Georgia State University Law Review

Volume 16
Issue 4 *Summer 2000*

Article 1

6-1-2000

Linkous v. Candler The Future of Acceleration of Remainders in Georgia

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LINKOUS V. CANDLER: THE FUTURE OF ACCELERATION OF REMAINDERS IN GEORGIA

INTRODUCTION

"Property is a burden as well as a benefit, and whoever is unwilling to bear the burden for the sake of the benefit, is at liberty to decline both."[1] So wrote Justice Bleckley of the Supreme Court of Georgia in 1879, recognizing the common-law doctrine of renunciation.[2] Under the associated doctrine of acceleration, both the common law and its statutory embodiment in Georgia treat a person renouncing an interest under a will or trust as predeceasing the donor, thus accelerating the time for vesting in possession of the succeeding estate, provided that the donor did not express a contrary intent.[3]

Because every renunciation thwarts a conveyor's wishes to some degree, the difficulty inherent in the acceleration doctrine lies in determining when a conveyor's intention is so contrary that it prevents acceleration.[4] As a general rule, acceleration appears to cause less disruption to a conveyor's plan than does failure to accelerate because the law presumes that acceleration accords with the conveyor's intent.[5] A difficulty arises, however, if an instrument creates successive estates—each determined by the death of the holder of the preceding estate—and an estate terminates for a reason other than death, such as renunciation. In that event, should the succeeding estate accelerate into possession in the hands of the succeeding donee when the preceding estate fails, or should distribution of the succeeding estate await the natural death of the holder of the preceding

1. Daniel v. Frost, 62 Ga. 697, 706 (1879).
2. *See id.*
3. *See* O.C.G.A. § 53-2-115 (1995); O.C.G.A. § 53-1-20 (1998).
4. *See* RESTATEMENT OF PROPERTY, § 231, cmt. a (1936); Patricia J. Roberts, *The Acceleration of Remainders: Manipulating the Identity of the Remaindermen*, 42 S.C. L. REV. 295, 297 (1991).
5. *See* RESTATEMENT OF PROPERTY, § 231, cmt. a (1936).

estate?[6] What if delaying distribution until the natural death of the life tenant may result in takers different from those who would take at the early termination of the life estate?[7] Two recent Georgia cases answered these questions in a somewhat surprising way.[8]

In 1996, the Supreme Court of Georgia decided *Wetherbee v. First State Bank & Trust Co.*,[9] a case involving renunciation and acceleration that pointed somewhat ambiguously toward a new understanding of Georgia's acceleration doctrine. Then, in 1998, the court determined in *Linkous v. Candler*[10] that Georgia's doctrine of renunciation and acceleration of remainders will take the new direction suggested by the holding in *Wetherbee*.[11]

This comment briefly examines the common-law history of the doctrine of renunciation and acceleration and its statutory elaboration, as well as the differing legal theories on which the parties relied in *Linkous*. The Article traces the court's extension of the view of acceleration implied by *Wetherbee* into a general rule of will and trust construction in Georgia. Part I gives a brief history of renunciation. Part II discusses the development of the doctrine of acceleration of remainders. Part III analyzes the facts and holding of *Wetherbee*. Part IV examines the facts, the theories of the opposing parties, and the holding of *Linkous*.

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6. *See generally, e.g.*, Roberts, *supra* note 4.
7. *See id.*
8. *See* Linkous v. Candler, 270 Ga. 284, 508 S.E.2d 657 (1998); Wetherbee v. First State Bank & Trust Co., 266 Ga. 364, 466 S.E.2d 835 (1996).
9. 266 Ga. 364; 466 S.E.2d 835 (1996).
10. 270 Ga. 284; 508 S.E.2d 657 (1998).
11. *See id.* at 285, 508 S.E.2d at 658.

I. A BRIEF HISTORY OF RENUNCIATION

A. Renunciation at Common Law

The right to disclaim or renounce[12] a gift, legacy, or devise existed at common law and traces its roots to antiquity.[13] Under Roman Law, donees could refuse most titles whether conveyed by inter vivos or testamentary gift.[14] Interestingly, the Romans applied the word "heir" (*heres*) to a taker whether designated by will (*ex testamento*) or by intestate succession (*ab intestato*).[15] Free persons could generally decide whether or not to accept an inheritance,[16] but if they were of sufficiently close familial relation to the decedent, Roman law made them compulsory heirs (*sui et necessarii heredes*).[17] Compulsory heirs could still petition a magistrate for the right not to enter into the estate (*beneficium abstinendi*), however.[18]

In a seminal early nineteenth-century English case,[19] Chief Justice Abbott recognized that the "law certainly is not so absurd as to force a man to take an estate against his will."[20] In the same case, Justice Bayley reasoned that "a man cannot have an estate put into him in spite of his teeth," holding that "an

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12. The words "disclaimer" and "renunciation" have the same meaning. *See* John H. Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. CHI. L. REV. 316, 316 n.3 (1979).

13. *See id.* at 316, n.2.

14. *See id.* When Martin states that any gift could be refused under Roman law, he overlooks the common practice of masters designating slaves as *necessarii heredes*, who at their master's death, by operation of law, became freedmen and his heirs. They had no *potestas abstinendi*, the power to renounce an inheritance. *See* FERDINAND MACKELDEY, HANDBOOK OF THE ROMAN LAW 545-46 (Moses A. Dropsie trans. & ed. 1883).

15. *See* J. A. C. THOMAS, THE INSTITUTES OF JUSTINIAN: TEXT, TRANSLATION AND COMMENTARY 111 (1975).

16. The Roman magistrate, known as a *praetor*, had wide authority regarding wills and had the power to determine the amount of time allowed to an heir to deliberate whether or not to enter into an inheritance. *See* SHELDON AMOS, THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME 330 (1883); MACKELDAY, *supra* note 14, at 546.

