2d 845 (1973); Rasmussen v. Wedge, 190 Neb. 818, 212 N.W.2d 637 (1973).
4. Rudy v. Wagner, 188 Neb. 508, 198 N.W.2d 75 (1972); Berning v. National Bank of Commerce Trust & Savings, 176 Neb. 856, 127 N.W.2d 723 (1964); Baldwin v. Colglazier, 173 Neb. 775, 114 N.W.2d 890 (1962); Tiehen v. Hebenstreit, 152 Neb. 754, 42 N.W.2d 802 (1950); Brandeis v. Brandeis, 150 Neb. 222, 34 N.W.2d 159 (1948); *In re* Estate of Moore, 147 Neb. 434, 23 N.W.2d 685 (1946); *In re* Estate of Stieber, 139 Neb. 36, 296 N.W. 336 (1941); *In re* Estate of Hanson, 118 Neb. 208, 224 N.W. 2 (1929); Davis v. Davis, 107 Neb. 70, 185 N.W. 442 (1921).
5. Rudy v. Wagner, 188 Neb. 508, 198 N.W.2d 75 (1972); Baldwin v. Colglazier, 173 Neb. 775, 114 N.W.2d 890 (1962); *In re* Estate of Carr, 173 Neb. 189, 112 N.W.2d

A frequent consequence of the rule favoring early vesting is a court finding that, in the absence of a clear contrary intention,[6] a class specified to take in remainder is to be determined as of the testator's death.[7] Thus, an incongruity arises when a will conveys a life interest to an individual who is the testator's sole heir at the time of death and is necessarily designated as a remainderman under such terms as my "heirs" or "next of kin."[8] For example, if *X* was the sole heir of *T*, as determined by applicable rules of intestate succession and was granted a life estate through *T*'s will which provided, "to *X* for life, then to my heirs," *X* would have not only the life interest but also a remainder interest as a result of the preference toward early vesting, *i.e.*, determining remaindermen as of the testator's death.

There is generally no inconsistency in having a life tenant share a vested interest in a remainder. There is, however, a possibility that the testator may have desired to determine the remainder class at a later time in instances in which the life tenant also happens to be the testator's sole heir and, therefore, the sole member of the class designated to share the remainder. Courts have referred to a desire on the part of the testator to have the remainder class determined at a subsequent date as an intent to "postpone vesting."[9]

If there are indications of an intent to exclude the heir from the remainder, the only manner in which this may be accomplished is to determine the members of the class at a time subsequent to the testator's death. Moreover, if the sole heir is excluded from the remainder, determining membership at the earliest possible moment leaves no one to take the remainder interest.[10]

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786 (1962); Goodrich v. Bonham, 142 Neb. 489, 6 N.W.2d 788 (1942); Drury v. Hickinbotham, 129 Neb. 499, 262 N.W. 37 (1935); *In re* Estate of Hanson, 118 Neb. 208, 224 N.W. 2 (1929).

6. Hill v. Hill, 90 Neb. 43, 132 N.W. 738 (1911).

7. *In re* Estate of Baker, 161 Neb. 241, 72 N.W.2d 844 (1955); Tiehen v. Hebenstreit, 152 Neb. 753, 42 N.W.2d 802 (1950); Lacy v. Murdock, 147 Neb. 242, 22 N.W.2d 713 (1946). This is not meant to imply, however, that the doctrine of early vesting is the sole reason that the policy exists. As stated in 4 BOWE-PARKER: PAGE ON WILLS § 35.9 (1961):

> Where the class of beneficiaries is described as "heirs" or "next of kin" of the testator, the class must be determined as of the death of the testator, unless the will plainly indicated otherwise. This is due to the fact that such a class imports descent or succession under the statute of descent and distribution. Rights under the statute are determined as of the death of the testator, and the class is, prima facie, fixed as of such time.

Id. at 514.

8. RESTATEMENT OF PROPERTY § 308, Comment k (1940).

9. *See* notes 24-25 *infra*.

10. 2 L. SIMES, THE LAW OF FUTURE INTERESTS 234 (1936).

