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FUTURE INTERESTS-RULE AGAINST PERPETUITIES-VESTING OF RESIDUARY ESTATE IN TRUSTEE FOR CHARITY SUBJECT TO A CONDITION PRECEDENT

Edward W. Rothe S.Ed.
University of Michigan Law School

FUTURE INTERESTS—RULE AGAINST PERPETUITIES—VESTING OF RESIDUARY ESTATE IN TRUSTEE FOR CHARITY SUBJECT TO A CONDITION PRECEDENT—The will of testatrix provided: after the payment of debts and legacies, "I give, devise and bequeath" the residue of my estate to a charitable foundation. *Held,* the provision for payment of debts and legacies refers only to the quantum of estate the trustee will take and not to the time when his title vests in interest; it constitutes no condition precedent to the vesting of title in the trustee for charity. Therefore, the rule against perpetuities, which applies only to remoteness of vesting and not to postponement of possession and enjoyment, has no application. The fact that debts and legacies might not be paid within lives in being and twenty-one years has significance only in regard to the postponement of actual possession by the trustee. *Smith v. United States Nat. Bank of Denver,* (Colo. 1949) 207 P. (2d) 1194.

The fact that a charitable trust involves an inalienable, indestructible interest does not make it repugnant to the rule against perpetuities which is concerned with remoteness of vesting.[1] Nor is it objectionable that the prospective beneficiaries may not enjoy the fruits of a charitable trust until some time after the period of the rule has elapsed.[2] However, if the vesting of legal title in the trustee for devotion to charitable purposes is subject to a condition precedent which may not occur within lives in being and twenty-one years, the gift is void for remoteness.[3] In this respect, the charitable trust is subject to the same rules as are private trusts. Therefore, the problem is entirely one of construing the terms of the instrument to determine whether or not the donor provided a condition precedent to vesting in interest, regardless of when that interest is to ripen into actual possession and enjoyment.[4] The problem is created by the use in wills of such seemingly innocuous phrases as "upon the probate of my estate," "when my estate is settled," or "after payment of debts and legacies" to introduce a

[1] 2 SIMES, FUTURE INTERESTS §541 (1936); GRAY, RULE AGAINST PERPETUITIES, 4th ed., § 590 (1942).

[2] 2 SIMES, FUTURE INTERESTS §546 (1936); 3 SCOTT, TRUSTS 2139 (1939).

[3] 2 SIMES, FUTURE INTERESTS §543 (1936); GRAY, RULE AGAINST PERPETUITIES, 4th ed., §§591, 596, 605 (1942); 3 SCOTT, TRUSTS 2138 (1939); Cherry v. Mott, 1 My. & Cr. 123, 40 Eng. Rep. 323 (1836); Chamberlayne v. Brockett, 8 Ch. App. 206 (1872); Robert G. Wolfe, "Rules Against Perpetuities and Gifts to Charity," 17 IND. L.J. 205 (1942). It should be noted that even though legal title is vested in the trustee, the gift will be void if the property is not to be devoted to charitable uses until the happening of a remote condition precedent. See Jocelyn v. Nott, 44 Conn. 55 (1876). Cf. Duggan v. Slocum, (2d Cir. 1899) 92 F. 806; Perkins v. Citizens & Southern Nat. Bank, 190 Ga. 29, 8 S.E. (2d) 28 (1940).

