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Future Interests - Rule Against Perpetuities - Recent Statutory Amendment in New York

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RECENT LEGISLATION

FUTURE INTERESTS—RULE AGAINST PERPETUITIES—RECENT STATUTORY AMENDMENT IN NEW YORK—After 128 years of criticism and confusion¹ and enormous amounts of litigation,² New York has amended its statutory rule against perpetuities. The old rule provided that the absolute power of alienation could not be suspended for longer than “two lives in being” at the creation of the estate plus a minority exception in some cases.³ Under the new rule the absolute power of alienation can be suspended for a period measured by *any* number of “lives in being” at the creation of the estate so long as they are not “so designated or so numerous as to make proof of their end unreasonably difficult.” There is, however, still no period in gross provided for in the New York statutes. *N.Y. Sess. Laws 1958* (McKinney) chapters 152 and 153.

This recent statutory amendment makes no primary change in New York’s statutory rule against perpetuities other than to extend the permissible period during which the power of alienation may be suspended,⁴ or within which a contingent future interest must vest.⁵ Therefore, the new amendment will not change New York’s definition of the suspension of the power of alienation,⁶ nor the concurrent requirement of vesting which has been read into the New York statutes.⁷ By extending the permissible period the new amendment will nevertheless give some needed relief from the harsh effects of the old “two lives” rule. A specific example of this type relief is found in connection with the statutory spendthrift trust. Since the equitable interests in most active trusts are made inalien-

¹ “The Statutes of the State of New York Concerning Perpetuities and Related Matters,” SECOND ANNUAL REPORT OF THE LAW REVISION COMMISSION, NEW YORK LEGISLATIVE DOCUMENT (No. 65 H) 489 (1936); GRAY, *THE RULE AGAINST PERPETUITIES*, 3d ed., §§747-750 (1915).

² 6 AMERICAN LAW OF PROPERTY §25.16 (1952); 6 ST. JOHN’S L. REV. 50 (1931); GRAY, *THE RULE AGAINST PERPETUITIES*, 3d ed., §§750, 871 (1915).

³ 49 N.Y. Consol. Laws (McKinney, 1945) §42; 40 N.Y. Consol. Laws (McKinney, 1949) §11. Although the personal property statute refers to “suspension of absolute ownership” it would seem that this term is as broad as “suspension of the absolute power of alienation.” See SIMES, *FUTURE INTERESTS* §121 (1951).

⁴ See 28 MICH. ST. B. J. 17 (March 1949); 49 YALE L. J. 1112 (1940).

⁵ Matter of Wilcox, 194 N.Y. 288, 87 N.E. 497 (1909). See 49 YALE L. J. 1112 (1940), 22 HARV. L. REV. 520 (1909); 49 CONSOL. LAWS (McKinney, 1945) §§46, 50; 40 N.Y. Consol. Laws (McKinney, 1949) §11. The common law rule, unlike the New York rule, is directed only against remoteness of vesting. GRAY, *THE RULE AGAINST PERPETUITIES*, 4th ed., §191 (1942).

⁶ See SIMES AND SMITH, *FUTURE INTERESTS* §1418 (1956), for a definition of suspension of the power of alienation.

⁷ Thus certain shifting or springing executory interests which are alienable will still be invalid under the new rule unless limited to vest within “lives in being” at the creation of the estate. Walker v. Marcellus and Otisco Lake Railway Co., 226 N.Y. 347, 123 N.E. 736 (1919). See SIMES, *FUTURE INTERESTS* §122 (1951).

able by statute in New York,⁸ these trusts are void when they are so limited that they might continue beyond the permissible period.⁹ Thus a statutory spendthrift trust for the joint benefit of three or more living persons to continue until the death of the survivor was void under the old "two lives" rule.¹⁰ Under the new rule, however, such a trust will be valid because it must end within "lives in being." A power of appointment may now be limited to be executed within "lives in being," computed from the creation of the power,¹¹ and a trust, contingent interest, or sub-power created by a power will be void only when it may suspend the power of alienation beyond, or may not vest within, "lives in being" at the creation of the power.¹² Since the validity of a limitation is normally determined as of the inception of the instrument creating it,¹³ it would seem that the old rule will probably still apply to all trusts, amendable or not, created prior to the effective date of the new act.¹⁴