17. *Sui et necessarii heredes* were usually issue, especially children, because even during the life of the *paterfamilias* they were "regarded as themselves owners." *See* Thomas, *supra* note 15, at 136.

18. *See* AMOS, *supra* note 16, at 330; MACKELDEY, *supra* note 14, at 546. Such a right, however, was only granted to heirs who had reached majority—the age was 25—and who had not interfered with the estate, or to minors who found the estate debt-laden. *See Amos*, *supra* note 16, at 330.

19. *See* Townson v. Tickell, 106 Eng. Rep. 575 (K.B. 1819).

20. *Id.* at 576-77.

estate cannot pass to a surrenderee without his assent, and the principle is applicable to all other conveyances as well as to a devise."[21] Writing in the eighteenth century, Blackstone enumerated and distinguished two ways of acquiring property at common law: descent, which vests title immediately by operation of law, and purchase, which vests title by the purchaser's "own act or agreement."[22] Nevertheless, as late as 1819, the law continued to recognize the argument that, by virtue of the Statute of Wills, title to an estate conveyed by devise vested immediately in the devisee without the devisee's consent.[23] Thereafter, the view that the law would not force a devisee to take unwillingly so prevailed that in 1941 an American court characterized the right to renounce a devise or legacy as a natural right, requiring no statutory recognition.[24] The authors of the *Uniform Probate Code* acknowledged the common-law view, stating that "[i]t is said that no one can make another an owner of an estate against his consent by devising it to him."[25]

The Supreme Court of Georgia recognized the common-law right of renunciation in the 1879 case *Daniel v. Frost*:[26]

> The rule is plain and uniform, that, in general, a disclaimer made and promulgated in proper time and manner prevents the intended estate from vesting; the reason for which is, that no man will be constrained to accept property or an interest in property contrary to his own election and

21. *Id.* at 576.

22. 2 WILLIAM BLACKSTONE COMMENTARIES *201.

23. *See Townson*, 106 Eng. Rep. at 575.

24. *See* Perkins v. Isley, 32 S.E.2d 588, 590-91 (N.C. 1945) (holding that a "title by deed or devise requires the assent of the grantee or devisee before it can take effect"). *Perkins* also states succinctly the common-law doctrine that an heir-at-law cannot renounce or disclaim an inheritance because such title vests by operation of law. *See id.* at 591. Heirs would have to wait for the advent of statutory disclaimer before gaining the right to renounce. *See* PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 24 (2d ed. 1994).

25. UNIF. PROBATE CODE § 2-801 cmt (a) (5th ed. 1977). The common-law rule was different for intestate inheritance; it regarded such transfers as made by operation of law and therefore considered them unpreventable by disclaimer or renunciation. *See* HASKELL, *supra* note 24, at 24.

26. 62 Ga. 697 (1879).

> consent. Riches are not to be forced on people whether they will or not.[27]

B. Statutory Disclaimer

Historically, two classes of intended donees sought to disclaim: (1) widows electing to take their statutory portion of the husband's estate instead of taking under their husband's will, and (2) devisees who used disclaimer for the somewhat disfavored purpose of avoiding creditors' claims.[28] Later, the growth of estate taxes made disclaimer an important post-mortem estate planning tool.[29] A particularly harsh 1952 federal tax case involving disclaimer shocked the estate planning community and helped provide the impetus for legislation that would avoid such results in the future by granting uniform treatment to both testate and intestate succession.[30] By 1973, the National Conference of Commissioners on Uniform State Laws had issued three uniform state laws on disclaimers: the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act[31] (applying to probate transfers), the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act[32] (covering nonprobate transfers), and the Uniform Disclaimer of Property Act[33] (integrating the rules for probate and nonprobate transfers).[34] By 1990, every state had a disclaimer or renunciation statute.[35] The 1969 version of the *Uniform Probate*

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27. *See id.* at 706.

28. *See* Carolyn A. Adams, Note, *Disclaimer Statutes: New Federal and State Tools for Postmortem Estate Planning*, 20 WASHBURN L. J. 42, 44 n.15, 51 (1980); *Frost*, 62 Ga. at 697.

29. *See* Adams, *supra* note 28, at 51 n.70 and accompanying text.

30. *See id.* at 52-54. The case was *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir. 1952), *cert. denied*, 344 U.S. 836 (1952), where a mother and daughter both disclaimed their intestate shares in a large estate in favor of their son and brother in order to fulfill the wishes of the decedent, who had died suddenly with an unexecuted will. *See* Adams, *supra* note 28, at 52-54. The Internal Revenue Service levied gift taxes against the disclaimants, and the court of Appeals held that Minnesota's common law did not provide for disclaimer in the case of intestate succession, thus making their disclaimers taxable transfers. *See id. Hardenbergh* not only helped to inspire state statutes, but it even influenced Congress in passing the Tax Reform Act of 1976. *See id.* at 54.

31. 8A U.L.A. 93 (1983).

32. 8A U.L.A. 111 (1983).

33. 8A U.L.A. 85 (1983).

34. *See* S. Alan Medlin, *An Examination of Disclaimers under U.P.C. Section 2-801*, 55 ALB. L. REV. 1233, 1234 (1992).