The Nebraska Supreme Court was recently faced with this incongruity in *Hanley v. Craven*,[11] and declared this particular aspect of the case to be one of first impression in the state.[12] Searching for guidance, the court took cognizance of the rule in the *Restatement of Property* which states in part:

> If a person to whom a prior interest in the subject matter of the conveyance has been given is the sole heir of the designated ancestor at the death of such ancestor, there is some incongruity in also giving such person all the interest under the limitation to "heirs" or "next of kin." The incongruity is especially great when a will conveys property "to B and his heirs but if B dies without issue to my heirs" and B is the sole heir of A. The incongruity is almost as great when A, by will, conveys property "to B for life then to my heirs" and B is the sole heir of A. Thus, the fact that in such cases, B is the sole heir of A at the death of A *tends to establish* that A intended his heirs to be ascertained as of the death of B, so that B is prevented from sharing in the limitation to the heirs of A.[13]

The court had before it a will in which the testator had provided for his daughter through a testamentary trust. The will stated: "If my said daughter die without issue . . . real estate . . . shall descend at her death to my heirs-at-law, by blood relation . . . and at her death without issue surviving her, said real estate shall descend to my heirs-at-law who are related to me by blood . . . ."[14] Following the rationale of the *Restatement*, the court found that the resulting incongruity required a holding that the remainder interest vested at the death of the testator's daughter because the incongruity demonstrated an intent to postpone vesting of the remainder.[15]

II. THE FACTS OF *HANLEY*

At the testator's death, he was survived by his daughter Nellie, three nephews, and two nieces. His daughter was forty-three years of age at the time of his death, and she died without issue at the age of ninety-one in 1974. Under the Nebraska rules of intestate succession Nellie was the testator's sole heir-at-law at the time of his death.[16]

The will was admitted to probate in 1927. Two years later, Nellie instituted an action to revoke the order admitting the will to probate on the ground that her father was incompetent at the time he made his death-bed testament. The county court entered a de-

11. 200 Neb. 81, 263 N.W.2d 79 (1978).
12. *Id.* at 97, 263 N.W.2d at 87.
13. RESTATEMENT OF PROPERTY § 308, Comment k at 1715-16 (1940) (emphasis added).
14. 200 Neb. at 83-84, 263 N.W.2d at 81.
15. *Id.* at 102, 263 N.W.2d at 89.
16. NEB. REV. STAT. § 30-102 (Reissue 1964) (current version at NEB. REV. STAT. § 30-2303 (Reissue 1975)).

cree revoking the order of probate. Tried twice in the district court, the will was eventually judged to be valid. This holding was subsequently affirmed by the Nebraska Supreme Court in 1935.[17]

The will contest litigation gave rise to diverse interests in the real estate. The appellants in *Hanley* were the devisees and grantees by mesne conveyances of three attorneys who had successfully defended the will. Under certain fee contracts,[18] the attorneys represented the nieces and nephews during the litigation. It was alleged that since the nieces and nephews were vested remaindermen under the will which designated "heirs" as the class taking in remainder, the appellants had an interest in the property by reason of quitclaim deeds executed and delivered to the attorneys by four of the five nieces and nephews in payment for the services rendered to their ancestors.

In 1936, the attorneys had filed suit in the federal district court, representing the nieces and nephews against Nellie, her mother, her husband, the administrator, and the executor and trustee of the estate. The parties sought a judgment for expenses and fees incurred by the nieces and nephews in the action brought by Nellie to contest the will. They alleged that in the event they predeceased Nellie, they would never benefit from the sizeable remainder. In 1937, the attorneys intervened on their own behalf. After a series of judgments and appeals,[19] they eventually recovered a judgment in 1938.

In *Hanley*, the grantees and devisees of the attorneys sought to quiet title in the property, to establish ownership of fractional interests, and to enter a decree of partition. The district court held that the remainder interests of the nieces and nephews had vested at the death of the testator, but that the quitclaim deeds were unenforceable because those claiming had failed to prove that enforcement would not be inequitable.[20] On appeal and cross-

17. *In re* Estate of House, 129 Neb. 838, 263 N.W. 389 (1935).

18. An example of the contracts in question is set out at length within the body of the opinion. They provided for an interest in the remainder of the nieces and nephews. The two attorneys were to receive a sum equal to one-third of the amount received by each heir under the will in all but one of the contracts. However, if the impending proceedings were appealed, transferred, or removed from the county court, the attorneys were to receive one-half of the amount collected; the fees were to be a lien upon whatever rights the particular party had in the property described in the will.

