Michigan Law Review

Volume 34 | Issue 4

1936

TRUSTS - DURATION OF AN INDESTRUCTIBLE TRUST

TRUSTS — DURATION OF AN INDESTRUCTIBLE TRUST — The celebrated case of *Claflin v. Claflin* [1] left in its wake a number of novel legal problems, some of which have been at best only partially resolved. One of the most perplexing is that of the duration of the so-called "indestructible trust." Once such an "indestructible trust" is created, how long may it be permitted to endure? If an attempt is made to attain excessive duration, what penalty attaches? What disposition will be made of the legal and equitable estates?

Claflin v. Claflin decided in effect that even though all those having beneficial interests under a trust were *sui juris* and united in requesting termination thereof, the court would not terminate the trust if such termination decree were repugnant to the settlor's intent or purpose as manifested by the trust instrument.[2]

Although the *Claflin* doctrine has attracted a large following in the various state courts [3] and may be said to be the American rule, it is in

[1] 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393 (1889).

[2] Assuming, of course, that the trust is still active. Cf. statement of the rule in BOGERT, HANDBOOK OF THE LAW OF TRUSTS 580 (1921); 1 BOGERT, THE LAW OF TRUSTS AND TRUSTEES 671-672 (1935). Legal writers have differed as to the wisdom of this rule. Kales felt that it rested upon a foundation of better reason than the contrary view which he thought had only tradition to support it and that while it might permit of unwise restraints upon alienability in particular instances, such a possibility did not suggest any general reason of public policy which would prevent enforcement of a settlor's intent by means of this doctrine. KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2d ed., § 294 (1920). Cf. Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 632 at 648 (1917). Gray found the same paternalistic influences at work behind such a view as behind that which countenanced spendthrift trusts, and consequently Claflin v. Claflin shared the antipathy he always evidenced toward the latter; or as expressed by Professor Scott, "The purpose of a spendthrift trust is the coddling of a person as against himself and as against third persons. The purpose of the postponement of enjoyment is simply the coddling of a person against himself."

[3] For collections of cases and jurisdictions adopting the Claflin doctrine, see BOGERT, HANDBOOK OF THE LAW OF TRUSTS 580-582 (1921); 1 BOGERT, THE LAW OF TRUSTS

direct conflict with the common law rule as enunciated by the English case of *Saunders v. Vautier*.[4] Under this rule if all cestuis are *sui juris* and join in desiring to terminate, the court will put an end to the trust even though the settlor's intent may be thereby clearly overriden.[5]

Curiously enough, however, the problem of duration of indestructibility seems also to present itself in jurisdictions which purport to reject the *Claflin* rule and follow that of the common law. The Supreme Court of Florida, in the case of *Story v. First Nat. Bank and Trust Co. in Orlando*,[6] although it reached the somewhat anomalous position of rejecting the rule of *Claflin v. Claflin*,[7] nevertheless held that the testamentary trust there involved was not immediately destructible. The court's answer to the question of how long indestructibility may last is somewhat unsatisfactory. It would seem according to the decision, that no one may question the provisions regarding duration until the proper time has elapsed. The issue will then be decided upon the facts which are apparent at the time.[8] Such a solution, obviously, merely sidesteps the issue and postpones the ultimate solution.

Although ostensibly nothing more is decided by the Florida court

AND TRUSTEES 671 (1935); SCOTT, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS, 2d ed., 785-786 (1931); 37 A. L. R. 1420 (1925).

[4] 4 Beav. 115, 49 Eng. Rep. 282 (1841). The same view was adopted as to charitable trusts in Wharton v. Masterman, [1895] A. C. 186. Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 at 396 (1934), sums up the English point of view: "The case [Saunders v. Vautier] . . . is followed . . . establishing the rule that, when all beneficiaries are sui juris and all interests vested, the beneficiaries may unite and force a termination contrary to the terms of the trust instrument."

[5] Cf. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 579 (1921); 1 BOGERT, THE LAW OF TRUSTS AND TRUSTEES 645, 671 (1935). Postponement of transfer to the cestui may be accomplished, however, in a jurisdiction adhering to the view of Saunders v. Vautier by the simple expedient of subjecting the entire trust estate to a charge for an inconsiderable amount for some third party. In such a case the one holding the bulk of the equitable interest is not the sole beneficiary and so may not demand a conveyance. See Harbin v. Masterman, 12 Eq. 559 (1871); Talbot v. Jevers, 20 Eq. 255 (1875); Weatherall v. Thornburgh, 8 Ch. D. 261 (1875).