35. *See* RONALD A. BRAND & WILLIAM P. LAPIANÁ, DISCLAIMERS IN ESTATE PLANNING,

Code (U.P.C.) contained section 2-801, entitled "Renunciation of Succession."[36] Guided by the U.P.C., Georgia enacted its first renunciation statute in 1972.[37] The original law survives in amended form in the 1998 Georgia Probate Code.[38] In 1976, Congress set statutory standards for disclaimers made for tax purposes, evidently with the goal of achieving some uniformity in the treatment of remainders that satisfied differing state requirements.[39]

II. ACCELERATION OF REMAINDERS

Acceleration is the shortening of time required for vesting in possession of a future interest when the preceding estate fails.[40] Courts recognized acceleration at common law.[41]

A. Examples of Acceleration

In 1853, an English Chancery court held that the words "from and immediately after his decease," following the granting of a life estate, generally indicated the order of estates only; where the intermediate estate failed for a reason other than death, the subsequent gift accelerated into possession just as if death had

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app. A. at 1 (1990). For an example of hideous unintended consequences wrought by hazy drafting in earlier statutes, see *Estate of Bryant v. Bryant*, 149 Cal. App. 3d 323 (1983), where two sons' attempted renunciation of their intestate share in favor of their mother not only failed to convey their shares of the estate to the mother, but actually reduced the share of the child of one son from one-half to one-third when the estate unintentionally passed to the sons' issue. *See id.*

36. UNIF. PROBATE CODE § 2-801 (1969).

37. *See* Ga. Code § 113-824 (1933), 1972 Ga. Laws 452. *Linkous* was decided under O.C.G.A. § 53-2-115 (1995) (current version at § 53-1-20). *See* Linkous v. Candler, 270 Ga. 284, 285, 508 S.E.2d 657, 658 (1998).

38. *See* O.C.G.A. § 53-2-20 (1998).

39. *See* Martin, *supra* note 12, at 316-17 (1979). Martin contends that federal legislation has not succeeded in achieving the sought-after uniformity. *See generally id.*

40. *See* BLACK'S LAW DICTIONARY 12 (6th ed. 1990); *see also* Christian v. Wilson's Ex'rs, 151 S.E. 300, 305 (Va. 1930).

41. *See* Elliott v. Brintlinger, 33 N.E.2d 199 (Ill. 1941); Cockey v. Cockey, 118 A. 850 (Md. 1922); *In re* Disston's Estate, 101 A. 804 (Pa. 1917); Lainson v. Lainson, 1 Ruling Cases 194 (Ch. 1853-54); RESTATEMENT OF PROPERTY, § 231 (1936); 28 AM. JUR. 2D *Estates* § 304.

terminated the life estate.[42] This principle has remained the basic paradigm for the doctrine of acceleration.[43]

In the influential 1917 case *In re Disston's Estate*[44] the Supreme Court of Pennsylvania held that a widow's election to take her statutory portion and renounce the life estate that her husband's will granted her was the equivalent of her death for the purposes of distribution.[45] The court acknowledged that the testator's intent was determinative and that, where not express, the testator's intent to prevent acceleration could be shown by the inevitable implication of the terms of the instrument.[46] Therefore, the court held that conditions in the instrument would manifest such an intent where they fix a time for distribution independent of the life tenant's death.[47] The *Disston's Estate* will provided for a life estate in favor of the testator's widow and children, with the remainder at the widow's death passing half to the testator's son in fee, half in trust for the testator's daughter, with a substitutional gift to the issue of each child in the event a child predeceased the widow.[48] The court stated that the will's implied purpose was to provide for the widow and not to preserve the estate until some future time or until some future takers could be ascertained.[49] The court reasoned that after his widow, the natural objects of the testator's bounty were his children and not their issue, so that even though delaying distribution of the estate until the widow's natural death would probably result in different takers, establishing such takers was not the testator's purpose.[50] Thus, acceleration best fulfilled the testator's intent.[51]

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42. *See Lainson*, 1 Ruling Cases at 194, 198-99.

43. *See, e.g.*, HASKELL, *supra* note 24, at 26; JESSE DUKEMIIER AND STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 523, 761-62 (5th ed. 1995).

44. 101 A. 804 (Pa. 1917).

45. *See id.* at 804.

46. *See id.* at 806.

47. *See id.*

48. *See id.* at 804-05. The will in *Disston's Estate* also granted the testator's sister-in-law an annuity, to which all parties agreed even in the event of acceleration. *See id.* at 805.

49. *See id.* at 806.

50. *See id.*

51. *See id.*; *see also* Cheshire v. Drewry, 197 S.E. 1, 7 (N.C. 1938) (stating that the enjoyment of the succeeding interest is postponed for the benefit of the preceding interest and that premature determination of the succeeding estate accelerates succeeding estate into possession).

Although it noted that acceleration most often takes place when a devisee renounces the prior estate, the Supreme Court of Illinois held in the 1941 case *Elliot v. Brintlinger*[52] that acceleration, unless otherwise prevented, occurs when an estate fails for any reason. In that case, the testator left half her estate to daughter A in fee and half in trust for daughter B, remainder to A.[53] When daughter B predeceased the testator, and B's heir argued that the gift in trust had lapsed and should pass by intestacy, the court found that A's remainder interest was accelerated into possession by the failure of the intermediate estate, namely, the unfulfilled life interest in favor of B.[54] The court found that no other reason existed for the postponement of daughter A's possessory estate in the remainder, except the testator's intent to provide for the needs of daughter B.[55] For that reason, the acceleration of A's remainder into possession when B's estate failed to vest best implemented the testator's intent.[56]

Whether a court regards a devise as vested or contingent can determine whether the doctrine of acceleration applies, as the Maryland Court of Appeals demonstrated in the 1922 case *Cockey v. Cockey*.[57] There, the court invoked

> the principle that the law favors the early vesting of legacies whenever it can do so without doing violence to the intent of the testator as expressed in his will, or where there is nothing contained in the will indicative of an intention or desire on the part of the testator that the legacy should be of a contingent nature.[58]