The appellees in *Hanley* urged the invalidity of the contracts because they were executed after the attorney-client relationship had commenced. Moreover, "there was no compelling proof of their fairness." 200 Neb. at 87, 263 N.W.2d at 83. The court ultimately concluded that it was unnecessary to consider the validity of the contracts. *Id.* at 102, 263 N.W.2d at 89.

19. Craven v. Shoults, 97 F.2d 299 (8th Cir. 1935).

20. 200 Neb. at 83, 263 N.W.2d at 81.

appeal, the supreme court held that the remainder interest had vested at Nellie's death; since the nieces and nephews had no vested interest in the property, the claims of the attorneys' devisees and grantees were disallowed.[21]

III. ANALYSIS

A. Scope of the Problem

Although the court seemed to accentuate what it termed a "split in authority,"[22] the majority of the precedent in this area is relatively consistent. The outcome of any given case would appear to depend upon the amount of inferences as to the testator's true intent which accompany the life tenant-sole heir factor.[23]

Several courts have held that the fact that the life tenant is the sole heir is insufficient by itself to show that the testator intended his or her heirs to be ascertained at a time other than his or her own death.[24] On the other hand, many courts confronted with the life tenant-sole heir situation have postponed ascertainment until the death of the life tenant.[25] The reason for the apparent inconsistency stems from the fact that in the former group of decisions, the life tenant-sole heir factor was the only cogent implication that the testator intended to postpone ascertainment of remaindermen. In the latter group, additional factors were present that tend to show the testator desired to exclude the sole heir or include a different group.[26]

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21. 200 Neb. at 102, 263 N.W.2d at 89.
22. *Id.*; the court uses the terms "decisions . . . going both ways," and "split in authority."
23. L. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶ 375 (abr. ed. 1968) [hereinafter cited as POWELL]. *See In re* Ecclestone's Estate, 339 Mich. 15, 62 N.W.2d 606 (1954).
24. Thomas v. Castle, 76 Conn. 447, 56 A. 854 (1904); Le Sourd v. Leinweber, 412 Ill. 100, 105 N.E.2d 722 (1952); Tyler v. City Bank Farmers Trust Co., 314 Mass. 528, 50 N.E.2d 778 (1943); Evans v. Rankin, 329 Mo. 411, 44 S.W.2d 644 (1931); Oleson v. Somogyi, 90 N.J. Eq. 342, 107 A. 798, *aff'd*, 93 N.J. Eq. 506, 115 A. 526 (1919); Safford v. Kowalik, 278 A.D. 604; 101 N.Y.S.2d 876 (1951); Grantham v. Jinnette, 177 N.C. 229, 98 S.E. 724 (1919); Stewart's Estate, 147 Pa. 383, 23 A. 599 (1892); *In re* Kenyon, 17 R.I. 149, 20 A. 294 (1890); Clardy v. Clardy, 122 S.C. 451, 115 S.E. 603 (1923); Richardson v. Poe, 210 S.W.2d 568 (Tex. Civ. App. 1948); Stokes v. Van Wyck, 83 Va. 724, 3 S.E. 387 (1887).
25. *In re* Estate of Hoover, 16 Cal. App. 2d 529, 60 P.2d 1010 (1936); Bond v. Moore, 236 Ill. 576, 86 N.E. 386 (1908); Rusing v. Rusing, 25 Ind. 63 (1865); Welch v. Howard, 227 Mass. 242, 116 N.E. 492 (1917); Irvine v. Ross, 339 Mo. 692, 98 S.W.2d 763 (1936); Francisco v. Citizens Trust Co., 132 N.J. Eq. 597, 29 A.2d 320 (1940), *aff'd*, 133 N.J. Eq. 28, 29 A.2d 884 (1943); *In re* Estate of Potter, 167 Misc. 848, 4 N.Y.S. 2d 828, *aff'd*, 255 A.D. 823, 7 N.Y.S.2d 32 (1938); Miller's Estate, 275 Pa. 30, 118 A. 549 (1922); Dorrance v. Greene, 41 R.I. 444, 104 A. 12 (1918).
26. The majority of these cases are collected in Annot., 30 A.L.R.2d 416 (1953).