[6] 115 Fla. 436, 156 So. 101 (1934). Testator created a trust estate with defendant as trustee for his wife and children. It was provided that if any of the named children predeceased testator or died prior to the distribution to him of his share of the estate, such share should be held in trust and not distributed to the children of such deceased child until the youngest of them reached the age of thirty years. The share of one of testator's daughters, Kate Agnes Story Burch, was not to be paid to her in any event but she was to receive only the income therefrom and the corpus of her portion held in trust for her and her children until the youngest of them became thirty.

[7] 115 Fla. 436 at 443. "The Claflin doctrine or some other modification of the common law rule has been provided in many states by statute but in this State no change having been made, we are bound by the common law rule."

[8] The effect of this is to render the trust possibly indestructible for at least thirty years after testator's death. It does not appear how old Kate Agnes Story Burch was or whether her husband was still living; in any event her share was not to be given her nor

than that the trust is not presently assailable because of its indestructible character, it is intimated that the restraining provision might not be sustained in its entirety upon attack in the future. The possibility is indicated that indestructibility may be immune from attack only during the lives of testator's children and may not be preserved thereafter until the youngest of any of the as yet unascertained children's children who may acquire a beneficial interest reaches the age of thirty. This disposition to decide the matter by innuendo runs through much of the case material on the problem, and while it is indicative of the court's feeling, it can hardly be relied upon as absolute authority.

It appears not unlikely that these courts are considering the idea that indestructibility may be permitted to last for the period of the rule against perpetuities: lives in being plus twenty-one years with an additional allowance for the period of gestation.[9] As the court in the *Story* case very correctly reiterates several times with considerable emphasis, the perpetuities rule itself in no way applies to the situation.[10] They find that all future estates will vest at once or during the permitted period. But though there is no question of the time of vesting involved here, might not the period during which vesting of estates is permitted be carried over to delimit their indestructibility?

That the situations presented are not dissimilar was early remarked by Gray [11] who held that *Claflin v. Claflin* recognized a novel idea in the law as did *Pells v. Brown* [12] centuries before when it introduced the idea of the indestructibility of future interests. Just as the courts had to invent or "discover" the rule against perpetuities [13] to control the creation of the indestructible future estates made possible by *Pells v. Brown*,

distributed among her children until the youngest of them had reached the age of thirty years.

[9] Cf. GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., 174, § 201 (1915); KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2d ed., 113-114, § 119 (1920); TIFFANY, THE LAW OF REAL PROPERTY, 2d ed., § 179 (1920); Kales, "Several Problems of Gray's Rule Against Perpetuities, Second Edition," 20 HARV. L. REV. 192 at 198-199 (1907); 5 ILL. L. REV. 385 at 387 (1911).

[10] Cf. Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 at 395 (1934); GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., 105, § 121f (1915); KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2d ed., 852, § 737 (1920); TIFFANY, THE LAW OF REAL PROPERTY, 2d ed., 609-610, § 183 (1920); Scott, "Control of Property by the Dead," 65 UNIV. PA. L. REV. 632 at 649 (1917).

[11] GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., 106-107, § 121 (1915).

[12] Cro. Jac. 590, 79 Eng. Rep. 504 (1620).

[13] The fuller development of the rule may be roughly traced through the Duke of Norfolk's Case, 3 Chan. Cas. 1, 22 Eng. Rep. 931 (1682); Cadell v. Palmer, 1 Clark & Finnelly 372, 6 Eng. Rep. 956 (1833); London & S. W. Ry. Co. v. Gomm, 20 Ch. D. 562 (1882).

so they must now find criteria with which to circumscribe the indestructible [14] interests arising out of *Claflin v. Claflin.*

The few actual decisions and frequent dicta that have touched upon the problem are far from clear. From an examination of the authorities, Cleary [15] concludes that in general the courts have refused to void entirely the interest of cestuis under a trust merely because its duration is excessive [16] when it is attacked by one not a party thereto, such as an intestate successor who will take in the event the trust is avoided.[17]

Quite another problem, however, is presented if the beneficiaries

[14] Although often so denominated, interests of this sort can hardly be said to be inalienable. De Ladson v. Crawford, 93 Conn. 402, 106 A. 326 (1919); Hall's Estate, 248 Pa. 218, 93 A. 944 (1915). However, there is probably very little actual trafficking in them; practically, substantial inalienability is generally achieved. Cf. Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 at 400 (1934); 9 MINN. L. REV. 562 at 565 ff. (1925). But to facilitate clarity in discussion, "indestructibility" seems preferable to and more exact than "inalienability."

[15] Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 at 398: "No case is found, not since overruled expresssly or by implication, which must be regarded necessarily as holding that a trust for private persons is void as to both legal and beneficial interests on the sole ground that its duration is excessive." For cases upholding trusts so attacked, see ibid. at p. 398, n. 21.