There, the testator's will created a life estate in his widow, remainder to son A, if A survived the widow, with a substitutional gift to A's issue; if neither A nor his issue survived the widow, then to son B in fee; if neither A nor B nor their issue survived the widow, then in fee to son C.[59] The widow

52. 33 N.E.2d 199 (Ill. 1941).
53. *See id.* at 200-01.
54. *See id.*
55. *See id.* at 201.
56. *See id.*
57. 118 A. 850 (Md. 1922).
58. *Id.* at 851. For a comprehensive discussion of the principle of early vesting, see also Lewis v. Payne, 77 A. 321 (Md. 1910).
59. *See Cockey*, 118 A. at 850-51.

renounced her interest under the will, electing to take her statutory portion instead.[60] Son C sought a construction from the court that would sequester the estate until the end of the widow's natural life in order that the takers might be ascertained at that time.[61] The court held that the widow's renunciation resulted in the acceleration into possession of son A's remainder interest because A's interest vested at the termination of the widow's estate, whether by death or renunciation, rather than remaining contingent on his surviving her natural life.[62] Thus, acceleration serves the principle of early vesting where possible.[63]

Even when a court finds a remainder to be contingent, it may find that acceleration best fulfills the testator's intent. The Virginia Supreme Court of Appeals did so in the 1930 case *Christian v. Wilson's Ex'rs*.[64] There, the testator divided his estate into a one-third share (share A) and a two-thirds share (share B).[65] He granted a life interest in share A to his second wife, with the remainder to his children by his second wife that survived her, with a substitutional gift per stirpes[66] to the children's issue that survived the testator's second wife; the remainder passed to whoever might survive among the takers of share A.[67] The testator granted similar interests in share B to all his children, including his two daughters from his first marriage, as well as his children by his second wife; but in no event were the children of his first marriage to benefit from share A, however.[68] The court took pains to point out that the remainder of the children of the second marriage was contingent on their surviving the second wife and noted that such remainders cannot usually be accelerated because

60. *See id.* at 851.
61. *See id.*
62. *See id.* at 851-52.
63. *See id.*
64. 151 S.E. 300 (Va. 1930).
65. *See id.* at 301-02.
66. Per stirpes is Latin for "by the roots" and describes the situation wherein descendants take a predeceased parent's share of an estate. *See* HASKELL, *supra* note 24, at 14.
67. *See Christian*, 151 S.E. at 301-02.
68. *See id.*

> such acceleration might permit one to participate in the distribution of an estate although it might thereafter be demonstrated that he had no interest therein, but . . . it is immaterial whether the remainder be vested or contingent if the time for distribution has actually arrived, for in such a case the contingency is determined and the donee ascertained.[69]

The court held that the identity of the takers became certain at the date of the renunciation, and thus the character of their prior future interests—contingent or vested—became unimportant at that time.[70] In applying the doctrine of acceleration, the court reasoned that although a succeeding estate might be devised "'in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, yet . . . it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way.'"[71] Thus, because postponement of the sons' estate was intended for the widow's benefit, the court held that accelerating the sons' estate into possession best effected the testator's intent because the sons (or their issue substitionally) were destined to become the ultimate takers.[72] The court noted that even though the renunciation effectively changed the proportions of the estate that the takers would receive—because the widow's elective share was taken out of both shares A and B, pro rata—the testator's express wish that the takers of share B never benefit from share A made it impossible to change such an outcome.[73]

B. Examples of Failure of Acceleration

The terms of a will prevent acceleration when, taken together, they evince a contrary intent on the part of the testator, as shown in the Supreme Court of Nebraska's 1923 decision in *Askey v. Askey*.[74] There, the testator created a life estate in favor of his widow, remainder to his grandchildren at his widow's

69. *Id.* at 305 (citing 5 A.L.R. 474); *see also* Blatchford v. Newberry, 99 Ill. 11 (1880).
70. *See Christian*, 151 S.E. at 305.
71. *Id.* at 306 (citing Slocum v. Hagaman, 52 N.E. 332, 333 (Ill. 1898)).
72. *See id.*
73. *See id.* at 305.
74. 196 N.W. 891 (Neb. 1923).

death,[75] with a provision that the widow's enjoyment of the life estate would terminate if she remarried.[76] When the widow elected to take her statutory portion rather than taking under the will, the grandchildren born after the widow's renunciation and before her natural death successfully challenged and prevented acceleration of the vesting in possession of the remainder interests of the grandchildren born before the renunciation.[77] The grandchildren born before the renunciation contended that the widow's renunciation was the equivalent of her death for purposes of distributing the estate under the will and that their interests indefeasibly vested at that time.[78] The court found that the testator had contemplated the prospect that his widow's life estate might terminate before her physical death when he included the clause regarding remarriage, yet he still used her death as the time for ascertaining the remaindermen.[79] This clause demonstrated his intent that the remainder not accelerate.[80] The court reasoned that the testator may have chosen his widow's death as the time for ascertaining the remaindermen because he was aware that he had made a gift to an open class and wished purposely to allow in any grandchildren born between his death and the death of his widow.[81]

In a 1941 case, *Blackwell v. Virginia Trust Co.*,[82] the Supreme Court of Virginia found that a spendthrift provision combined with a substitutional gift prevented acceleration. In that case, the testator left half her estate in trust to pay the income to son A for life, half to pay income to son B for life, remainder in each son's half in fee to the children of each son with a substitutional gift per stirpes to the issue of a son.[83] In the event that a son

75. *See id.* at 892.
76. *See id.*
77. *See id.* The *Askey* court apparently treated the renunciation itself as establishing the moment that is equivalent to the death of the disclaimant without relating the renunciation back to the testator's death; presumably, no grandchildren were born into the twilight zone thus created between the testator's death and his widow's renunciation. *See id.*
78. *See id.*
79. *See id.* at 893.
80. *See id.*
81. *See id.*
82. 14 S.E.2d 301 (Va. 1941).
83. *See id.* at 302.