There are several recognized factors which bear against the application of the general rule of early vesting and as such tend to evidence an intent to postpone vesting when they accompany the life tenant-sole heir factor.[27] The fact that the life tenant is both the sole heir apparent and the sole heir in fact has been given considerable weight.[28] Although criticized as grasping at feeble straws,[29] the incongruity which arises from a plural description of the remainder class, *e.g.*, "heirs," where there exists only one heir, has been taken into account as a factor bearing upon the intent of the testator.[30] Nevertheless, it is probably safe to say that postponement is usually not justified on the finding of any isolated factor, unless it is supplemented by other indications of intent.[31] Even in those cases in which courts purportedly postponed vesting due to the life tenant-sole heir "incongruity" alone, other factors were generally considered.[32]

An example of a decision in which the sum of the factors present was held greater than the whole of the preference toward early vesting was *In re Wilson's Estate*.[33] In this case, a widow devised

27. A number of factors which tend to evidence an intent to postpone ascertainment of a remainder class are listed in POWELL, *supra* note 23, at 453-54:
    (1) the fact that the gift to the described group is to them "at the death," or "upon the death," or "after the death," of a life tenant; or
    (2) the fact that the gift to the described group follows a prior interest and is in terms "then" to such group; or
    (3) the fact that the gift to the described group follows a prior interest and is in terms of the amount "remaining" at the end of the prior interest; or
    (4) the fact that the gift to the described group follows a prior interest and is in terms to such persons as "would (or shall) by law inherit the same"; or
    (5) the fact that the gift to the described group is couched solely in a direction to divide and to pay over to them at the end of prior limited interests; or
    (6) the fact that the gift to the described group is subject to some condition precedent (other than a requirement of survival) which is unfulfilled at the death of the designated ancestor, or
    (7) the fact that some person who otherwise comes within the descriptive term employed to describe the group at the death of the ancestor is specifically excluded.
28. Heard v. Read, 169 Mass. 216, 47 N.E. 778 (1897); Irvine v. Ross, 339 Mo. 692, 98 S.W.2d 763 (1936).
29. POWELL, *supra* note 23, at 452. *See* Thomas v. Castle, 76 Conn. 447, 56 A. 854 (1904); Rand v. Butler, 48 Conn. 293 (1880).
30. *In re* Hoover's Estate, 16 Cal. App. 2d 529, 60 P.2d 1010 (1936); *In re* Estate of Wilson, 184 Cal. 63, 193 P. 581 (1920); Nicoll v. Irby, 83 Conn. 530, 77 A. 957 (1910); Stewart v. Giblett, 235 A.D. 589, 257 N.Y.S. 746 (1932); Grantham v. Jinnette, 177 N.C. 229, 98 S.E. 724 (1919).
31. POWELL, *supra* note 23, at 453.
32. *See* notes 25-26 & accompanying text *supra*.
33. 184 Cal. 63, 193 P. 581 (1920).

property to her son for life and at his death to his then living children; but, if he died without leaving issue, the remainder was to go to her heirs "upon his death."[34] Since the son was her sole legal heir under California intestacy law, the court noted the conflict in describing him as "heirs" and distributing property "among" him.[35] It further noted that she had previously described him as "my said son" in the will, and therefore concluded that due to these and other clear indications of contrary intent, the widow could not have intended to include her son in the remainder.[36]

In *Irvine v. Ross*,[37] a Missouri decision closely analogous to the facts of *Hanley*, the testator provided for his only daughter through a testamentary trust. His will stated that in the event his daughter married and at her death left no lineal descendants surviving, the remainder of his estate would pass to his "heirs." The court held that while the testator's daughter was his sole heir at his death, there was sufficient indication that the testator intended that his heirs be determined as of his daughter's death.[38] It stressed the fact that she was his sole heir apparent at the date of his death. Moreover, because the daughter was not expressly given any power to appoint, alienate, or dispose of the fee, the court found it clear that the testator intended to vest the remainder at the termination of the life estate.[39]

Only one case was found which gave conclusive weight to the *Restatement* formula.[40] *In re Latimer's Will*[41] was viewed favorably by the Nebraska court in *Hanley*, and was used as a guide in its decision. In *Latimer*, the will provided for a limitation over to the heirs of the testatrix and the heirs of her husband following the termination of a granddaughter's life estate. The granddaughter happened to be the sole heir-at-law of the testatrix' husband. The court held that in order to avoid the resulting inconsistency, the remainder class was to be determined as of the death of the life tenant.[42] In support of the rule announced in the *Restatement*, the court stated:

