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Trusts-Termination-Proof of Impossibilty of Issue

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TRUSTS—TERMINATION—PROOF OF IMPOSSIBILITY OF ISSUE—The surviving trustee of a testamentary trust petitioned the probate court for authority to terminate and distribute the trust in accordance with a compromise agreement between all interested persons apart from the possible issue of one beneficiary. Undisputed medical testimony was received that neither the beneficiary nor his wife were capable of procreation. On a question of law certified to the New Hampshire Supreme Court, *held*, remanded with instructions to terminate and distribute the corpus of the trust. Termination of a trust in prejudice of the interests of possible future issue is permissible when the possibility of such issue is demonstrably negligible. *In re Bassett's Estate*, 190 A.2d 415 (N.H. 1963).

The traditional view, a product of a medically less sophisticated society, is that any human being is conclusively presumed at law to be capable of bearing children until death. Mentioned earlier by Sir Edward Coke in the context of the fee tail,[1] this irrebuttable presumption was firmly established as part of the common law by Lord Kenyon in *Jee v. Audley*.[2] Aside from the influence of the Biblical narrative of Isaac's birth to venerable parents,[3] the indelicacy of the inquiry and the inconclusiveness of the medical evidence were the primary moving considerations.[4]

1 COKE, COMMENTARY UPON LITTLETON 28a.
2 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).
3 Genesis 17:17, 21:5 (to Abraham, aged one hundred, and Sarah, aged ninety).
4 3 POWELL, REAL PROPERTY § 347 (1952).

With regard to the termination of trusts,[5] the marketability of titles,[6] and the Rule Against Perpetuities,[7] the great majority of American courts passing on the question have adopted the common-law conclusive presumption. Significantly, however, ever since the leading case of *United States v. Provident Trust Co.*,[8] the presumption has been held rebuttable in the more pragmatic area of taxation.[9] The English courts, moreover, having reversed themselves since *Jee v. Audley*, consistently hold the presumption rebuttable by clear evidence in all contexts except the Rule Against Perpetuities.[10] Further, several American courts have recently expressed dissatisfaction with the conclusive presumption,[11] one jurisdiction apparently having reversed an earlier acceptance of the rule,[12] while several others have narrowed its applicability through liberal interpretation.[13] In the principal case, therefore, the court has adopted a distinct minority view in holding the presumption rebuttable when the question is the termination of a trust, and it is virtually alone in suggesting that it would hold similarly when confronted with the Rule Against Perpetuities.[14]

5 See, *e.g.*, P v. Wilmington Trust Co., 188 A.2d 361 (Del. Ch. 1962); Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932). *Contra*, White v. Weed, 87 N.H. 153, 175 Atl. 814 (1934), reaching the result of the principal case although not considering the question in detail.

6 See, *e.g.*, Love v. McDonald, 201 Ark. 882, 148 S.W.2d 170 (1941); Shepherd v. Moore, 283 Ky. 181, 140 S.W.2d 810 (1940). *Contra*, Whitney v. Groo, 40 App. D.C. 496 (D.C. Cir. 1913), holding a title marketable where the only objection was that children thereafter born to a seventy-year-old widow would be entitled to an interest in the property.

7 See, *e.g.*, Fletcher v. Los Angeles Trust & Sav. Bank, 182 Cal. 177, 187 Pac. 425 (1920); Letcher's Trustee v. Letcher, 302 Ky. 448, 194 S.W.2d 984 (1946); McPherson v. First & Citizens Nat'l Bank, 240 N.C. 1, 81 S.E.2d 386 (1954).

8 291 U.S. 272 (1934).

9 See Annot., 146 A.L.R. 794 (1943).

10 See Annot., 146 A.L.R. 794 (1943); Annot., 67 A.L.R. 538, 543 (1930).

11 In a jurisdiction which has long accepted the conclusive presumption, it was recently suggested that if a situation sufficiently compelling were presented, it might relax the rule. McPherson v. First & Citizens Nat'l Bank, 240 N.C. 1, 19, 81 S.E.2d 386, 398 (1954). Other courts have indicated that they were following the rule only because of the authoritative precedent. See, *e.g.*, P v. Wilmington Trust Co., 188 A.2d 361 (Del. Ch. 1962).

