Michigan Law Review

Volume 52 | Issue 6

1956

FUTURE INTERESTS-POWERS-LEGAL CONSEQUENCES OF A LIFE ESTATE WITH A POWER OF DISPOSITION UNDER THE NEW YORK TYPE POWERS STATUTE

Richard W. Young S.Ed.
University of Michigan Law School

FUTURE INTERESTS—POWERS—LEGAL CONSEQUENCES OF A LIFE ESTATE WITH A POWER OF DISPOSITION UNDER THE NEW YORK TYPE POWERS STATUTE —Testatrix devised certain property to her husband "to be used and enjoyed by him with the right to sell and dispose of same and use so much thereof, either principal or income, as he may desire during his lifetime." Any property or the proceeds thereof remaining at his death was to be distributed equally to named takers, children of the testatrix. Successors of the remaindermen brought an action for ejectment and to quiet title against persons claiming under conveyances from the life tenant, the plaintiffs contending that these conveyances were made without consideration and could not operate to cut off the remainder. Section 266 of the applicable Oklahoma statute, part of a statutory system of powers, provided: "Every power of disposition is deemed absolute, by means of which the holder is enabled in his lifetime to dispose

of the entire fee, in possession or in expectancy, for his own benefit."[1] The district court found the will created a life estate with a power of disposition and that conveyances by the life tenant pursuant to the power operated to extinguish the rights of the remaindermen. On appeal, *held,* affirmed. The life tenant's power was conditional, but the statute raised a legal presumption in favor of the validity of conveyances executed under the power, even where they were without evidential support of consideration. *Ruby v. Bishop,* (10th Cir. 1953) 207 F. (2d) 84.

Oklahoma early adopted the New York statutory system of powers,[2] which substantially modifies the common law.[3] One important provision, section 262, declares that an estate for life or years coupled with an absolute power of disposition, unaccompanied by any trust, is a fee as regards creditors, purchasers, and encumbrancers.[4] Under these statutes a power of absolute disposal is not necessarily inconsistent with a life estate,[5] and even when a fee is so created it is subject to any future estates limited upon it if the power is not executed or the property is not sold for the satisfaction of debts.[6] But a power to consume or to dispose of property for the beneficial use of the life tenant is held not to be an absolute power of disposition because it does not encompass a power to effect a gift inter vivos or testamentary transfer.[7] Thus, where the testator manifests an intent to give the donee a life estate with a beneficial power of disposition, and limits a remainder over of such property as may be left at his death, the interests of the remaindermen cannot be cut off except by a conveyance in strict accordance with the terms of the power.[8] The court in the principal case accordingly found the will created a life estate with a conditional power of disposal and a remainder

[1] Okla. Stat. (1951) tit. 60, §266.

[2] Okla. Stat. (1890) §§4203-4268. This statutory scheme was originally framed in N.Y. Rev. Stat. (1829) part 2, c. 1, tit. 2, art. 3, §§73-135, and is now embodied in 49 N.Y. Consol. Laws (McKinney, 1945) §§130-183. Several other states have appropriated the New York codification or substantially similar provisions: Ala. Code (1940, Supp. 1953) tit. 47, §§75-93; D.C. Code (1951) §§45-1005; Mich. Comp. Laws (1948) §§556.1-556.106; N.D. Rev. Code (1943) §§59.0501-59.0559; Okla. Stat. (1951) tit. 60, §§181-299; S.D. (1939) §§59.0401-59.0461; Wis. Stat. (1949) §§231.14, 232.01-232.58.

[3] 5 AMERICAN LAW OF PROPERTY §23.17 (1952); 1 SIMES, FUTURE INTERESTS §292 (1936); 3 TIFFANY, REAL PROPERTY, 3d ed., §711 (1939); 3 WALSH, REAL PROPERTY §329 (1947). See also 2 REEVES, REAL PROPERTY 1210, n. a (1909); CHAPLIN, EXPRESS TRUSTS AND POWERS §531 (1897).

[4] Okla. Stat. (1951) tit. 60, §262; 49 N.Y. Consol. Laws (McKinney, 1945) §149. See indication of variations found in the statutes of other states, PROPERTY RESTATEMENT §327, comment *d* (1940 and 1948 Supp.).