As the amendment extends only the permissible period allowed under the old rule,¹⁵ it follows that the prior decisions and statutes which have absolutely exempted certain interests from the statutory rule against perpetuities are still good law. In this respect the branch of the New York rule against remoteness of vesting will not apply to such interests as an option to purchase land, a possibility of reverter, or a power of termination even though these interests could be classified as contingent.¹⁶ Further, as the old New York rule against perpetuities, like the common law rule, was normally not applied to charitable trusts,¹⁷ the new rule will make little change in this area.¹⁸ Since a New York statute provides that a

⁸ 49 N.Y. Consol. Laws (McKinney, 1945) §§96, 103; 40 N.Y. Consol. Laws (McKinney, 1949) §15. Not all trusts suspend the power of alienation, however. See 26 ST. JOHN'S L. REV. 247 (1955); 49 N.Y. Consol. Laws (McKinney, 1945) §118; 40 N.Y. Consol. Laws (McKinney, 1949) §23; Robert v. Corning, 89 N.Y. 225 (1882).

⁹ 6 AMERICAN LAW OF PROPERTY §25.6 (1952). Perhaps the New York legislature never contemplated such a result. See 19 MICH. L. REV. 235 (1921).

¹⁰ *Fowler v. Ingersoll*, 127 N.Y. 472, 28 N.E. 471 (1891). See 4 PROPERTY RESTATEMENT 2676, Appx., c. A (1944); 5 ST. JOHN'S L. REV. 1 (1930).

¹¹ 49 N.Y. Consol. Laws (McKinney, 1945) §178. See 6 AMERICAN LAW OF PROPERTY §25.19 (1952). However, the power of alienation is not suspended if a general power presently exercisable to appoint a fee is involved. It would therefore seem that in this case the period will be counted from the exercise of the power.

¹² 49 N.Y. Consol. Laws (McKinney, 1945) §179. See 6 AMERICAN LAW OF PROPERTY §25.19 (1952); WALSH, *FUTURE ESTATES IN NEW YORK* §27 (1931).

¹³ See 49 N.Y. Consol. Laws (McKinney, 1945), annotation following §42.

¹⁴ LOOKER, "The 1958 Modification of the New York Rule Against Perpetuities," *THE IRVING LAWYERS LETTER* (1958). The effective date of the new amendment was September 1, 1958.

¹⁵ See note 4 *supra*.

¹⁶ *Matter of City of New York*, 246 N.Y. 1, at 30, 157 N.E. 911 (1927); *Leonard v. Burr*, 18 N.Y. 96 (1858). See SIMES AND SMITH, *FUTURE INTERESTS* §1418 (1956).

¹⁷ *Matter of Crespi*, 158 Misc. 383, 285 N.Y.S. 780 (1936); *Matter of MacDowell*, 217 N.Y. 454, 112 N.E. 177 (1916); 49 N.Y. Consol. Laws (McKinney, 1945) §113; 40 N.Y. Consol. Laws (McKinney, 1949) §12. See WALSH, *FUTURE ESTATES IN NEW YORK* §32 (1931).

¹⁸ The only exception being a gift to a charity on a remote contingency not preceded

direction for accumulations for a longer term than the minority of the beneficiaries is void as to the time beyond the minority,¹⁹ the amendment will make no change in the permissible duration of trusts for accumulations.²⁰ The new rule also makes no change in the law of successive legal life estates. A section of the New York real property law prohibits successive legal life estates from being limited to persons not in being at the creation thereof, and provides that where a remainder is limited on more than two successive life estates all the life estates subsequent to the two persons first entitled thereto shall be void.²¹ As this section applies to all legal life estates it could invalidate a vested remainder in a life estate which does not suspend the power of alienation.²²

From the scope of the amendment it would seem that there will be no effect on any of the prior decisions as to the proper construction of instruments affected by the statutory rule against perpetuities. Unfortunately, however, the interpretative problems created by this amendment cannot be so easily disposed of. Feeling that the operation of the "two lives" rule was extremely harsh in a number of instances, the New York courts developed several constructional fictions to circumvent its harsh effect.²³ Though not in accord with the weight of common law authority on proper methods of construction,²⁴ these fictions became firmly established as the law in New York.²⁵ A common example of a constructional fiction was the tendency to treat limitations as separable. Thus where a settlor created a trust to pay the income to *B*, *C*, and *D*, for life and upon the death of each to pay a proportionate part of the corpus to his issue or to others, this was treated as three trusts so as not to violate the "two lives" rule.²⁶ Such separability has been extended to less obvious situations.²⁷

by a prior gift to a charity which was formerly invalid unless bound to vest within "two lives" in being, is now valid if limited by "lives in being." See SIMES AND SMITH, *FUTURE INTERESTS* §1417 (1956).