[16] Loomer v. Loomer, 76 Conn. 522, 57 A. 167 (1904); Greenwich Trust Co. v. Shively, 110 Conn. 117, 147 A. 367 (1929); Sandford's Admr. v. Sandford, 230 Ky. 429, 20 S. W. (2d) 83 (1929).

[17] In reaching the conclusion above set forth it is necessary for Cleary to explain away the famous decision of Fitchie v. Brown, 211 U. S. 321, 29 S. Ct. 106 (1908). This case, in which the celebrated John C. Gray appeared as of counsel for the appellees, involved a quarter of a million dollars' worth of property (approximately equal amounts of realty and personalty) situated in Hawaii and Ireland. There were some pecuniary legacies, then "the balance, residue or remainder of my estate is to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute . . ." for the benefit of "forty odd" cestuis. The trust was attacked by the heirs at law. The court upheld the trust created, basing its decision, since there was no statute applicable, upon the common law. The court says at p. 333: "It must be assumed that the testator was not positive as to the time provided by law for the duration of a trust, or whether it was limited by any particular statute. It is enough to know that his desire was to have the trust continue as long as was legally possible, and consistent with distribution as directed, and that the estate was to be then distributed, and hence the trust to pay the annuities was to cease when it would no longer be consistent with the provision for distribution." And at p. 329 "the utmost extent of a trust at common law is limited by lives in being at its creation and for twenty-one years thereafter." Cleary, at p. 399 (op. cit. n. 4, supra), would dispose of the case upon two grounds. First, the last quoted statement is dictum, it is not required by the facts of the case. This may be quite true but it would seem an unduly narrow interpretation by which to avoid the explicit language of the court and the clearly intended effect of the decision. Further, he objects that Mr. Justice Peckham confused the problem with that of the rule against perpetuities. It would seem rather that he indicated that the same period and the same considerations which apply in the one case will apply in the other.

themselves seek prematurely to terminate the trust. Dicta and the views of legal writers rather than definite pronouncement by the courts must be relied upon here. Many decisions advert to the problem and indicate that the perpetuities period is the limit of duration but none can be cited as absolute authority. Among these are *Pennsylvania Co. v. Price*,[18] *Southard v. Southard*,[19] *Armstrong v. Barber*,[20] *Winsor v. Mills*,[21] *Shallcross's Estate*,[22] *Colonial Trust Co. v. Brown*,[23] *Van Epps v. Ar-*

[18] 7 Phila. (Pa.) 465 (1870). Property was deeded in trust to testator's eight children, their heirs and assigns forever. The trustee was to distribute the principal among the children who attained the age of twenty-one if he thought it prudent to do so; otherwise to pay over merely rents and profits. He could sell and invest at his absolute discretion. The lunatic committee of one child sought to obtain his share. It succeeded. Inasmuch as the court held that the child had absolute equitable fee no question of the rule against perpetuities enters. The case seems to say that if the trustee and heirs so chose, there might result an endless estate which public policy could not sustain.

[19] 210 Mass. 347, 96 N. E. 941 (1911). Half the income of a trust made in 1856 was to be used to pay off mortgages. The estate was to remain undivided until they were paid. It is not clear what the court decided in 1911, but it seems it would decree termination. However, the case is in no way authority for the trustee was not resisting termination but rather asking for instructions.

[20] 239 Ill. 389, 88 N. E. 246 (1909). The Illinois court demonstrates that the rule against perpetuities has reference to the time of the vesting of the estate and not to the postponement of possession, and that an interest which is to begin within lives in being and twenty-one years thereafter, though it may end beyond such period, does not come within the rule. At p. 403 the court does, however, say: "Once such trusts are permitted, it follows that there must be some limits as to the length of time they can be made to last." Such necessity is further commented upon but the question of when the trust may end is found not essential to the decision of the case. Nevertheless, the inescapable implication of the holding is that such a provision would be held void if the trust were to endure too long and the issue were squarely presented the court.

[21] 157 Mass. 362, 32 N. E. 352 (1892). The decision rests upon another ground but it is often cited for the statement found at p. 364: "but where such a restraint is held permissible for a limited time, it would be deemed unreasonable, and contrary to the policy of the law, to allow it to continue beyond the period fixed by the rule against perpetuities."

[22] 200 Pa. 122, 49 A. 936 (1901). The testator gave property in trust for named minor children of a son. A codicil directed that it be paid them when they reached the age of twenty-five. All survived testator. It was held that their respective estates vest in them and that they are entitled to receive their shares when they reach their majorities. The devise is said to violate the rule against perpetuities; but the decision further reads, at p. 125: "While it was evidently the wish of the testator to postpone the payment of the bequests to the grandchildren until they attained the age of twenty-five years, yet this desire cannot be upheld, as it is against the rule of public policy, forbidding restraint in the use or disposition of property, in which no one but the beneficiary has any interest." Gray has interpreted this as rejecting the Claflin doctrine. THE RULE AGAINST PERPETUITIES, 3d ed., 104, § 121c (1915). Similarly, Kales finds it dictum for the view of the Saunders case. ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2d ed., § 733 (1920).

