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Future Interests - Rule Against Perpetuities - Recent Kentucky Legislation Pertaining to Administrative Contingencies

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RECENT LEGISLATION

FUTURE INTERESTS—RULE AGAINST PERPETUITIES—RECENT KENTUCKY LEGISLATION PERTAINING TO ADMINISTRATIVE CONTINGENCIES—A recent Kentucky amendment to its perpetuities statute follows the lead of Illinois[1] in seeking a legislative solution to the problems inherent in applying the rule against perpetuities to administrative contingencies.[2] The amendment provides, inter alia, that the vesting of any limitation of property "shall not be regarded as deferred for purposes of the rule against perpetuities or regarded as a suspension of the power of alienation of title to property[3] merely because the limitation is made to the estate of a person,

12 28 U.S.C. (1952) §2680.

13 The interpretation of the "discretionary functions" exception as set down in Dalehite v. United States, note 7 supra, immunizes the government for negligence at a high "planning or cabinet" level, where policy decisions are made. If governmental activity at the operational level, where policy decisions are carried out, was also immunized by application of the "governmental-proprietary" distinction, there would be a very narrow spectrum of liability, e.g., "proprietary-operational" functions, and "non-discretionary" acts at the planning level.

14 While this conclusion greatly extends the scope of recovery under the act, it cannot be doubted that Congress intended such broad liability. The Court in the principal case, at 320, said: "Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees." See generally H. Hearings Before Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d sess., p. 11 (1942).

1 Ill. Rev. Stat. (1955) c. 30, §153 (a). The provisions of the Illinois statute are the same as the Kentucky amendment with the exception of the reference to "suspension of alienation." See Yager, "Legislative Modification in Illinois of the Rule Against Perpetuities," CURRENT TRENDS IN STATE LEGISLATION, 1953-1954, p. 197 (1954), for a discussion of the Illinois statute.

2 This terminology was used by Professor Leach in describing some of the problems under the rule. See Leach, "Perpetuities in a Nutshell," 51 HARV. L. REV. 638 at 644 (1938).

3 The Kentucky perpetuities statute refers to a suspension of the absolute power of alienation for a period longer than "lives in being at the creation of the estate, and twenty-one years and ten months thereafter." Ky. Rev. Stat. (1956) §381.220. The Kentucky courts, however, have indicated that this statute is declaratory of the common law, and the common law rule against perpetuities is in effect. See 3 SIMES & SMITH, FUTURE INTERESTS, 2d ed., §1414 (1956).

or to a personal representative, or to a trustee under a will, or to take effect on the probate of a will." Ky. Rev. Stat. (1956) §381.220.

Authorities have frequently recommended remedial legislation designed to overcome specific problems and pitfalls with respect to the rule against perpetuities.[4] The case of the "administrative contingency" is one such trap which harasses the unwary draftsman. This term refers to a gift contingent upon "probate of a will," "payment of a debt," "distribution of an estate," or a similar event occurring in the administration of an estate.[5] The validity of an interest under the rule against perpetuities requires absolute certainty of vesting within lives in being and 21 years, and this determination is made as of the creation of the interest. Thus, a devise conditioned upon the probate of an estate or similar contingency may be held invalid because of the mathematical possibility that this administrative event will not occur within the period required by the rule.[6] At times the courts avoid this seemingly harsh result by construction,[7] or even by a presumption that the estate will be settled within a reasonable period.[8] When the condition precedent construction cannot be avoided, however, the weight of authority holds that the administrative contingency renders the gift invalid under the rule.[9] It has been pointed out that a provision for an administrative contingency does not contravene the purposes of the rule, for such a condition causes no additional tying up of property.[10] For this reason legislative reform has been considered necessary.

The necessity for some type of reform became apparent when changes in the federal tax laws brought about the increased use of provisions involving administrative contingencies. For example, in connection with the marital deduction in tax planning for estates, numerous writers have suggested the creation of an estate in trust with a life estate in the testator's widow and the remainder to be distributed to the widow's executor or administrator.[11] A question may thereby arise as to whether a bequest to the administrator or executor, who conceivably may not be appointed

4 See e.g. Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 at 747 (1952); Simes, "The Policy Against Perpetuities," 103 UNIV. PA. L. REV. 707 at 731 (1955).

5 See 6 AMERICAN LAW OF PROPERTY §24.23 (1952).

6 Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907); Miller v. Weston, 67 Col. 534, 189 P. 610 (1920).

7 Trautz v. Lemp, 329 Mo. 580, 46 S.W. (2d) 135 (1932); McQueen v. Branch Banking & Trust Co., 234 N.C. 737, 68 S.E. (2d) 831 (1952).

8 Belfield v. Booth, 63 Conn. 299, 27 A. 585 (1893). See 4 PROPERTY RESTATEMENT §374, comment *f* (1944).

9 3 SIMES & SMITH, FUTURE INTERESTS, 2d ed., §1228 (1956).

