Michigan Law Review

Volume 39 | Issue 5

1941

RULE AGAINST PERPETUITIES - CONSTRUCTION OF WILLS

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RULE AGAINST PERPETUITIES — CONSTRUCTION OF WILLS — Testator devised properties to trustees to provide his wife and son with an income for life. The will directed that upon the death of the survivor the corpus should be distributed to testator's grandchildren. A later codicil changed the will by providing that the trust principal and undistributed earnings left at the death of the survivor of the life tenants should be payable to the grandchildren when they should reach the age of thirty-five years. No provision was made for the continuance of the trust after the death of the life beneficiaries. Upon the death of the life beneficiaries, an action was brought attacking the disposition to the grandchildren on the ground that it violated the New York statute limiting the period for restrictions on the power of alienation.[1] *Held*, the New York "two-lives" rule rendered invalid any restrictions on alienation beyond the two lives of the life beneficiaries. It was the clear intent of the testator, however, to fix as of the death of the survivor of the life beneficiaries both the persons who should take and the share to which each should be entitled. This dominant purpose can be accomplished without creating intestacy in whole or in part by striking out the invalid portions of the will and admitting the rest. The court hence ordered that the share of a grandson who had reached the age of twenty-one should be paid over immediately, and that the share of each infant granddaughter should be held in trust and paid over upon her attaining the age of twenty-one years, with no accumulation of income permitted during the interval. *In re Eveland's Will*, 284 N. Y. 64, 29 N. E. (2d) 471 (1940).

[1] N. Y. Consol. Laws (McKinney, 1938), Personal Property Law, § 11; Real Property Law, § 42. Sec. 11, Personal Property Law, reads as follows: "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition, or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. . . ." Similar legislation is found in Arizona, California, Idaho, Indiana, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota, and Wisconsin.

Commendable as this decision may be in its avowed purpose of fulfilling substantially the directions of the testator, it cannot be accepted without some question as to its possible violation of the rule against suspension of the power of alienation. Also, there is difficulty in finding a basis for withholding the remainder interest from the grandchildren until they reach the age of twenty-one years. The court found to its satisfaction that the remaindermen's interests were intended to be determined at the date of the decease of the surviving life tenant, and that the same persons would take in the same proportions if the gifts were accelerated instead of postponed until the donees reached the age of thirty-five years. Under this interpretation, the estate would be vested at the end of two lives in being and the devise would be in compliance with the New York "two-lives" statute.[2] This is consistent with the general policy of courts to favor a construction which will preserve the will rather than one which would defeat it in whole or in part.[3] However, there may be serious doubts concerning the court's finding that the dominant intent and purpose of the testator was to fix the interests of the remaindermen at the death of the surviving life beneficiary.[4] The codicil expressly provided that the issue of any deceased grandchild should take the share of their parent by right of representation.[5] Although the failure of the testator to provide for the continuance of the trust for the extended period may be an indication that the remainder interests were to vest immediately, an acceleration of the grandchildren's remainder interest is contrary to the express language and only purpose of the codicil. Courts have generally held that there can be no acceleration of a remainder interest, where, as here, the attempted disposition is void and the rights of the beneficiaries are not vested absolutely.[6] However, the New York courts have been liberal in avoiding the consequences of the rule on suspension of the power of alienation where the invalid parts of the will are secondary in importance to the main purpose of the testator.[7] Accordingly, a trust apparently measured by lives of more than two

[2] A separate examination and discussion of the New York "two lives" rule is found in 2 SIMES, FUTURE INTERESTS, § 564 et seq. (1936); Whiteside, "Suspension of the Power of Alienation in New York," 13 CORN. L. Q. 31 (1927), 167 (1928); 46 HARV. L. REV. 701 (1933).

[3] Whiteside, "Suspension of the Power of Alienation in New York," 13 CORN. L. Q. 31 at 72 (1927); Matter of Hitchcock, 222 N. Y. 57, 118 N. E. 220 (1917); Matter of Horner, 237 N. Y. 489, 143 N. E. 655 (1924).

[4] The appellate division in the principal case, 258 App. Div. 432, 16 N. Y. S. (2d) 737 (1940), found that there were several contingencies which would prevent the remainder from vesting. In reversing a solution much like that finally adopted by the court of appeals in the principal case, the appellate division held that it was impossible to conceive of a disposition more at variance with the dominant purpose of the testator.

[5] It might be possible to construe this provision as a vested remainder subject to divestment, but even this construction would be contrary to the "two lives" rule.

[6] Matter of Durand, 250 N. Y. 45, 164 N. E. 737 (1928); Matter of Silsby, 229 N. Y. 396, 128 N. E. 212 (1920); In re Chittick, 243 N. Y. 304, 153 N. E. 83 (1926).

[7] A leading opinion expounding this principle is that written by Cardozo in

persons may be divisible into separate valid trusts; [8] a provision for an illegal accumulation may be destroyed and a trust for life preserved; [9] or an illegal suspension added by a codicil may be eliminated and the will proper preserved.[10] More perplexing, in the principal case, is the direction that the trustee should continue to hold the trust fund for each infant until she should reach twenty-one. The cases allowing acceleration of remainder interests in trusts which run beyond the allowable period provide for the striking out of the invalid part entirely, not for the substitution of a shorter term of years.[11] Nor is there any language in the instrument authorizing such retention of the remainder interest by the trustee, as the will without the codicil provides for immediate vesting upon the death of the life tenants. Furthermore, the withholding of the remainder interest after the expiration of the "two lives" and until the grandchildren reach their majority can only be justified on the assumption that the estate is not held in trust and that only actual payment is postponed.[12] It is established that no suspension of alienation results if the beneficial interests under a will are vested in the devisees, and the property is not held on a trust which vests title in the trustees, but possession only is withheld from the devisee or payment over to him is postponed to a future time.[13] It is not clear in the principal case whether the court adhered to this doctrine, or even to a narrower one to the effect that the suspension of the full power to alienate during minority results only from the disability of infancy.[14] In either event it is a questionable practice for a court to make such a disposition when not specifically authorized to do so by the terms of the instrument in issue.

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Matter of Horner, 237 N. Y. 489, 143 N. E. 655 (1924). See in general, Whiteside, "Suspension of the Power of Alienation in New York," 13 CORN. L. Q. 31 (1927), 167 (1928); 46 HARV. L. REV. 701 (1933).

[8] Matter of Horner, 237 N. Y. 489, 143 N. E. 655 (1924).

[9] Matter of Central Union Trust Co., 193 App. Div. 292, 183 N. Y. S. 671 (1920).

[10] Hertzog v. Title Guarantee & Trust Co., 177 N. Y. 86, 69 N. E. 283 (1903).

[11] Gettins v. Grand Rapids Trust Co., 249 Mich. 238, 228 N. W. 703 (1930); Story v. First Nat. Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934).

[12] In any given case, it may be difficult to determine whether the property is held by the executors under an "administrative title" [Matter of Chittick, 243 N. Y. 304, 153 N. E. 83 (1926)] giving them possession and actual management until the time of payment arrives, or under a trust giving them the same control and management, but with entirely different results. Matter of Hitchcock, 222 N. Y. 57, 118 N. E. 220 (1917); Matter of Trevor, 239 N. Y. 6, 145 N. E. 66 (1924).

[13] 48 C. J. 935 (1929); In re Carroll's Will, 274 N. Y. 288, 8 N. E. (2d) 864 (1937).

[14] Matter of Trevor, 239 N. Y. 6, 145 N. E. 66 (1924); In re Froman's Estate, 165 Misc. 400, 300 N. Y. S. 1088 (1937).