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TRUSTS — TERMINATION OF TRUSTS WHERE LIFE BENEFICIARY ACQUIRES REMAINDER — PROOF OF IMPOSSIBILITY OF ISSUE — Plaintiff was named life beneficiary of a trust, the legal remainder being disposed of to her children, or if she died without issue, then to *H*. *H* died before the plaintiff; and the plaintiff, establishing that she is childless and no longer capable of having issue, seeks a termination of the trust on the ground that the now intestate remainder has become vested in her, the sole heir at law of the settlor. *Held*, both an unrestricted life estate and the legal remainder being in the plaintiff, the trust can be terminated. *White v. Weed*, (N. H. 1934) 175 A. 814.

It is a generally accepted principle of trust law that a trust will be terminated by the court [1] where the life beneficiary acquires, by inheritance or purchase, the legal remainder, regardless of whether the period of duration fixed by the settlor has expired [2] unless it would work an injustice so to do [3] or the intent of the

[1] The reason sometimes given for allowing the termination is one of merger; but this is not strictly accurate since that doctrine applies only where the interests meeting in the same person are of the same character, and in the case here discussed the intervening legal estate of the trustee prevents a true merger. Asche v. Asche, 113 N. Y. 232, 21 N. E. 70 (1889); 4 BOGERT, TRUSTS AND TRUSTEES, § 998 (1935); annotation, 2 A. L. R. 579 (1919). It would seem better to treat the termination as founded on the accomplishment of the trust purpose, which would then explain why termination is not allowed where, for example, the trust is a spendthrift trust. Moore's Estate, 198 Pa. 611, 48 A. 884 (1901). See Evans, "The Termination of Trusts," 37 YALE L. J. 1070 (1928).

[2] 2 A. L. R. 579 (1919); Davis v. Goodman, 17 Del. Ch. 231, 152 A. 115 (1930); Thomas v. Rhode Island Hospital Trust Co., 50 R. I. 369, 147 A. 884 (1929). Closely related cases are those similar to the situation in Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393 (1889), or those in which all possible beneficiaries come together seeking a termination of the trust. These cases, however, have received separate treatment by the courts, and it is clear that here the intent of the settlor is more definitely expressed. Yet the same principles in all the cases would seem to apply. In regard to these cases, see Evans, "The Termination of Trusts," 37 YALE L. J. 1070 (1928); 27 ILL. L. REV. 227 (1932); annotation, 45 A. L. R. 743 (1926).

[3] Allen v. Allen's Trustee, 141 Ky. 689, 133 S. W. 543 (1911); Turnage v.

settlor is manifested to the contrary.[4] But the mere giving of administrative duties to the trustee, without more, is not enough to prevent a termination.[5] In the state of New York the right of the beneficiary to terminate is regulated by statute.[6] Any intent of the settlor in the principal case to prevent a termination of the trust being undisclosed, the correctness of the decision allowing the termination depends solely on whether there is any interest which might be prejudiced. And in turn whether there is such an interest must depend on whether the court will adopt the conclusive presumption that a woman is capable of having children as long as she lives. Such a presumption has uniformly been applied to a number of varying situations;[7] and in regard to the terminating of trusts and the distri-

Green, 2 Jones Eq. (55 N. C.) 63, 62 Am. Dec. 208 (1854); Carney v. Kain, 40 W. Va. 758, 23 S. E. 650 (1895).

[4] Bowlin v. Citizens' Bank & Trust Co., 131 Ark. 97, 198 S. W. 288, 2 A. L. R. 575 (1917); Herrick v. Slocombe, 84 N. H. 413, 151 A. 81 (1930); Equitable Trust Co. v. Snader, 17 Del. Ch. 203, 151 A. 712 (1930); and see 4 BOGERT, TRUSTS AND TRUSTEES, § 998 (1935); 2 A. L. R. 579 (1919).

[5] Fox v. Fox, 250 Ill. 384, 95 N. E. 498 (1911); Simmons v. Northwestern Trust Co., 136 Minn. 357, 162 N. W. 450, L. R. A. 1917F 736 (1917); collection of cases, 2 A. L. R. 579 (1919).