[5] Miller v. Irey, 150 Okla. 240, 1 P. (2d) 654 (1931). See 36 A.L.R. 1166 (1925); 1 PROPERTY RESTATEMENT §111 (1936).

[6] 33 AM. JUR., Life Estates, Remainders, etc. §31 (1941); CHAPLIN, EXPRESS TRUSTS AND POWERS §577 (1897).

[7] Rosenburg v. Baum, (10th Cir. 1946) 153 F. (2d) 10; Quarton v. Barton, 249 Mich. 474, 229 N.W. 465, noted 29 MICH. L. REV. 761 (1931); Norvell, "The Power to Consume: Estate Plan or Estate Confusion," 28 MICH. S.B.J. 5 (March 1949). See 69 A.L.R. 820 (1930).

[8] Whiteside and Edelstein, "Life Estates with Power to Consume," 16 CORN. L.Q. 447 at 470 (1931).

over. But this conclusion seems to ignore the express language of the statute set out above defining a power as absolute by which the donee can dispose of the entire fee for his own benefit The opinion concedes that the life tenant was empowered to dispose of the whole fee for his beneficial use,[9] but declares that the statute relates only to the power and not to the title in the donee and cannot make absolute that which is plainly conditional.[10] While this explanation seems unsatisfactory at best, it finds some support in the decisions interpreting this particular statute.[11] Though the statute does not serve to enlarge a life estate into a fee, this result may be accomplished if the prescribed conditions under which the power is to be exercised have been met.[12] A general rule places the burden of proof upon the one claiming under a power to show its valid execution,[13] and the defendants who derived their title from the donee's power to dispose of the entire fee for his beneficial use were required to establish that the power was exercised according to its tenor, i.e., for a consideration. This is especially true under section 262, which translates a life estate with an "absolute" power of disposition into a fee only in favor of creditors, purchasers, and encumbrancers. Rather curiously, the court found this burden sustained by a legal presumption in favor of the validity of the conveyances. This presumption that the power to convey the fee became absolute upon its exercise was found to have been raised by section 266, notwithstanding that this section does not appear to be framed in terms of a presumption, and actually does no more than recite a definition. The court did not cite authority for its holding in this regard,[14] and may have seized upon this device as a means to affirm the district court in upholding the execution of the power as valid. The decision rather effectively shifts the burden of proof from those claiming under the power of disposition in the life tenant and places it upon the remaindermen and their successors, who are quite possibly not in a position to offer evidence going to the absence of consideration in deeds by the life tenant. Whether this result is desirable or not, it may be questioned whether the court should have con-

[9] In Rose v. Hatch, 125 N.Y. 427 at 429, 26 N.E. 467 (1891), involving a life estate with a power to consume for necessities, the court said of this statute: "Here there was not an absolute power of disposition, as Asa L. Hatch could not dispose of the entire fee for his own benefit. He could dispose only of the income of the property during his life. His right to use the corpus was limited to his personal wants and necessities."

[10] Principal case at 89.

[11] This construction first appears in Hasbrouck v. Knoblauch, 130 App. Div. 378 at 384, 114 N.Y.S. 949 (1909): "Here the provision relates not to the title which vests in the grantee of the power. The statute does not provide that the grantee of an absolute power of disposition of the property shall have the fee, but that the power which is granted by which the grantee is entitled in his lifetime to dispose of the entire fee for his own benefit is deemed an absolute power." See In re Brower's Estate, 278 App. Div. 851, 104 N.Y.S. (2d) 658 (1951).

[12] Principal case at 89.

[13] 72 C.J.S., Powers §40(d) (1951).

[14] Swarthout v. Ranier, 143 N.Y. 499, 38 N.E. 726 (1894), suggests that there may be a presumption that a disposition was within the terms of the power, but this holding was not based on the statute. See also Whiteside and Edelstein, "Life Estates with Power to Consume," 16 CORN. L.Q. 447 at 464 (1931).

strued this statute as creating an implied presumption. The language of neither section warrants this interpretation, and no other court in the 125 years since the language was originally propounded has ever found it to create a presumption.

Richard W. Young, S.Ed.