THE OHIO PERPETUITIES REFORM STATUTE

ROBERT J. LYNN*

The author explains Ohio's revised statutory approach to the Rule Against Perpetuities.

Ohio has modified its statutory statement of the common law Rule Against Perpetuities[1] in several important respects: (1) The "possibilities" test for determining the validity of contingent future interests has been abandoned, and an actualities or "wait and see" principle has been adopted, together with a cy pres reformation component.[2] (2) It is at least arguable that an interest aris-

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* Professor of Law, The Ohio State University College of Law.

[1] The Ohio perpetuities statute as amended is as follows:

2131.08 Statute against perpetuities. [Page Current Service 1967.]

(A) No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. It is the intention by the adoption of this section to make effective in Ohio what is generally known as the common law rule against perpetuities except as set forth in paragraphs (B) and (C) of this section.

(B) For the purposes of this section, the time of the creation of an interest in real or personal property subject to a power reserved by the grantor to revoke or terminate such interest shall be the time at which such reserved power expires, either by reason of the death of the grantor or by release of the power or otherwise.

(C) Any interest in real or personal property which would violate the rule against perpetuities, under paragraph (A) hereof, shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate the rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events.

(D) Paragraphs (B) and (C) of this section shall be effective with respect to interests in real or personal property created by wills of decedents dying after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed on or before December 31, 1967 which by reason of paragraph (B) of this section will be treated as interests created after December 31, 1967. An interest in real or personal property which comes into effect through the exercise of a power of appointment shall be regarded as having been created by the instrument exercising the power rather than the instrument which created the power.

[2] OHIO REV. CODE § 2131.08 (C) (Page Current Service 1967).

ing under the exercise of a power of appointment is henceforth to be treated for perpetuities purposes as created by the instrument which exercises the power rather than the instrument which creates the power.[3] (3) With regard to an interest terminable by its creator, the perpetuities period begins to run when the power to revoke or terminate ceases.[4]

In moving from the traditional Rule to a "wait and see" coupled with cy pres version of the Rule, Ohio joins Kentucky[5] and Vermont,[6] with similar statutes, and New Hampshire, with a comparable judge-made doctrine.[7] Limited "wait and see" coupled with cy pres statutes exist in a number of states.[8] Combining "wait and see" with cy pres is a more conservative approach to reforming the Rule than is the adoption of a full-scale cy pres statute. When "wait and see" and cy pres principles are joined, a limitation that would have been void at its creation under the traditional Rule will be good if it actually vests within the perpetuities period under "wait and see" without resort to reformation.[9]

THE TRADITIONAL RULE

The Rule Against Perpetuities is a rule against the remoteness of vesting of contingent future interests.[10] Prior to the statutory change, Ohio's test for the validity of such an interest was a possibilities test, not an actualities test. If the contingency on which the interest was limited might be resolved at a remote time, the interest was bad ab initio under a possibilities test even though it was probable at the creation of the interest that the contingency would be resolved within the perpetuities period, or even if the contingency had been resolved well within the perpetuities period and before litigation began. For example, if *A* devised "to *B* for life, remainder to that child of *B* who first attains twenty-five,"

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[3] OHIO REV. CODE § 2131.08 (D) (Page Current Service 1967).

[4] OHIO REV. CODE § 2131.08 (B) (Page Current Service 1967).

[5] KY. REV. STAT. § 381.216 (1963).

[6] VT. STAT. ANN. tit. 27, § 501 (1967).

[7] Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891).

[8] *See, e.g.*, CONN. GEN. STAT. REV. §§ 45-95, 45-96 (1960); ME. REV. STAT. ANN. tit. 33, §§ 101, 102 (1965); MD. ANN. CODE art. 16, § 197A (1966); MASS. GEN. LAWS ANN. ch. 184A, §§ 1, 2 (1955).

[9] R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 39-40 (1966) [hereinafter cited as LYNN]. I have drawn freely on this book and other previously published material when preparing this article on the Ohio statute.

[10] J. GRAY, THE RULE AGAINST PERPETUITIES 3-4 (4th ed. 1942).

and no child of *B* had attained twenty-five at *A*'s death, and the word child was given its customary meaning of a child whenever born, the contingent remainder was bad ab initio. It was bad although a child of *B* was alive at *A*'s death and became twenty-five two weeks after *A* died and before the perpetuities question was raised.