12 The early Pennsylvania Supreme Court decision of List v. Rodney, 83 Pa. 483 (1877), holding the presumption conclusive, was widely cited. There followed other decisions in that court holding similarly. See, *e.g.*, Sterrett's Estate, 300 Pa. 116, 150 Atl. 159 (1930). However, all of the recent decisions of the lower Pennsylvania courts have held the presumption rebuttable. See, *e.g.*, Bowen Estate, 3 Pa. D. & C.2d 401 (Philadelphia County Ct. 1955); Case Estate, 84 Pa. D. & C. 123 (Bucks County Ct. 1952); Kelby Estate, 80 Pa. D. & C. 1 (Philadelphia County Ct. 1952). The large number of these recent clear holdings strongly indicates that the rule has been modified, although the highest state court has not reversed itself.

13 A growing body of decisional law has avoided the conclusive presumption through construction of the instrument, finding intent to create interests only in favor of those alive when the instrument spoke. RESTATEMENT, PROPERTY § 377, comment *b* (1944); Newhall, *Nibbling at the Rule Against Perpetuities*, 29 Mass. L.Q., Oct. 1944, p. 29; see, *e.g.*, Bankers Trust Co. v. Pearson, 140 Conn. 332, 99 A.2d 224 (1953).

14 Principal case at 417. One other case in relation to the Rule Against Perpetuities has refused to follow what it termed the "absurd" doctrine of the conclusive presumption of fertility. Exham v. Beamish, [1939] Ir. R. 336.

Nonetheless, the principal case is in accord with a very substantial segment of modern judicial thought.[15]

Modern medical knowledge, frequently supplemented by statistical studies,[16] makes evidence as to the possibility of issue extremely reliable.[17] While distrust of medical evidence once dictated a contrary policy, it would seem today that a court, exercising its discretion in prescribing the proof required, could confidently decide the question of impossibility of issue.[18] Any remaining doubts regarding the possibility of error prejudicial to unborn beneficiaries would seem to be adequately removed by requiring a bond, which in turn should prove inexpensive due to the relative certainty of the medical sciences.[19] The second policy consideration of the early cases, that of the indelicacy of the inquiry into the ability to procreate, likewise seems inapplicable today, as modern courts routinely conduct even more "indelicate" inquiries.[20]

Additional policy reasons favoring the conclusive presumption have recently been advanced. In addition to several questionable arguments premised on considerations of uniformity,[21] the concern has been promi-

15 See notes 9-13 *supra*. A recent commentator on the principal case stated that it was "a giant step in the direction of realism . . . ." Leach, *Perpetuities: New Hampshire Defertilizes the Octogenarians*, 77 HARV. L. REV. 279, 283 (1963).

16 For example, a compilation from the yearly CENSUS BUREAU BIRTH STATISTICS, *Live Births*, table 4, reveals that of 28,938,636 births in the United States between 1923 and 1936, only 3 were to women of 55 or over. A similar compilation from CENSUS BUREAU VITAL STATISTICS, *General Tables—Live Births* for the decade 1951-1960 reveals that .003 percent of the births were to women aged 50 or over.

17 Case Estate, 84 Pa. D. & C. 123, 130 (Bucks County Ct. 1952). See generally BEHRMAN & GOSLING, FUNDAMENTALS OF GYNECOLOGY (1959).

18 In practice the Pennsylvania and English courts have generally accepted expert medical testimony. See, *e.g.*, Kelby Estate, 80 Pa. D. & C. 1 (Philadelphia County Ct. 1952) (medical expert's testimony after exhaustive tests); Leonard's Estate, 60 Pa. D. & C. 42 (Dauphin County Ct. 1947) (testimony based on age and atrophy of sexual organs).

Often the words "children" and "issue" do not include adopted children, notwithstanding statutes investing the adopted child with a right of inheritance. See Annot., 144 A.L.R. 670, 674 (1943). In those jurisdictions in which they are included, the possibility of adoption will also have to be considered. See *Re* Barker, 11 D.L.R.2d 146 (B.C. 1957), refusing to terminate a trust partly on ground that it was not demonstrated that plaintiff was legally incapable of adopting a child.

19 The bond also affords wider latitude to a court's determination of what proof of impossibility it considers sufficient. The Pennsylvania courts have generally considered the proof of impossibility sufficient protection. Case Estate, 84 Pa. D. & C. 123, 131 (Bucks County Ct. 1952). They have, however, utilized the personal bond when the possibility of issue is slight but more than negligible. See, *e.g.*, Bowen Estate, 3 Pa. D. & C. 2d 401 (Philadelphia County Ct. 1955).