[4] The rule against perpetuities is concerned only with vesting in interest, not with vesting of possession and enjoyment. 2 SIMES, FUTURE INTERESTS §500 (1936); Trautz v. Lemp, 329 Mo. 580, 46 S.W. (2d) 135 (1932).

bequest or devise.[5] Because it is possible that the will may not be probated or the estate settled within the period allowed by the rule against perpetuities the gift is void, provided, however, that the court finds probate or settlement to be a condition precedent to vesting in interest.[6] The same result follows in those cases involving bequests and devises after payment of debts and legacies, except that courts have been quite reluctant to find that payment was intended as a condition precedent to vesting in interest.[7] The gift is held valid on the theory that the residuary legatee takes title at once with possession and enjoyment deferred until debts and legacies are paid, which would, of course, be the case even if there were no express provision in the will. The direction for payment is held to refer only to the quantum which the legatee will take rather than to the time of vesting.[8] In arriving at this conclusion the courts make use of the standard "aids to construction." If an instrument is capable of two constructions, one

[5] The problem of remote vesting in interest also arises in the following illustrative cases: gift to a non-existent charitable corporation [See discussion of the *cy pres* power as applied to such gifts in GRAY, RULE AGAINST PERPETUITIES, 4th ed., § 608 ff. (1942); 74 A.L.R. 671 (1931)]; gift to charity on condition that others also donate something [In re White's trusts, 33 Ch. 449 (1886); Kingham v. Kingham, 1 I.R. 170 (1897); Malmquist v. Detar, 123 Kan. 384, 255 P. 42 (1927)]; gift to charity upon the happening of a fortuitous event or upon the act of a third party [Cherry v. Mott, supra note 3; In re Lord Stratheden and Campbell, 3 Ch. 265 (1894)]; gift to charity after directions to accumulate a certain sum [Ingraham v. Ingraham, 169 Ill. 432, 48 N.E. 561 (1897); Tincher v. Arnold, (7th Cir. 1906) 147 F. 665; Girard Trust Co. v. Russell, (3d Cir. 1910) 179 F. 446].

[6] In the following cases the courts interpreted the bequest or devise as contingent: Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907); Miller v. Weston, 67 Colo. 534, 189 P. 610 (1920); Estate of Campbell, 28 Cal. App. (2d) 102, 82 P. (2d) 22 (1938), noted in 37 MICH. L. REV. 814 (1939). In the following cases the courts found the bequest or devise vested in interest with only possession and enjoyment postponed: McCutcheon v. Pullman T. & S. Bank, 251 Ill. 550, 96 N.E. 510 (1911); Union Trust Co. of Springfield v. Nelen, 283 Mass. 144, 186 N.E. 66 (1933), noted in 47 HARV. L. REV. 884 (1934); Trautz v. Lemp, supra note 4, noted in 17 ST. LOUIS L. REV. 370 (1932). In the following cases the courts found that the condition precedent to vesting would happen within a "reasonable time" and therefore within the time permitted by the rule: Belfield v. Booth, 63 Conn. 299, 27 A. 585 (1893); Brandenburgh v. Thorndike, 139 Mass. 102, 28 N.E. 575 (1885). See discussion of these cases in GRAY, RULE AGAINST PERPETUITIES, 4th ed., §214.1 ff. (1942).

[7] Bacon v. Proctor, T. & R. 31 at 40, 37 Eng. Rep. 1005 (1822): "all the authorities show that where an estate is given to trustees to pay debts, and then to a person designated, the person designated takes at once subject to the debts." Scofield v. Olcott, 120 Ill. 362, 11 N.E. 351 (1887); Heisen v. Ellis, 247 Ill. 418, 93 N.E. 362 (1910); Canda v. Canda, 92 N.J. Eq. 423, 112 A. 727 (1921); Collis v. Walker, 272 Mass. 46, 172 N.E. 228 (1930); Morgan v. Morgan, 20 R.I. 600, 40 A. 736 (1898). It is interesting to note that in Chamberlayne v. Brockett, supra note 3, the court worried about a gift to erect an almshouse when land should be given for that purpose, but was not disturbed by the fact that the gift was of the residue after the payment of debts and legacies. The bequests were construed as contingent on payment of debts and legacies, and therefore void in In re Bewick, 1 Ch. 116 (1911) and Rudolph v. Schmalstig, 9 Ohio Op. 452, 25 Ohio L. Abs. 249 (1937).