died without issue, the testator provided for a substitutional gift over to the other brother, his children, or issue.[84] In addition, the testator provided that any attempt at alienation of a son's interest in the trust, whether voluntary or involuntary, would result in the absolute termination of that son's right to receive trust income, with the trust at such time becoming wholly discretionary in the hands of the trustee.[85] Some years after the testator's death, son A renounced his interest in the trust; shortly thereafter, son A's adult children sought to force the trustee to pay the remainder to them on the theory that the elimination of their father's life estate accelerated their remainder into present possession.[86] After reviewing and acknowledging the doctrine of acceleration, the court observed that unlike the case of a widow electing to take against her husband's will, no statute or rule of law granted a son the right to elect between taking under a will or apart from it, with the result that he must take under the will or not at all.[87] Therefore, the court rejected the theory that the son's renunciation of the trust benefits equaled the termination of his life estate, thereby accelerating the remainder.[88] Because son A's adult children might in turn donate their interest to their father, the testator's express intent that the trust property not come into her son's hands could be violated.[89] The court observed that, as a rule, after a beneficiary has accepted a trust whose spendthrift provisions made his interest inalienable, his renunciation does not terminate the trust.[90] The court further reasoned that the substitutional gift over to issue of a deceased child of son A, along with the substitutional gift over to son B's line in the event son A died without issue, made the identity of the remaindermen unascertainable until son A's physical death.[91] These provisions further evinced the testator's desire that the trust not terminate until son A's physical death.[92] For these

84. *See id.*
85. *See id.*
86. *See id.* at 303.
87. *See id.* at 304.
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.* at 304-05.
92. *See id.*

reasons, the court held that failure to accelerate best served the testator's intent.[93]

A finding that an interest is not indefeasibly vested can result in failure to accelerate.[94] In a 1941 New York case, *In re MacIntyre's Estate*,[95] a testator attempted to create a life estate for his three sisters; at the death of a sister, that sister's share was to go to a single, named niece, or substitutionally to the niece's children; at the death of the survivor of the three sisters, remainder in fee to the niece, with a substitute gift to the niece's children.[96] The court held that the instrument actually created three separate life estates, one in each sister, and a secondary life estate in the niece, but it found that no life estate could exist in the niece's children because of "remoteness."[97] The question then arose whether removing the failed life estate accelerated the remainder, with the result that at the death of the survivor of the three sisters, the remainder would become vested in possession.[98] The court held that because the possibility remained that the takers would not be identical to those who might have taken at the natural termination of the invalid preceding interest (had it existed) and because the proportion of the estate received by succeeding takers might not be the same as at the natural termination of the invalid preceding interest (had it existed), the remainder interest was not indefeasibly vested.[99] Therefore, not only did acceleration fail, but the entire remainder gift failed and would pass by intestacy.[100] By this reasoning, acceleration would defeat the testator's intention that there should be no vesting until the death of the survivor of his three sisters.[101]

93. *See id.* at 305.
94. 32 N.Y.S.2d 528 (N.Y. Supp. Ct. 1941).
95. *See id.*
96. *See id.* at 529.
97. *See id.* at 530-32.
98. *See id.* at 531.
99. *See id.* at 532.
100. *See id.* at 531-32.
101. *See id.* at 532.

C. Acceleration in Georgia

Georgia common law recognizes the doctrine of acceleration.[102] The leading Georgia case prior to *Wetherbee* and *Linkous* eloquently set forth the doctrine as follows: "Whenever the prior estate is made to depend upon any prescribed event, and the second estate is to arise upon the determination of that event, the first is not to be taken as a condition precedent, but upon its failure the second estate must take place."[103] The U.P.C. adopted the doctrine of acceleration.[104] Georgia's statute is virtually identical to the U.P.C. in substance, and the Supreme Court of Georgia has recognized that the Georgia statute is an expression of the common-law principle of acceleration of remainders, "whereby the elimination of any intermediate interest in a line of successive estates 'accelerates the time for the vesting in possession of those subsequent thereto.'"[105]

III. WETHERBEE V. FIRST STATE BANK & TRUST

In the 1996 case *Wetherbee v. First State Bank & Trust Co.*,[106] the Supreme Court of Georgia held that a testator's sons' renunciation of their interests in trust property did not result in an acceleration of the vesting in possession of the remaindermen's interest because the will's terms made the remaindermen unascertainable before the death of life tenants.[107] This ruling was consistent with the common-law doctrine that provides for a failure of acceleration on account of the "inevitable implication" of the instrument's terms even absent express contrary terms.[108]

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102. *See* Jossey v. Brown, 119 Ga. 758, 47 S.E. 350 (1904). In *Jossey*, the prior estate failed not by reason of renunciation but rather by reason of failure of condition. *See id.* at 351-52.

103. *Id.* at 352 (quoting Doe v. Brabant, 3 Br. 393).

104. *See* UNIF. PROBATE CODE § 2-801 (1969).

105. Wetherbee v. First State Bank & Trust, 266 Ga. 364, 365, 466 S.E.2d 835, 836 (1996) (citing O.C.G.A. § 53-2-115(c) and quoting *Jossey*, 119 Ga. at 758, 47 S.E. at 350).

106. 266 Ga. 364, 466 S.E.2d 835 (1996).

107. *See id.* at 365, 466 S.E.2d at 836.