34. *Id.* at 65, 193 P. at 582.
35. *Id.* at 69-70, 193 P. at 583-84.
36. *Id.* at 71, 193 P. at 584.
37. 339 Mo. 692, 98 S.W.2d 763 (1936).
38. *Id.* at 698, 98 S.W.2d at 766.
39. *Id.* at 699, 98 S.W.2d at 767.
40. Although the court made note of the RESTATEMENT view in *In re* Ecclestone's Estate, 339 Mich. 15, 62 N.W.2d 606 (1954), it did not consider the rule as conclusive on the question of contrary intent. It chose rather to treat the life tenant-sole heir factor as *some evidence* of an intent to postpone ascertainment of the remainder. It treated the use of the term "heirs" under the facts as ambiguous, and admitted extrinsic evidence to explain the will.
41. 266 Wis. 158, 63 N.W.2d 65 (1954).
42. *Id.* at 174, 63 N.W.2d at 73.

> We take cognizance of the fact that the framers of the Restatement on Property were specialists in this field of the law and were selected for such task because of their recognized ability as the leading authorities in the nation on this particular subject. Undoubtedly they fully considered the existing conflict in the decisions and framed comment k . . . in the light of that which they thought the correct rule ought to be.[43]

B. The Decision in *Hanley*

The appellees in *Hanley* argued that the decision of the court in *Abbott v. Continental National Bank*,[44] was controlling on the issue of vesting. In *Abbott*, the will provided for a trust for the benefit of the testator's wife. During her life she was to receive the income from the fund and upon her death, the principal was directed to be distributed among the testator's heirs. In an action brought by the wife to determine her interest in the trust corpus, the trial court held that the corpus had vested in the testator's then living brothers and sisters at the time of his death. The supreme court affirmed that portion of the judgment, agreeing that she had no interest in the corpus. However, it reversed the trial court on its decision as to the time of vesting.[45]

The court held that the words "to my legal heirs" referred to the heirs living as of the date of the failure of the trust. Citing *In re Estate of Combs*,[46] the court held that the intent of the testator was to vest the remainder at a subsequent date.[47] Furthermore, the

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43. *Id.* at 166, 63 N.W.2d at 69-70 (citing RESTATEMENT OF PROPERTY § 308, Comment k at 1715-16 (1940)).
44. 169 Neb. 147, 98 N.W.2d 804 (1959).
45. It is interesting to note that the author of the court's opinion in *Hanley*, Justice Spencer, was also the trial judge in *Abbott*. It was his decision that the trust had vested at the testator's death that was reversed in *Abbott*.
46. 117 Neb. 257, 220 N.W. 269 (1928).
47. In discussing the case, the court said:

> The case of *In re Estate of Combs* . . . was a case where the will provided that the remainder of the estate "remaining after the death of my wife, shall descend to my legal heirs in equal shares in accordance with the laws of descent and distribution of the state of Nebraska." While the court construed the latter portion of the quoted part of the provision as bearing upon the intention of the testator to exclude the wife, a portion of that opinion does have application to the present case. We there said: "It must be admitted that the term 'my legal heirs' construed, in the light of the surrounding circumstances, with reference to all of the language employed in the will, must be relied upon to designate the ultimate devisees, the ultimate remainderman. It would seem that the fact that the testator desired to dispose of the title to his property to the exclusion of his wife with her consent by will (she chose not to take under the statute) indicates that he did not desire to have it come back to her after his death for distribution to her heirs. It appears absurd to conclude that the testator intended to give her only a life estate living, and after her death cast a fee simple title on her, dead. Had he wanted his widow to share in his property as a remainderman to the partial exclusion of

court adhered to the rule followed in *In re Estate of Mooney*,[48] that upon the failure of an express trust, the trustee holds the trust for the heirs of the testator who are determined at the date of the failure of the trust.[49] The words "to my legal heirs" were construed to mean the heirs who would take if no disposition of the property had been made under the will.[50]