20 The very same inquiry is made in cases of contested legitimacy and in tax cases. Scott refers to the notion that the inquiry into fertility is indecent as "absurdly prudish." 3 SCOTT, TRUSTS § 340.1, at 2498 (2d ed. 1956).

21 The rather dubious argument has been noted in 23 COLUM. L. REV. 50, 53 (1923), that since the presumption throughout the law is held irrebuttable when interests outside those of the possible issue or of the persons alleging impossibility are involved, the presumption should always be held conclusive in the interest of uniformity. Even if true, this is hardly consonant with the sound practice of permitting conclusive presumptions only when very substantial reasons exist for them. 20 AM. JUR. *Evidence* § 160 (1939). Holmes said that scrutiny of the ancient rules is justified and revision a right if the

nent that a contrary holding might encourage mercenary operations rendering individuals irrevocably sterile.[22] It would seem, however, that the danger of voluntary submission, especially by a woman, to such an operation for material reasons is minimized by religious, psychological, and legal deterrent factors.[23]

The conclusive presumption is thus seen as an anachronism from the days of Coke, supported only by dubious policy considerations and resting principally on adherence to ancient precedent. In addition, a conclusive presumption of fertility must inevitably result in the disruption of many family estate plans and the frustration of reasonable expectations.[24] Careful drafting may well avoid the problem in particular instances, but given holographic wills, perfunctory lawyers, and the frequent probate of wills drawn in other states, this solution is idealistic. Moreover, property may be needlessly tied up for years. Having found only unconvincing reasons supporting the conclusive presumption, and finding compelling practical reasons to modify it, the court in the principal case would seem to have reached the logical and preferable conclusion.

The American Law Institute supports the rule of the principal case in every area except that of the Rule Against Perpetuities.[25] The traditional view has been almost unanimously criticized by legal scholars.[26] American courts have excepted the taxation area and have occasionally avoided its application elsewhere.[27] Now the principal case has expressly rejected the

various grounds of policy, ancient and modern, upon which the rule is founded are unsatisfactory. HOLMES, THE COMMON LAW 33 (Howe ed. 1963). It would seem that uniformity could as well be sought in compliance with this principle. Haggerty v. City of Oakland, 161 Cal. App. 2d 407, 420, 326 P.2d 957, 965 (1958), noted that an argument based on uniformity is especially strong for the Rule Against Perpetuities, which is said to contain no "exceptions." In the light of such rules as the "Wait and See" doctrine, this conclusion seems to turn upon a semantic point. Regardless, the rebuttable presumption certainly does not promote the predicability necessary to achieve absolute certainty in the law. *Cf.* 6 AMERICAN LAW OF PROPERTY § 24.22 (Supp. 1962). Practicality almost certainly will demand at least one pure "exception" because of recent advances in biological sciences. The now real possibility of artificial insemination by refrigerated sperm long after the sperm donor's death would seem to void many gifts.

22 *E.g.*, Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932); Hill v. Sangamon Loan & Trust Co., 295 Ill. 619, 129 N.E. 554 (1920).

23 3 SCOTT, *op. cit. supra* note 20, § 340.1. Besides the religious and social aspects, several authors advance the psychological theory that, in a woman, the maternal has priority over the material. *E.g.*, BEHRMAN & GOSLING, *op. cit. supra* note 17, at 383; REIK, OF LOVE AND LUST 524 (1959). Consider here also the very real possibility, and therefore effective deterrent, that a court of equity might refuse relief because of "unclean hands." Equity will not afford relief to one who has violated conscience or good faith. 2 POMEROY, EQUITY JURISPRUDENCE § 398 (5th ed. 1941).

24 6 AMERICAN LAW OF PROPERTY § 24.22 (Casner ed. 1952).

25 RESTATEMENT, PROPERTY § 274 (1940); RESTATEMENT (SECOND), TRUSTS § 340, comment *e* (1959).

26 *E.g.*, 6 AMERICAN LAW OF PROPERTY, *op. cit. supra* note 24, § 24.22; BOGERT, TRUSTS AND TRUSTEES § 1007 (2d ed. 1962); 3 POWELL, *op. cit. supra* note 4, § 347; Leach, *supra* note 15; 23 COLUM. L. REV. 50 (1923); 34 MICH. L. REV. 453 (1936).

27 See notes 9, 11-13 *supra*.

traditional view. Legal opinion is thus increasingly adopting what appears the preferable rule—a presumption of the ability to procreate rebuttable by clear evidence. The strong judicial endorsement here given to the view held by legal scholars should certainly have a wide influence on the future course of litigation and decision.

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