108. *See id.* (quoting 28 AM. JUR. 2D *Estates* § 305 at 498-99). Such an implication comports with the Georgia statute, which provides for acceleration "[u]nless the decedent or donee . . . has otherwise indicated by his or her will . . . ." O.C.G.A. § 53-2-115(c) (1995). For the case underlying the above quotation from 28 AM. JUR 2D § 305, see

Mr. Wetherbee died in 1977, survived by his wife, daughter, and two married sons.[109] His will created a trust granting a life interest to his wife; at her death, a life interest would pass to his then-living sons.[110] In the event a son predeceased his mother, the will provided that "his interest shall vest in his then surviving unmarried wife and in his then surviving descendants."[111] The will further stated that at the termination of the interest created in each son, the corpus "'shall be set apart for the use and benefit of his surviving wife and descendants.'"[112]

At Mr. Wetherbee's death, each son renounced[113] his interest in the trust, and subsequently each divorced.[114] Upon Mrs. Wetherbee's death in 1991, the trustee petitioned the trial court to construe the terms of the trust, especially as to whether the renunciations resulted in acceleration of the vesting in possession of the remainder "'in [Mr. Wetherbee's] then surviving unmarried wife and in his then surviving descendants.'"[115] The superior court[116] held that no acceleration resulted and that the trustee was to accumulate the income due to each son and distribute it along with that son's share of the corpus to the wife and descendants actually surviving at each son's physical death.[117]

The appellants, the ex-wives and children of the renouncing sons, relied on Code section 53-2-115(c), which provides that

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also *In re* Disston's Estate, 101 A. 804, 806 (Pa. 1917); Brief of the Appellees, Linkous v. Candler, 270 Ga. 284, 508 S.E.2d 835 (1998) (No. S98A1011) [hereinafter Appellee's Brief].

109. *See Wetherbee*, 266 Ga. at 364, 466 S.E.2d at 835.

110. *See id.* at 365, 466 S.E.2d at 836 (quoting Mr. Wetherbee's will).

111. *Id.*

112. *Id.*

113. That the Georgia Code does not distinguish the words "renunciation" and "disclaimer" is evidenced by the Index to Titles 52 and 53; there, the word "disclaimer" references Code section 53-2-115, which is headed, "Renouncement of Succession," and which employs the terms "renounce" and "renunciation." *See, e.g.*, O.C.G.A. 53-2-115(a) and (a)(1)(1995); *see also* Martin, *supra* note 12, at 316 n.3.

114. *See Wetherbee*, 266 Ga. at 365, 466 S.E.2d at 836.

115. *Id.*

116. In Georgia, cases involving wills and all cases in equity are appealed directly from superior court to the Supreme Court of Georgia. *See* GA. CONST. art. VI, § 6, ¶ 3. "Trusts of every kind, not generally cognizable at law, are peculiarly subjects of equity jurisdiction." O.C.G.A. § 53-12-4 (1997).

117. *See Wetherbee*, 266 Ga. at 365, 466 S.E.2d at 836.

> [u]nless the decedent . . . has otherwise indicated by his or her will, the interest renounced and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced shall pass as if the person renouncing had predeceased the decedent . . . . In every case the renunciation relates back for all purposes to the date of death of the decedent . . . .[118]

Reading the statute literally, the appellants contended that they were the "sons' surviving unmarried wives and descendants at the time of Mr. Wetherbee's death" and thus should take the accelerated remainder interest in the trust.[119] The court acknowledged that the principle of acceleration of remainders exists under Georgia law[120] and that "'[t]he testator is presumed to have intended to devise the remainder from and after the determination of the precedent estate, rather than from and after the death of the particular tenant.'"[121] Nonetheless, noting that the statute provided that the inference of acceleration is defeated if the testator has "otherwise indicated" a contrary intent, the court found that such a contrary intent need not be express.[122] The court observed that

> [a]n intent that there shall be no acceleration may be shown by inevitable implication, as, for instance, . . . where the contingency upon which the remaindermen are to take is such that in the nature of things the persons entitled can be ascertained only by the physical death of the life-tenant . . . .[123]

The court found such an "inevitable implication" in Mr. Wetherbee's will and held that it was necessary to await the physical death of the holders of the intermediate estate, the sons, to ascertain the identities of their surviving wives and descendants.[124] The court held that Mr. Wetherbee indicated his

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118. *Id.* (quoting O.C.G.A. 53-2-115(c) (1995)).
119. *Id.*
120. *Id. See also* Jossey v. Brown, 119 Ga. 758, 758, 47 S.E. 350, 351 (1904) ("Where there has been the creation of a line of successive estates, the elimination of any intermediate interest accelerates the time for the vesting in possession of those subsequent thereto").
121. *Wetherbee*, 266 Ga. at 365, 466 S.E.2d at 836 (quoting 24 AM. JUR. 2D ESTATES § 305 at 497).
122. *See id.*
123. *Id.* (quoting 28 AM. JUR. 2D ESTATES § 305 at 498-99).
124. *See id.*

intention by using the term "surviving" and by not naming the wives or descendants whom he wished to take.[125] The court ruled that as a result of Mr. Wetherbee's determinative intent, the remainder could neither accelerate into possession, nor could the class close, until his sons' physical death.[126]

Because the court held, in effect, that "'unmarried surviving wife'" essentially meant "widow" the court's holding that it was necessary to await the natural death of the renouncing life tenants before the identity of the widow of each could be ascertained came as no surprise.[127] More unexpectedly, the court also held that Mr. Wetherbee's use of the phrase "then surviving descendants" indicated his intent that his sons' descendants must survive his sons' natural deaths in order to take.[128]

Before *Wetherbee*, most courts and commentators had reasoned that language requiring takers to survive or be in life did not require that such takers survive the physical death of the holder of the intermediate estate.[129] Indeed, a comment to the U.P.C. proposes an example that clearly indicates that such language alone does not evince a contrary intent that would prevent acceleration.[130] The applicable section of the U.P.C. and the relevant Georgia Code section are virtually identical on this issue.[131]

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125. *See id.*

126. *See id.* at 366, 466 S.E.2d at 837.