Appellants, on the other hand, relied upon the court's decision in *Goodrich v. Bonham*.[51] In *Goodrich*, the testator left certain real estate in trust with income to be paid to his daughter for life. The son was appointed trustee and executor and upon the death of the daughter, title was to vest in him in fee simple. If the son predeceased the daughter, the will requested that someone else be appointed trustee. The son predeceased the daughter, but was adjudged bankrupt prior to his death.[52]

The defendant in the litigation purchased the son's alleged reversionary interest at bankruptcy proceedings, and claimed a right in the property through the deed he had received. Testator's heirs subsequently brought an action to construe the will and quiet title to the property in themselves. Claiming the son's interest lapsed when he predeceased the daughter, the heirs asserted that the de-

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his heirs of the blood, it would have been easy to have evidenced such intention by use of appropriate words. This he failed to do."

169 Neb. at 150, 98 N.W.2d at 806 (quoting *In re* Estate of Combs, 117 Neb. 257, 260, 220 N.W. 269, 270 (1928)).

48. 131 Neb. 52, 267 N.W. 196 (1936).

49. 169 Neb. at 151, 98 N.W.2d at 807. *E.g.*, Applegate v. Brown, 168 Neb. 190, 95 N.W.2d 341 (1959); Dennis v. Omaha Nat'l Bank, 153 Neb. 865, 46 N.W.2d 606 (1951).

50. According to Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts*, 52 CALIF. L. REV. 921 (1964), who cited *Abbott* in support of his proposition in a footnote discussion:

> [I]mplying powers in the legal life tenant to sell and manage the subject matter, with a duty to substitute the proceeds, would facilitate replacing the rule of early determination of heirs (i.e., giving "heirs" its technical meaning) with a presumption under which an artificial class of heirs is to be determined at the date of distribution (the probable expectation of one using "heirs" in its typical future interest context) . . . *Abbott v. Continental Nat'l Bank* . . . . The usual rule presumes the technical meaning was intended, RESTATEMENT, PROPERTY § 308 . . . , but natural impressions of the transferor's admittedly vague expectations have led both to explicitly recognized exceptions and to inconsistent applications supposedly based on contrary intention under the particular facts. *In re Latimer's Will* . . . relied in part upon a recognized exception and in part upon a doubtful one, but the practical difficulties (tracing vested remainders through the heirs' estates) which the court saw in the usually presumed result are shortcomings inherent in that rule itself.

Id. at 934, n.43.

51. 142 Neb. 489, 6 N.W.2d 788 (1942).

52. *Id.* at 492, 6 N.W.2d at 789.

fendant took no interest under the deed. The defendant's demurrer was sustained in the trial court.[53]

The supreme court followed the principle of early vesting and held that from the language of the will, the testator intended to vest the remainder in his son.[54] Since the son was specifically named as the remainderman and was trustee of the estate, no contrary intent was apparent which would nullify the effect of the rule. Moreover, the court dispelled any belief that the language "at the death of" refers to any time other than the time the remainderman takes possession.[55]

In its decision in *Hanley*, the court had little difficulty dealing with *Goodrich*. It distinguished that decision upon its facts, and most importantly, the life tenant-sole heir factor. Nevertheless, ignoring the non-technical construction of the term "legal heirs" that it had applied in *Abbott*,[56] the court still found it no small task to determine the time of vesting. As a rule, the testator's intent must be gathered from the language used in the will.[57] In *Hanley*, how-

53. *Id.*, 6 N.W.2d at 790.

54. *Id.* at 497, 6 N.W.2d at 792.

55. The court stated:

> [I]n *DeWitt v. Searles* . . . we said: "Testators are ordinarily and primarily concerned in the commencement, continuance and termination of the enjoyment of property by them devised and bequeathed. Apart from statute, the weight of authority recognizes this fact, and, when a contary intent is not clearly expressed, construes such expressions as 'upon the death of' as, in effect, related to and affecting the enjoyment of property, rather than establishing and vesting technical estates and involved titles. This court is committed to the doctrine that, under the circumstances here presented, the words last referred to do not mean that the life estate and the estate in remainder shall not vest at the death of the testatrix, but rather that 'upon the death of * * *' refers to time when, subject to the rights of the life tenant, the enjoyment of the estate in remainder begins."

Id. at 496, 6 N.W.2d at 791-92 (quoting DeWitt v. Searles, 123 Neb. 129, 137, 242 N.W. 370, 373 (1932)).