¹⁹ 49 N.Y. Consol. Laws (McKinney, 1945) §61; 40 N.Y. Consol. Laws (McKinney, 1949) §16.

²⁰ However, if an accumulation is directed to commence subsequent to the creation of the estate out of which the rents and profits or income are to arise it may now commence within lives in being, rather than two lives in being as required under the former rule, subject to the rule of restrictive minority. *Ibid.*

²¹ 49 N.Y. Consol. Laws (McKinney, 1945) §43.

²² *Purdy v. Hayt*, 92 N.Y. 446 (1883); 49 N.Y. Consol. Laws (McKinney, 1945), annotation following §43.

²³ See note 1 *supra*.

²⁴ SIMES, *FUTURE INTERESTS*, Part 4 (1951).

²⁵ 34 CORN. L.Q. 270 (1948).

²⁶ 6 AMERICAN LAW OF PROPERTY §25.24 (1952).

²⁷ *Matter of Horner*, 237 N.Y. 489, 143 N.E. 655 (1924); 26 ST. JOHN'S L. REV. 245 (1952). Also, where a settlor created an inter vivos trust to endure for two lives and then disposed of his reversion for two additional lives, the courts may have held both trusts good. It looks, however, like the power of alienation had been suspended for four lives. See 23 N.Y. UNIV. L.Q. REV. 785 (1948). In testing the validity of trusts of personal prop-

Since these constructional fictions were adopted to avoid the harsh effect of the "two lives" rule it would seem to follow that they will be abandoned under the recent amendment,²⁸ and that the New York courts will return to the common law methods of construction. Inasmuch as these constructional fictions are firmly established by stare decisis in New York as the proper construction of instruments in relation to the perpetuity statutes, however, this result may not follow as easily as some writers have assumed.²⁹ The New York courts will, therefore, undoubtedly have to deal with a number of specific cases before the effect of the amendment on these constructional fictions is finally settled. In addition to this interpretative problem there are other problems arising under New York's perpetuity law which are not reached by the amendment. As there is still no period in gross provided for in the New York rule, a statutory spendthrift trust for a flat term of years, for instance, is still void.³⁰ It logically follows that since the power of alienation can be suspended for many lives in being it should also be suspendable for a given period of time.³¹ It likewise seems illogical that a future interest limited on a contingency in which no lives are involved should be void when the contingency is bound to occur within a reasonable period in gross.³²

Despite these problems which the amendment either creates or leaves unsolved, there is definite improvement in the New York statutory scheme.³³ One of its best features is that the "lives in being" measure conforms to the perpetuity statutes of most other states as well as to the common law, making it easier to find precedents which will assist lawyers and judges in construing legal documents. As only two of the several states which once followed the old New York measure have retained the "two life" permissible period,³⁴ this statute is in accord with a trend toward a return to the common law period of "lives in being."³⁵

Paul K. Gaston, S.Ed.

erty the New York courts were able to avoid the "two lives" rule by applying out-of-state law where either: (1) the trust was created in another jurisdiction to be administered in New York, or (2) the trust was created by a New York domiciliary to be administered elsewhere. See 29 ST. JOHN'S L. REV. 247 (1955).

²⁸ See 43 CORN. L.Q. 703 (1958).

²⁹ Ibid.

³⁰ *Haynes v. Sherman*, 117 N.Y. 433, 22 N.E. 938 (1889). See 50 COL. L. REV. 225 (1950).

³¹ See 49 YALE L. J. 1112 (1940).

³² SIMES, PUBLIC POLICY AND THE DEAD HAND (The Thomas M. Cooley Lectures, 6th series) 69 (1955).

³³ E.g., it no longer discriminates against testators with more than two children.

³⁴ Minn. Stat. Ann. (1947) §500.13; Ariz. Rev. Stat. (1956) §§33-261, 33-262.

³⁵ See 29 ST. JOHN'S L. REV. 247 (1955); 38 CORN. L. Q. 543 (1953); 46 HARV. L. REV. 701 (1933).