[23] 105 Conn. 261, 135 A. 555 (1926). Trustee was restrained from alienating realty for lives in being followed by lives not in being. It was held that all interests

buckle.[24] In the last named case there was a devise in trust with trustees to collect rents and profits and apply them upon encumbrances upon the trust property and other lands. After such payment was completed, the trustees were to make payments to persons named in the will or delay such payment as they deemed expedient. There was no restraint upon the alienation of any specific property. It appeared that at the then rate of income it would require 275 years to pay off the encumbrances. Upon this ground alone the court held that the cestuis were entitled to termination.[25]

Legal writers are more explicit and recognize that while there is nothing sacrosanct in the lives in being and twenty-one years period it is one to which the courts are accustomed and by force of analogy will probably adopt.[26] The same conclusion has been reached in works treating of the permissible duration of a business trust.[27]

When should such a period begin to run? Virtually all writers adopt Kales' view [28] that in testamentary cases the period should begin to run at the time of testator's death. This position makes for simplicity

vested within the perpetuities period. The decision clearly recognizes the distinction between the rule against perpetuities and the rule preventing restraints upon alienation but says that analogous situations are presented so that alienation may not be fettered for more than lives in being and twenty-one years. It is indicated that there might be circumstances in a particular case which would make a restraint for a shorter period so contrary to public policy as to be held invalid. The court directed the trustee to sell the realty. Cf. this case and Shallcross's Estate, supra, n. 22, with Angell v. Angell, 28 R. I. 592, 68 A. 583 (1908) which, at p. 601, holds that equity will terminate a trust when no good reason for its continued existence any longer obtains.

[24] 332 Ill. 551, 164 N. E. 1 (1928).

[25] 332 Ill. 551 at 558: "There is no direction in the will of testatrix for distribution by the trustees at any particular time. The trust was of unlimited duration. The distribution was postponed to such time as the trustees in their discretion might deem best or expedient. It seems clear that the devise to the trustees to distribute being without limitation as to time is void. It deprived the devisees of the use of the remainder or the power to sell it to advantage until the indebtedness mentioned was paid. . . . The devisees had a right to have the unlawful trust terminated. . . ."

[26] Cleary, "Indestructible Testamentary Trusts," 43 YALE L. J. 393 at 402-403 (1934); GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., 107, § 121 (i) (1915); KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2d ed., 851-852, § 737 (1920); Fraser, "The Rules Against Restraints on Alienation and Against Suspension of the Absolute Power of Alienation in Minnesota," 9 MINN. L. REV. 314 at 326 (1925); SCOTT, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS, 2d ed., 649, § X (1931).

[27] Whiteside, "Restrictions on the Duration of Business Trusts," 9 CORN. L. Q. 422 at 428 (1924); Clark, "Unenforcible Trusts and the Rule Against Perpetuities," 10 MICH. L. REV. 31 at 37 (1911); THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS 42 (1920); DUNN, TRUSTS FOR BUSINESS PURPOSES 415 (1922); SEARS, TRUST ESTATES AS BUSINESS COMPANIES, 2d ed., § 109 (1921); WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS 32-34 (1916).

[28] 20 HARV. L. REV. 192 at 202-204.

and for ease in applying the rule, even though it may perhaps lack the logical consistency and nicety of Gray's thesis that the period should run "from the beginning of the interest which is subject to the postponing clause." [29]

In conclusion, the decision in the *Story* case seems to be in line with the better reasoning when it intimates that the possibility of enjoyment of both legal and equitable estates by the eventual beneficiaries will be accelerated. Kales, however, has said that such a postponed enjoyment clause is "wholly void if it may possibly last longer than a life in being and twenty-one years." [30] The attribute of indestructibility is thus lost from the outset. It seems probable that this would now be taken only to indicate that the undue postponement is void, not the entire interest created by the clause in the cestui. It is not the settlor's attempt to create an estate for the ultimate beneficiary that offends against public policy but only his effort unduly to keep him from the complete enjoyment of it.

F. K. B.

[29] 19 HARV. L. REV. 604 at 605 (1906); GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., 107-108, § 121ii (1915).

[30] KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS, 2d ed., § 737 at p. 852 (1920). Gray would seem likewise to have held this view. GRAY, THE RULE AGAINST PERPETUITIES, 3d ed., §§ 121 (c)-121 (i) (1915).