56. It is certainly not apparent from the opinion how the court distinguished *Abbott*, if in fact it did. The only reference made to the case from which one might conclude that the court had decided not to follow its reason came shortly before the court's statement recognizing the RESTATEMENT rule:

> Determining the time of the vesting of the remainder in this instance is a difficult problem. If we distinguish the *Abbott* case, which appellees House argue is controlling, it is possible to find authority going either way in other jurisdictions. However, Restatement on the Law of Property has adopted the rule that an incongruity in this situation is present if we follow the rule applied by the trial court.

200 Neb. at 97, 263 N.W.2d at 87.

57. *E.g.*, *In re* Estate of Kriter, 196 Neb. 482, 243 N.W.2d 773 (1976); *In re* Estate of Anderson, 194 Neb. 41, 230 N.W.2d 182 (1975); Gretchen Swanson Family Foundation, Inc. v. Johnson, 193 Neb. 641, 228 N.W.2d 608 (1975); Rasmussen v. Wedge, 190 Neb. 818, 212 N.W.2d 637 (1973); Garwood v. Drake Univ., 188 Neb. 605, 198 N.W.2d 336 (1972).

ever, the court might have been unable to support a finding of contrary intent strong enough to counter the principle of early vesting simply from the instrument's language. As a result of the dilemma, the court found it necessary to resort to the rule of the *Restatement*[58] to find contrary intent.

The court reinforced its conclusion as to intent by going into some detail, urging that the language evidenced a contrary intent. It considered several supporting indications. First, the court reasoned that the testator surely would have known that his nieces and nephews were "heirs-at-law by blood relation."[59] Had he desired to vest them with a remainder at his death, he would have used the terms "nieces and nephews." A further indication was said to be the use of the words "at the death of." In contrast to its interpretation of those words in *Goodrich*,[60] the court determined that such language, in light of the contrary intent shown through application of the *Restatement* rule, clearly manifested a design on the part of the testator to postpone vesting.[61] Finally, the court concluded that the use of the term "blood relation" made it obvious that the testator wanted his estate to be enjoyed by his blood relatives, to the exclusion of spouses, legatees, assignees and devisees of his heirs at law as determined at the time of his death.[62]

A general trend in the construction of wills seems to be away from absolute rules of construction toward an examination of the language of each will, to find the true intent of the testator.[63] This somewhat liberal trend is reflected in Nebraska by decisions which have held to the effect that the purpose of a court is to carry out and enforce the testator's true intent as shown by the will itself, in light of the circumstances under which it was made.[64] However, in

58. For text of the RESTATEMENT rule, *see* text accompanying note 13 *supra*.
59. 200 Neb. at 100, 263 N.W.2d at 89.
60. 142 Neb. at 496, 6 N.W.2d at 791. *See* note 55 *supra*.
61. 142 Neb. at 100-01, 263 N.W.2d at 89.
62. *Id.* at 100, 263 N.W.2d at 89.
63. *See* Albery, *Coincidence and the Construction of Wills*, 26 MOD. L. REV. 353 (1963); Halbach, *supra* note 50; Power, *Wills: A Primer of Interpretation and Construction*, 51 IA. L. REV. 75 (1965). *Compare* Heard v. Read, 169 Mass. 216, 47 N.E. 778 (1897), in which the Massachusetts court reached the same conclusion some eighty years ago:

> The present tendency in this country is against absolute rules of construction, and in favor of a careful consideration of the particular language of each will, as well as of its general scope and purpose, in order to determine, in view of the circumstances known to the testator when the will was made, the testator's intention as expressed in it.

Id. at 223, 47 N.E. at 781.
64. *E.g.*, *In re* Estate of Kriter, 196 Neb. 482, 243 N.W.2d 773 (1976); *In re* Estate of Anderson, 194 Neb. 41, 230 N.W.2d 182 (1975); Gretchen Swanson Family Foundation, Inc. v. Johnson, 193 Neb. 641, 228 N.W.2d 608 (1975); *In re* Estate

the court's valiant search for the testator's true intent in *Hanley*, it has fallen victim to one of the major failures considered inherent in the movement.