[8] See the interesting analysis by Professor Kales, "How Far Interests Limited to Take Effect 'When Debts Are Paid' or 'an Estate Settled' or 'A Trust Executed and Performed' are Void For Remoteness," 6 ILL. L. REV. 373 (1912); 2 SIMES, FUTURE INTERESTS §496 (1936); GRAY, RULE AGAINST PERPETUITIES, 4th ed., 607 (1942).

doing violence to the rule against perpetuities, the other steering clear of it, the court should choose the latter.[9] Especially is this true if the bequest involved is for charity, for courts always construe favorably to charities if at all possible.[10] Besides, courts always prefer vested over contingent interests.[11] If testator has used the words "give, devise and bequeath," such words connote a present, vested gift.[12] It is presumed that testator intended to create a valid interest,[13] and he is presumed to know that no testamentary trust is valid unless title vests in the trustee immediately upon the settlor's death.[14] It is also presumed that testator knows that the law itself provides that the trustee cannot take possession until all debts are paid and the estate settled,[15] and that if the trustee is the residuary legatee, he receives only what remains after specific legacies are paid. Therefore, testator must have been doing no more than reciting the law, referring to the quantum the trustee would take in possession, when he provided for the payment of debts and legacies.[16] As "makeweights," the courts often point to the fact that if there is no gift over in case the condition never happens, it would tend to indicate that the fund was to be immediately and irrevocably devoted to charity. In addition, the courts prefer to pass property by will rather than by intestacy, and if a residuary bequest is declared void, the residue would go intestacy. Faced with such an imposing body of "aids to construction," it is small wonder that most courts have held that title vests at once subject to a charge for the payment of debts and legacies. Of course, if the testator's language unmistakably sets up a condition precedent, there is no occasion to search for his intent with the aid of these rules of construction. The court is then bound to hold the interest void if the condition may not occur within lives in being and twenty-one years. However, in most instances, common sense would seem to dictate that, if testator had thought about it at all, he would not have chosen to word his will so as to create any question of a residuary bequest contingent on the payment of debts and legacies.[17]

Edward W. Rothe, S.Ed.

[9] Ingraham v. Ingraham, supra note 5; McCutcheon v. Pullman T. & S. Bank, supra note 6; Heisen v. Ellis, supra note 7; Trautz v. Lemp, supra note 4; Perkins v. Citizens & Southern Nat. Bank, supra note 3. These courts apparently reject the traditional view that the rule against perpetuities is not an "aid to construction" but that the instrument must first be construed without reference to the rule and then the rule must be heartlessly applied. See GRAY, RULE AGAINST PERPETUITIES, 4th ed., §629 ff. (1942).

[10] 2 SIMES, FUTURE INTERESTS §546 (1936); GRAY, RULE AGAINST PERPETUITIES, 4th ed., §607 (1942); Ingraham v. Ingraham, supra note 5; Reasoner v. Herman, 191 Ind. 642, 134 N.E. 276 (1921). But cf. First Camden Nat. Bank v. Collins, 114 N.J. Eq. 59, 168 A. 275 (1933), reversing 110 N.J. Eq. 623, 160 A. 848 (1932).

[11] Morgan v. Morgan, supra note 7; Heisen v. Ellis, supra note 7; Reasoner v. Herman, supra note 10.

[12] Ingraham v. Ingraham, supra note 5; Miller v. Weston, supra note 6; Collis v. Walker, supra note 7; Trautz v. Lemp, supra note 4.

[13] First Nat. Bank v. Collins, supra note 10.

[14] Trautz v. Lemp, supra note 4; Miller v. Weston, supra note 6.

[15] Collis v. Walker, supra note 7. Union Trust Co. of Springfield v. Nelen, 283 Mass. 144, 186 N.E. 66 (1933); Trautz v. Lemp, supra note 4.

[16] Collis v. Walker, supra note 7.

[17] See 4 PROPERTY RESTATEMENT §374, comment *c* (1944).