127. *See id* at 365-66, 466 S.E.2d at 836-37; Appellee's Brief, *supra* note 108, at 22.

128. *See Wetherbee*, 266 Ga. at 365, 466 S.E.2d at 836.

129. *See, e.g.*, Elliott v. Brintlinger, 33 N.E.2d 199 (Ill. 1941); Cockey v. Cockey, 118 A. 850 (Md. 1922); Cheshire v. Drewry, 197 S.E. 1, 7 (N.C. 1938); *In re* Disston's Estate, 101 A. 804 (Pa. 1917); Christian v. Wilson's Ex'rs, 151 S.E. 300 (Va. 1930); Lainson v. Lainson, 1 Ruling Cases 194, 194, 198-99 (Chancery 1853-54); UNIF. PROBATE CODE § 2-801 cmt. to subsection (c) at 76 (5th ed. 1977); RESTATEMENT OF PROPERTY § 231 cmt. j (1936).

130. *See* UNIFORM PROBATE CODE § 2-801 cmt. to subsection (c) at 76 (5th ed. 1977). The comment proposes as follows:

> If T. leaves his estate in trust to pay the income to his son for life, remainder to his son's children who survive him, and S. disclaims with two children then living, the remainder in the children accelerates; the trust terminates and the children receive possession and enjoyment, even though the son may subsequently have other children or that one or more of the living children may die during their father's lifetime.

131. *Compare* UNIF. PROBATE CODE § 2-801(c) (5th ed. 1977), which states:

> Unless the decedent or donee of the power has otherwise provided, the property or interest renounced devolves as though the person renouncing had predeceased the decedent or, if the appointment exercised by a testamentary instrument, as though the person renouncing has

Moreover, the common law and the U.P.C. provide that when succeeding takers are members of a class subject to increase in membership, the class remains open only during the continuance of the intermediate interest; a renunciation of the intermediate interest closes the succeeding class.[132] The rationale for such closing is that the "renunciation of such attempted prior interest prevents the period during which such increase was intended to be possible from ever existing."[133]

IV. *LINKOUS V. CANDLER*

A. The Facts of the Case

In *Linkous*, a group of adult children, all over fifty-seven years old, who were beneficiaries of a trust set up by a parent,[134]

> predeceased the donee of the power. A future interest that takes effect in . . ., possession or enjoyment after the termination of the estate or interest renounced takes effect as though the person renouncing had predeceased the decedent or donee of the power. A renunciation relates back for all purposes to the date of the death of the decedent or the donee of the power.

with O.C.G.A. § 53-2-115(c)(1997) (current version at O.C.G.A. 53-1-20(f)(1998)), which states:

> Unless the decedent or donee of the power has otherwise indicated by his or her will, the interest renounced and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced shall pass as if the person renouncing had predeceased the decedent or, if the person renouncing is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the person renouncing had predeceased the donee of the power. In every case the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

132. *See* RESTATEMENT OF PROPERTY, § 231 cmt. i (1936); *see also Cockey*, 118 A. at 850; Lewis v. Payne, 77 A. 321 (Md. 1910); *Christian*, 151 S.E. at 300. But see 28 AM. JUR. 2D Estates § 310 at 506, for an example of a gift to a class subject to open preventing acceleration. The leading case is *Askey v. Askey*, 196 N.W. 891 (Neb. 1923), in which there was additional indication of testator's intent over and above the naked "at the death of" language. *See Askey*, 196 N.W. at 891.

133. RESTATEMENT OF PROPERTY, § 231 cmt. i (1936).

134. The parent was Charles Howard Candler, Jr. *See* Linkous v. Candler, 270 Ga. 284, 285, 508 S.E.2d 657, 658 (1998). Mr. Candler's grandfather was Asa Griggs Candler (1851-1929), an Atlanta druggist, who, in 1886, bought the formula for Coca-Cola from J. S. Pemberton for $2300. A marketing visionary in a frock coat, Asa Candler stewarded his company to international success and himself to unimagined wealth; he was on the board of trustees of Emory University (1914) and served as mayor of Atlanta from 1917-1918. *See* Mark K. Bauman, *Asa Griggs Candler, in* 1 DICTIONARY OF GEORGIA BIOGRAPHY 163 (Kenneth Coleman & Charles Stephen Gurr eds. 1983). Asa's son, Charles Howard Candler, Sr. (1878-1957) served as Coca-Cola's president and chairman

sought a declaratory judgment establishing that their renunciation of their life interests in the trust would result in the acceleration of their children's (*i.e.*, the settlor's grandchildren's) remainder interests in fee.[135]

The settlor of the trust[136] and his wife divorced in 1961 after thirty-two years of marriage.[137] The settlor agreed to create an irrevocable trust pursuant to his divorce settlement.[138] The trust granted a life estate in the entire net income of the trust to the wife.[139] In addition, the trust created an interest in income in the four joint children of the divorced couple during the children's lives.[140] The children received the income without restriction as long as they produced no issue (*i.e.* grandchildren of the settlor).[141] Once a child produced grandchildren, the child retained the right to request a share of income at the trustee's discretion, but otherwise the income was to be distributed to the settlor's living grandchildren, with a substitutional gift per stirpes to the issue of any of the settlor's deceased grandchildren.[142] All the children produced grandchildren.[143] The trust provided that "[u]pon the death of the last survivor of the children . . . the corpus of the trust estate remaining shall be distributed, share and share alike, among the grandchildren . . . then living, with the issue of any then deceased grandchild taking per stirpes its deceased parent's share."[144]

All three living children renounced their limited interest in the income of the trust in order to accelerate the vesting in possession of the interest of the grandchildren by all four

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of the board from 1916 until his retirement in 1923. *See id.* at 166; HAROLD H. MARTIN, ATLANTA AND ENVIRONS: A CHRONICLE OF ITS PEOPLE AND EVENTS 281-82 (1987). Charles Howard Candler, Jr. settled the trust that gave rise to *Linkous* in anticipation of his divorce from Ruth O. Stillman Candler in 1961. *See Linkous*, 270 Ga. at 285, 508 S.E.2d at 658.