[6] For discussion of the New York statute see Chaplin, "Destruction of Express Trusts by Merger," 3 COL. L. REV. 155 (1903), and 2 A. L. R. 579 (1919).

[7] In applying the presumption to determine whether the rule against perpetuities has been violated, the English and American cases are unanimous in holding that the presumption is conclusive. Blackhurst v. Johnson, (C. C. A. 8th, 1934) 72 F. (2d) 644. As the present note points out, when it comes to a question of the termination of trusts, the English and American courts split, nearly all the courts of this country making the presumption conclusive. Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932). In its application to the problem of distribution of property the courts have, generally speaking, been consistent in holding the presumption irrebuttable, but there appear also cases to the contrary. See annotation 48 L. R. A. (N. S.) 865 (1914), continued in 67 A. L. R. 538 (1930). In regard to the question whether the vendor's title is good, where a fee is liable to be divested by birth of issue, the American courts are again prone to prohibit all evidence of incapacity in order to complete the title. Azarch v. Smith, 222 Ky. 566, 1 S. W. (2d) 968 (1928). A few recent federal cases have considered the question whether evidence was admissible to prove that an estate contingent on a named person's dying without issue had vested at the time of the testator's death, for taxation purposes, because of impossibility of that named person's having issue. In the first case, the court held the evidence, although the nature of it is not clear, to be inadmissible. Farrington v. Comr. of Internal Revenue, (C. C. A. 1st, 1929) 30 F. (2d) 915, 67 A. L. R. 535, noted 15 IOWA L. REV. 100 (1929), cert. denied, 279 U. S. 873, 49 S. Ct. 513 (1929). Yet the United States Supreme Court, a little later, without expressly overruling this case, or even discussing it, held that for the same purpose evidence of a physical operation could be introduced to prove the vesting of the remainder. United States v. Provident Trust Co., 291 U. S. 272, 54 S. Ct. 389 (1934), noted 32 MICH. L. REV. 702 (1934), 47 HARV. L. REV. 1061 (1934), 9 NOTRE DAME LAWYER 373 (1934), 18 MINN. L. REV. 755 (1934), 1 UNIV. CHI. L. REV. 820 (1934), 12 TENN. L. REV. 301 (1934), 11 N. Y. UNIV. L. Q. REV. 646 (1934), 40 W. VA. L. Q. 394 (1934); affg. Provident Trust Co. v. United States, (Ct. Cl. 1933) 2 F. Supp. 472, noted 32 MICH. L. REV. 414 (1934), 81 UNIV. PA. L. REV. 879 (1933). And a little before the Supreme Court decision, but after the lower court decision in this case, another lower federal court held

bution of property, the well settled rule in this country is opposed to the admission of any evidence as to incapacity.[8] The instant case, therefore, in allowing the evidence to be introduced is in the very definite minority, although it is in accord with the English view that the probability of issue, not the possibility of issue, is the true problem in every case regarding termination of trusts.[9] The surprising thing in the case, however, is the ease with which the court skipped over the problem as though it did not exist.[10] It is submitted, nevertheless, that to admit the evidence to rebut the presumption is the wiser and better policy. That policy which stands behind the rule against perpetuities, that future estates must not remain contingent too long, thus restricting the present owner's power of alienation,[11] may well dictate that the presumption of capacity should be conclusive in that situation; but the self-same policy would seem rather to dictate that in the cases involving the termination of trusts the presumption should be rebuttable.

that evidence that a woman was 59 years old was admissible to show she would never have issue. The purpose was the same as in the other two cases. City Bank Farmers' Trust Co. v. United States, (D. C. N. Y. 1934) 5 F. Supp. 871. The court made use of birth statistics in arriving at its conclusion. On the whole problem of the use of the presumption in the various situations, see annotation 48 L. R. A. (N. S.) 865 (1914), continued in 67 A. L. R. 538 (1930).