10 6 AMERICAN LAW OF PROPERTY §24.23 (1952).

11 See Casner, "Estate Planning—Marital Deduction Provisions of Trusts," 64 HARV. L. REV. 582 at 605 (1951); Mannheimer & Wheeler, "Relative Merits of Two Kinds of Trusts that Qualify for the Marital Deduction," N.Y. UNIV. ELEVENTH ANNUAL INSTITUTE ON FEDERAL TAXATION 673 (1953); Neuhoff, "Standard Clauses for Wills," 96 TRUSTS & ESTATES 166 at 168 (1957).

within the required period, would be invalidated by the rule.[12] In seeking the maximum marital deduction, the testator may leave a trust to his wife consisting of property to be selected by his executor after payment of debts and expenses. If the payment of the debts is interpreted as a condition precedent to the vesting of the bequest, the rule may be violated.[13]

Several approaches have been suggested for corrective legislation. One method is the application of a "wait and see" doctrine to all types of contingencies.[14] Under this doctrine we wait and see whether the contingent interest does in fact vest with the period of the rule.[15] This doctrine has been adopted in Pennsylvania,[16] and in a modified version in Massachusetts, Maine, and Connecticut, where the validity of an interest is determined as of the termination of certain life estates or lives in being.[17] The second approach requires the framing of legislation designed to correct specific problems arising under the rule without interpreting the contingency on the basis of actual events.[18]

In response to estate tax drafting problems mentioned above, the Committee on Probate Courts of the Section of Real Property, Probate and Trust Law of the American Bar Association recommended the statutory provision enacted in this Kentucky amendment.[19] It should be noted that the committee did not suggest modification in the form of the "wait and see" doctrine. The committee's approach appears to be more desirable than that of the Massachusetts version of the "wait and see" doctrine, for that statute would not prevent the possible invalidity of a bequest to a widow for life with remainder to her executor or administrator, since the determination of the validity of the remainder would only be deferred until the widow's death. Hence, in this respect the Kentucky statute is considerably more useful to the estate planner.

An analysis of the language of the amendment does indicate certain

12 See Casner, "Estate Planning—Marital Deductive Provisions of Trusts," 64 HARV. L. REV. 582 at 606 (1951).

13 See DeFosset, "Marital Deduction v. Rule Against Perpetuities," 29 TAXES 486 (1951). In Braun v. Central Trust Co., 92 Ohio App. 110, 109 N.E. (2d) 476 (1952), the court held that a provision for the executor to select property to obtain the maximum marital deduction was not a condition precedent to the vesting of the interest.

14 See generally Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 HARV. L. REV. 721 (1952). This doctrine is criticized in Simes, "Is the Rule Against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 MICH. L. REV. 179 (1953).

15 3 SIMES & SMITH, FUTURE INTERESTS, 2d ed., §1230 (1956).

16 Pa. Stat. Ann. (Purdon, 1950) tit. 20, §301.4.

17 Mass. Laws Ann. (1955) c. 184A, §1; Me. Rev. Stat. (1954; Supp. 1955) c. 160, §27; Conn. Gen. Stat. (1949; Supp. 1955) §2912d. See generally Leach, "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 (1954). A judicial version of the "wait and see" doctrine appears to have been adopted in Merchants National Bank v. Curtis, 98 N.H. 225, 97 A. (2d) 207 (1953).

18 Simes, "The Policy Against Perpetuities," 103 UNIV. PA. L. REV. 707 at 735 (1955).

19 The committee report is published in Edmonds, "Hints on Marital Deduction Problems," 89 TRUSTS & ESTATES 669 at 672 (1950). The committee pointed out that this statutory provision was recommended without "attempting to make a formal draft of the law on the subject."

shortcomings as an overall solution to the administrative contingency pitfall. The statute neglects to provide for the condition of "payment of debts." Further, its thrust is to assist the court in construing an interest as vested rather than contingent when the limitation is to an estate, trustee, personal representative, or upon probate of a will.[20] It does not appear to deal with an administrative contingency expressly made a condition precedent to the vesting of the interest. In such a case, the court could still hold the interest invalid because of the possible delay in vesting. A preferable provision should state that where conditions exist involving probate of wills, settlement of estates, or payment of debts, completion of such administration within a twenty-one year period will be presumed.[21] In these respects the Kentucky amendment appears to fall short as a remedy to the administrative contingency problem. Perhaps this shortcoming may be attributed to the framing of legislation primarily in response to specific tax planning difficulties. Nevertheless, this statute is noteworthy for its objective of correcting specific problems under the rule against perpetuities without introducing the "wait and see" doctrine.

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[20] The word "merely" in the statute seems to require this construction.

[21] Cf. Simes, "The Policy Against Perpetuities," 103 UNIV. PA. L. REV. 707 at 735 (1955). See generally, SIMES, PUBLIC POLICY AND THE DEAD HAND (1956).