135. *See* Appellees' Brief, *supra* note 108, at 2-4.

136. *See id.* at 22.

137. *See id.* at 5.

138. *See id.*

139. *See id.* at 7.

140. *See id.*

141. *See id.* at 8.

142. *See id.*

143. *See id.* at 8-10.

144. Brief of Appellant at 3-4, Linkous v. Candler, 270 Ga. 284, 508 S.E.2d 657 (1998) (No. S98A1011) [hereinafter Appellant's Brief].

children.[145] The superior court found that the children's renunciation would result in the acceleration of the grandchildren's remainder interest.[146] The guardian ad litem for the unborn and otherwise unrepresented descendants of the settlors appealed, arguing that the trust should remain open until the physical death of the settlor's children in order to preserve the interest of any subsequently born or adopted grandchildren.[147]

B. The Guardian's Argument

Appellant guardian ad litem (Guardian) depended primarily on *Wetherbee*.[148] The *Wetherbee* rationale required the court to hold the *Linkous* trust open until the identities of the remaindermen could be ascertained at the natural death of the holders of the prior life estate.[149] The Guardian pointed out a variety of ways in which awaiting the sons' natural deaths could result in takers different from those resulting from acceleration.[150] The Guardian further argued that disposition of the trust property should have been controlled by the portion of the trust agreement that stated "[u]pon the death of the *last survivor* of the children . . . , the corpus of the trust estate remaining shall be distributed, share and share alike, among the grandchildren . . . *then living*, with the issue of any *then deceased* grandchild taking per stirpes its deceased parent's share."[151] The word "then" has two possible and legally distinct meanings in the construction of wills and trusts, meaning either "in the event" (that is, pointing to circumstance) or "at that time" (pointing to actual chronological time).[152] The Guardian argued for the meaning "at that time" in order to establish that

145. *See* Appellees' Brief, *supra* note 108, at 11-12.
146. *See id.*
147. *See* Appellant's Brief, *supra* note 144, at 5-7.
148. *See* Linkous v. Candler, 270 Ga. 284, 508 S.E.2d 657 (1998); Wetherbee v. First State Bank & Trust Co., 266 Ga. 364, 466 S.E.2d 835 (1996).
149. *See* Appellant's Brief, *supra* note 144, at 13.
150. *See id.* at 6.
151. *Id.* at 13 (alteration in original).
152. *See* Clark v. Citizens & Southern Nat'l Bank, 243 Ga. 703, 705-06, 257 S.E.2d 244, 246 (1979); Fourth Nat'l Bank of Columbus v. Brannon, 227 Ga. 191, 192, 179 S.E.2d 232, 233 (1971).

the identities of the grandchildren could not be ascertained until the death of the "last survivor" of the children.[153]

C. The Candlers' Argument

The Appellants (Candlers) adduced the *Restatement of Property* and case law supporting their theory that

> language such as "upon the death of [the life tenant]" is customarily used in wills and trusts to refer to the termination of the preceding life estate, and does not necessarily indicate an intention to preclude acceleration upon termination of a life estate by renunciation rather than by the actual death of the life tenant." [154]

Citing the *Restatement* and precedential case law, the Candlers similarly contended that a remainder gift to an open class does not prevent acceleration upon the prior interest's premature determination.[155]

The Candlers cited a pertinent 1982 Florida District Court of Appeals case, *Weinstein v. Mackey*.[156] There, the testator established a testamentary trust granting a beneficial life interest to her nephew and his wife, remainder to his children "'including children born after [his] death, with a predeceased child's issue taking by representation.'" [157] After the testator's death, the nephew and his wife disclaimed their interest in the beneficial life estate.[158] The trustees sought a construction from the trial court, which ruled that the disclaimers accelerated the remainder into possession in the hands of the nephew's

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153. *See* Appellant's Brief, *supra* note 144, at 13. Although context can be determinative, courts in construction cases are predisposed to find "then" to be a word of reasoning (*i.e.*, "in the event"). *See* Bryant v. Green, 199 S.E. 804, 806 (1938) (discussing the history and rationale of variously construing "then"); 15 DIGEST OF ENGLISH CASE LAW 931-33 (John Mews ed. 1898) ("The word 'then' construed as pointing to the event, and not to the time"). One rationale for such construction is to give effect to the maxim, "The law favors the vesting of remainders in all cases of doubt." *See Bryant*, 199 S.E. at 806 (quoting Ga. Code § 85-708).

154. Appellee's Brief, *supra* note 108, at 25-26, (citing RESTATEMENT OF PROPERTY, § 231 cmt. j (1936); Weinstein v. Mackey, 408 So.2d 849, 850 n.1 (Fla. Dist. Ct. App. 1982); Keen v. Brooks, 47 A.2d 67, 69 (Md. 1946); and Pate v. Ford, 376 S.E.2d 775, 777 (S.C. 1989)).

155. *See id.* at 25-29.

156. *See Weinstein*, 408 So.2d at 850.

157. *Id.* at 850-51.

158. *See id.* at 851.