[8] Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932). See also 48 L. R. A. (N. S.) 865 (1914), and 67 A. L. R. 538 (1930). In Frank v. Frank, 153 Tenn. 215, 280 S. W. 1012 (1926), the court allowed the trust to terminate on proof of old age, but required a bond to protect any child born thereafter. New Jersey, at one time, apparently, allowed the presumption to be rebutted, Apgar's Case, 37 N. J. Eq. 50 (1883); Male v. Williams, 48 N. J. Eq. 33, 21 A. 854 (1891); but the more recent cases seem to have refused to admit the evidence, Application of Smith, 94 N. J. Eq. 1, 118 A. 271 (1922), noted 23 COL. L. REV. 51 (1923). West Virginia also allows the presumption to be rebutted. Carney v. Kain, 40 W. Va. 758, 23 S. E. 650 (1895). Most of the courts state the presumption as an arbitrary rule without exception. Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932). It is probable that in a great majority of cases the only proof attempted was that of old age and accompanying physiological changes, but the *dictum* in all but one or two of the cases is to rule out even such conclusive evidence as that of surgical operations. Cf. Ricards v. Safe Deposit & Trust Co., 97 Md. 608, 55 A. 384, 63 L. R. A. 145 (1903); Hill v. Sangamon Loan & Trust Co., 295 Ill. 619, 129 N. E. 554 (1920). But in Hill v. Spencer, 196 Ill. 65 at 70, 63 N. E. 614 (1902), the court held that an allegation that a woman was past the time of life to bear children was meaningless, "unless more than a mere matter of age is stated in the bill."

[9] See annotation in 48 L. R. A. (N. S.) 865 (1914), continued in 67 A. L. R. 538 (1930), for lists of cases.

[10] A search of the digests and New Hampshire statutes has failed to show any prior recorded case on the point, or any law regarding the presumption. In response to a request for information on this point, the attorneys for one of the litigants wrote, in a personal letter, "While we do not recall any particular decision on the question you mention in our reports, we believe it has generally been considered in New Hampshire that the question is one of fact to be found by the trial court upon such evidence as may be competent."

[11] See GRAY, THE RULE AGAINST PERPETUITIES, 3rd ed., § 118a (1915); 1 TIFFANY, REAL PROPERTY, 2d ed., § 179 (1920).

Moreover, the several arguments and theories [12] advanced in favor of making the presumption conclusive seem to diminish in importance when the problem is viewed in the light of the English decisions.[13] Hence, the principal case is welcomed, although a thorough reconsideration of the problem is desirable.[14]

J. B. B.

[12] Some of these arguments are: (1) that the age at which ability to procreate ceases cannot be ascertained with any degree of certainty, (2) that the subject is one of such delicacy that it should not be investigated in judicial proceedings, (3) that consideration of such evidence might encourage the performance of surgical operations to prevent birth of issue, and (4) that the prevailing rule tends to eliminate confusion of titles. See Ricards v. Safe Deposit & Trust Co., 97 Md. 608, 55 A. 384, 63 L. R. A. 145 (1903); Hill v. Sangamon Loan & Trust Co., 295 Ill. 619, 129 N. E. 554 (1920). To these might be added a fifth reason: that an adjudication of capacity in one suit would not prevent the starting of a subsequent suit on the allegation that while at the prior trial there might have been some doubt, at this time there no longer could be any; and so the courts would be crowded with cases recurring every few years until a favorable adjudication was given. But all these points seem to be theoretical objections rather than practical. For criticism of the rule making the presumption conclusive see 47 HARV. L. REV. 1061 (1934); 23 COL. L. REV. 50 (1923); 11 N. Y. UNIV. L. Q. REV. 646 (1934); 12 TENN. L. REV. 301 (1934).

[13] Cf. the citations in note 11, supra.

[14] The federal tax cases, discussed in note 7, supra, have intimated a change of attitude toward the presumption in this country. However, they can hardly be considered as affecting the rules of property heretofore existent, and must be considered as applicable only to their facts. But it would seem that if proof can be admitted under one set of circumstances it may be admitted under others unless, as in the cases involving the rule against perpetuities, there is a strong policy argument against such evidence.