It would appear from the decision that the factors bearing upon the intent of the testator were given credibility by the court only after it had attributed a contrary intent by application of the *Restatement* rule. Instead of treating the life tenant-sole heir factor as one consideration to be placed in balance with other indications of intent, the court has given the *Restatement* formula a *per se* effect. Through its interpretation of the rule, the court presumes the intent to postpone vesting is present due to the life tenant-sole heir factor alone. From this point, other indications, such as plural description of remaindermen, can be found to support this intent. At the same time, however, evidence found in the will which conflicts with an intent to postpone can be disregarded or conveniently negated by the court.

For example, the *Goodrich* rule that the language "at the death of" commonly refers to time of possession by the remainderman rather than time of vesting, was held inapplicable to similar language in *Hanley* since the rule was said to be effective only in the absence of a contrary intent.[65] If the court had given credence to this rule and had weighed it against the evidence in support of an intent to postpone vesting without giving such conclusive weight to the life tenant-sole heir factor, it might have come to a different conclusion. The net effect of this *per se* treatment of the *Restatement* rule is the abandonment of an investigation of the competing indications of intent found in the document in arriving at a reasonable determination of the testator's intent.

This methodology differs a great deal from decisions in other jurisdictions, the majority of which have not specifically given cognizance to the *Restatement*.[66] Most courts have found the life tenant-sole heir factor as one indication of a *possible* contrary intent,

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of Travis, 189 Neb. 242, 202 N.W.2d 185 (1972); Davis v. Wirth, 178 Neb. 74, 131 N.W.2d 718 (1964).

65. Disposing of the rule, the court held in *Hanley*:

> While ordinarily such words as "at her death" do not have the effect of postponing the vesting of an estate in remainder, this is not true if, when read in context, the intention of the testator would appear to be otherwise. Construed in the context of the contrary intent expressed by the Restatement rule, we hold the remainder interest herein vested at the date of the death of the daughter rather than that of the testator.

Id. at 100, 101, 263 N.W.2d at 89.

66. *In re* Latimer's Will, 266 Wis. 158, 63 N.W.2d 65 (1954), is the only case cited by the court in support of adopting the RESTATEMENT rule. However, this case has been attacked as raising a "doubtful exception" to the early vesting doctrine. *See* note 50 *supra*.

to be weighed against competing rules of construction and property law. In contrast, through utilization of this new rule, intent is injected into the document and factors in support of this intent are added seemingly at the court's discretion.

It is strongly urged by authorities in the field[67] that recurring types of construction issues should be resolved by resort to rule, rather than through a case-by-case approach which falsely claims to discover actual intent.[68] Decision by rule minimizes litigation and is likely to add consistency and predictability to the law.[69] On its face, the *Restatement* formula as embellished by the supreme court seems to provide such a rule. However, the adoption of such an artificial rule only contributes to the case-by-case inconsistency which plagues the field of wills litigation in that the lower courts are left to determine whether or not in the face of clear indications to the contrary, the *Restatement* rule is to be applied to conclusively establish that, in the presence of the life tenant-sole heir situation, the testator intended to exclude the sole heir from the remainder interest. Armed with a weapon to establish a conclusive intent where there exists at most a mere indication, the court has opened a pandora's box of "discovered" intention.[70]

IV. CONCLUSION

Through adoption of the *Restatement* rule in *Hanley*, the court has ignored existing precedent in which it has, through its own determination of social policy, developed rules of construction which are more readily acceptable and suited for consistent application.[71] Had the court adhered to the sound policies underlying its decision in *Abbott*, it might have aided in the development of a clear-cut rule for dealing with cases similar to *Hanley*. While indications of the testator's intent may not have been strong enough, apart from the presumption supplied by the *Restatement*, to weigh against early vesting, use of the *Abbott* rule concerning the non-technical meaning of the term "heirs" could have provided the court with an opportunity to deal with the ambiguity and at the same time avoid problems of inconsistency. By following an established exception to the rule of early vesting, the court might have eventually prompted judicial and legislative reexamination of such constructional rules and related property law doctrine.[72] As it has

67. *See* Albery, *supra* note 63; Halbach, *supra* note 50; Power, *supra* note 63.
68. Halbach, *supra* note 50, at 923.
69. *Id.* at 923.
70. *Id.* at 921-22.
71. *Id.* at 934.
72. *Id.*

come about, the court has helped cloud an area already suffering from chronic confusion.

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