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## FUTURE INTERESTS-EFFECT OF LIMITED POWER OF REVOCATION IN DETERMINING VALIDITY OF INTER VIVOS TRUST UNDER RULE AGAINST PERPETUITIES

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FUTURE INTERESTS—EFFECT OF LIMITED POWER OF REVOCATION IN DETERMINING VALIDITY OF INTER VIVOS TRUST UNDER RULE AGAINST PERPETUITIES—Settlor created an inter vivos trust, reserving to himself the income for life plus an absolute, non-cumulative right to withdraw sums not in excess of \$1500 per year. The trust was otherwise irrevocable. Measured from the date of the inter vivos transaction, some of the limitations clearly violated the rule against perpetuities; measured from the date of settlor's death, all limitations would be valid. The trust fund, some twenty years after its creation, amounted to about \$32,000. *Held*, the crucial date was that of creation. *Ryan v. Ward*, (Md. 1949) 64 A.(2d) 258.

Although it is a rule against remoteness of vesting,<sup>1</sup> the rule against perpetuities is one of the major results of judicial ingenuity in preventing the restriction

<sup>1</sup> GRAY, *THE RULE AGAINST PERPETUITIES*, 4th ed., §2 (1942); 2 SIMES, *FUTURE INTERESTS*, §490 (1936); Leach, "Perpetuities in a Nutshell," 51 *HARV. L. REV.* 638 (1938); Fraser, "The Rationale of the Rule Against Perpetuities," 6 *MINN. L. REV.* 560 (1922).

of practical alienability for an unreasonable length of time.<sup>2</sup> The period of the rule is counted from the time the instrument in question takes effect. If a will, it dates from the testator's death; if a deed, it dates from its delivery.<sup>3</sup> However, cases and theory indicate that when one person<sup>4</sup> has a present right to freely dispose of the entire fund for his own benefit<sup>5</sup> the rule does not apply to the future interests subject to being eliminated by the exercise of this right so long as the right exists.<sup>6</sup> The reason is that marketability is not impaired to any serious degree so long as there is a person who has a general power of appointment or revocation. For example, X creates an inter vivos trust, reserving a life estate to himself, life estate to those of his children living at his death, remainder on the death of his last child to the then living descendants of Y. If the trust is irrevocable, the gift to the living descendants of Y is clearly bad.<sup>7</sup> However, if X reserves an unlimited power to revoke, all provisions are good.<sup>8</sup> The trouble comes when the power to revoke is either limited as in the principal case or rests on a condition. Suppose X reserved a power to revoke after giving six months notice. In such a case, the period of the rule would probably begin to run not later than six months before the settlor's death. Even if X gave notice immediately after creating the trust, he might die within five months, and a child conceived after notice was given might be the last to die; consequently, the limitation to Y's descendants violates the rule.<sup>9</sup>

<sup>2</sup> GRAY, *THE RULE AGAINST PERPETUITIES*, 4th ed., §§2.1, 268 (1942); 2 SIMES, *FUTURE INTERESTS* §§490, 515 (1936).

<sup>3</sup> 2 SIMES, *FUTURE INTERESTS* §494 (1936), and cases cited.

<sup>4</sup> Future interests are subject to the rule even though a number of people together could alienate the entire property, since alienability is still materially clogged. In *re Hargreaves*, 43 Ch. D. 401 (1889); 2 SIMES, *FUTURE INTERESTS* §514 (1936). However, cotenancies seem to be an exception to this rule. *Id.* §515.

<sup>5</sup> Cases where the trustee has full power to change the investment are not within the scope of the exception, since the beneficial interests remain inalienable. *Wheeler v. Fellowes*, 52 Conn. 238 (1884).

<sup>6</sup> GRAY, *THE RULE AGAINST PERPETUITIES*, 4th ed., §203 (1942); 2 SIMES, *FUTURE INTERESTS* §515 (1936); 4 *PROPERTY RESTATEMENT* §373 (1944); *Pulitzer v. Livingston*, 89 Me. 359, 36 A. 635 (1896); *Miffin's Appeal*, 121 Pa. 205, 15 A. 525 (1888); *Equitable Trust Co. v. Pratt*, 117 Misc. 708, 193 N.Y.S. 152 (1922). But cf. *Anderson*, "The Modern Rule Against Perpetuities," 77 UNIV. PA. L. REV. 862 (1929). Examples of such future interests are: (1) Limitations following a barrable fee tail. *Leach*, "Perpetuities in a Nutshell," 51 HARV. L. REV. 638 (1938); *Fraser*, "The Rationale of the Rule Against Perpetuities," 6 MINN. L. REV. 560 (1922); but cf. GRAY, *THE RULE AGAINST PERPETUITIES*, 4th ed., §446 (1942). (2) Interests subject to a general power of appointment. 2 SIMES, *FUTURE INTERESTS* §516 (1936). (3) One case held that the rule does not apply to insurance trusts during the time the settlor retains power to change beneficiaries. *Manufacturers Life Ins. Co. v. von Hamm Young Co.*, 34 Hawaii 288 (1937); 51 HARV. L. REV. 172 (1937); but cf. *Morris*, "The Rule Against Perpetuities as Applied to Living Trusts," 11 UNIV. CIN. L. REV. 327 (1937).

<sup>7</sup> X is conclusively presumed capable of having children. *Jee v. Audley*, 1 Cox. 324, 29 Eng. Rep. 1186 (1787); 23 COL. L. REV. 50 (1923); 32 MICH. L. REV. 414, 702 (1934); 47 HARV. L. REV. 1061 (1934). If X was of advanced age when he executed the deed, the court might hold that he intended as grantees only those children then living. In *re Wright's Estate*, 284 Pa. 334, 131 A. 188 (1925). If so, the trust would not violate the rule.

<sup>8</sup> Note 6, *supra*.

<sup>9</sup> The period in gross must be taken at the end of the lives in being and not at the beginning. *Fidelity & Columbia Trust Co. v. Tiffany*, 202 Ky. 618, 260 S.W. 357 (1924).

In like manner, where the settlor's power to revoke is limited, not by a requirement of notice, but as to amount, the period of the rule may well start to run before the settlor's death. In the principal case, where the settlor retained at all times the right to revoke the trust to the extent of \$1500, the court could have held the trust provisions valid as to that amount.<sup>10</sup> The court does not discuss this possibility, however, and probably settlor would not have intended to have the fund so divided. With a larger amount or proportion involved, a different result as to the sum subject to the power of revocation might well be reached.<sup>11</sup>

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<sup>10</sup> Note 6, *supra*.

<sup>11</sup> 2 SIMES, FUTURE INTERESTS §§520 et seq., especially §529 (1936).