"Wait and See"

Ohio's new test for the validity of a contingent future interest is an actualities test. If at the creation of such an interest, the contingency on which it is limited might be resolved at a remote time, the interest is not necessarily bad ab initio. If *A* devises "to *B* for life, remainder to that child of *B* who first attains twenty-five," and no child of *B* has attained twenty-five at *A*'s death, and the word child is given its customary meaning of a child whenever born, determination of the validity of the contingent remainder may be deferred to a time beyond *A*'s death. If a child of *B* attains twenty-five within the perpetuities period, the contingent remainder vests and is good under the "wait and see" approach.

Cy Pres

For example, *A* devises "to *B* for life, remainder to that child of *B* who first attains twenty-five," and the only child of *B*, conceived and born after *A*'s death, has attained but three years of age at *B*'s death. Under the "wait and see" approach alone the contingent remainder is bad because *B*'s life is the only relevant life in being at *A*'s death for the purpose of testing validity, and *B*'s after-born child cannot attain twenty-five within twenty-one years after *B*'s death. Because Ohio has combined "wait and see" and cy pres principles, [11] the contingent remainder can be reformed at *B*'s death to save it from invalidity under the Rule. For example, it might be reformed to read "remainder to that child of *B* who first attains twenty-one." But this modification of the Rule Against Perpetuities does not guarantee the vesting of an interest. If *B*'s only child fails to reach the age designated in the reformed instrument, the contingent remainder fails by its own revised terms, just as it would have failed under the same circumstances had the testator himself conditioned his gift on the attainment of age twenty-one by the devisee.[12]

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[11] Ohio Rev. Code § 2131.08 (C) (Page Current Service 1967).

[12] Lynn 36.

PRIORITY OF "WAIT AND SEE" OVER CY PRES

Under Ohio's new approach, reformation of a contingent future interest should ordinarily be deferred until it is clear that the interest cannot vest within the perpetuities period as measured by actual events.[13] Deferring reformation as long as possible is consistent with the underlying justification for "wait and see," which is to carry out the intention of the grantor, settlor, or testator unless he in fact violates the Rule Against Perpetuities. The cy pres principle complements "wait and see;" it does not displace it. Although the new wording of the Ohio statute does not reflect this relationship, similar reform legislation elsewhere makes explicit the priority of "wait and see" over cy pres.[14]

THE PERPETUITIES PERIOD

Under the reformed version of the Rule, the perpetuities period remains "lives in being" and twenty-one years. To the extent that a life or lives are used to demonstrate the validity of interests, the life or lives must be in being when the instrument of transfer takes effect for perpetuities purposes (delivery of a deed, death of a testator, termination of a power to revoke an inter vivos trust). If a life or lives are not used to demonstrate validity, the period in gross of twenty-one years may be used, just as it is under the Rule in traditional form. Nonetheless, to the extent the amended statute allows wider latitude with respect to choosing a life in being for the purpose of demonstrating validity,[15] the perpetuities period is lengthened when the life so chosen is longer than the life or lives permissible for demonstration purposes under the traditional Rule.

THE CONCLUSIVE PRESUMPTION OF FERTILITY

Illustrative of the consequences of amending section 2131.08 is the following case. Suppose that *A* devises "to *B* for life, then to *B*'s children for their lives, remainder to the grandchildren of *B*." *B* is a woman thirty years of age at the execution of *A*'s will and has a child or children at that time. Additional children are born to *B* before *A*'s death; *B* and one or more of her children and grandchildren are alive at *A*'s death; and *B* is sixty-five years of age at *A*'s death. Under the traditional Rule Against Perpetuities the

[13] *Id.* at 39-40.

[14] *See, e.g.*, Law Reform Act, 11 ELIZ. 2, No. 83, § 11 (W. Austh). (1962).

[15] *See* Lynn, *Reforming the Rule Against Perpetuities: Choosing the Measuring*

gift to *B*'s grandchildren was clearly bad because theoretically *B* might conceive and bear a child after *A*'s death. Under the "wait and see" aspect of the reformed Rule, could a court at *A*'s death in an appropriate case declare the gift to *B*'s grandchildren valid ab initio? Valid because the inability of *B* to conceive after *A*'s death is a fact that permits using the lives of the children of *B* to demonstrate that the ultimate number of the grandchildren who share in the gift will be determined within the perpetuities period? The answer clearly is "yes." "Wait and see" sets the time limit within which a contingent future interest must vest, if at all, in accordance with the conditions imposed by its creator. "Wait and see" does not tell us *when* a declaration of invalidity can be made, and it no more restricts us solely to declarations of the invalidity of contingent future interests than did section 2131.08 in unamended form. In the case just put, the gift to grandchildren is good under the "wait and see" principle because the conclusive presumption of fertility can be rejected. No reformation of the gift under cy pres is required.[16]

CLASS GIFTS

Under the traditional Rule, a gift to a class is totally invalid unless the ultimate number of persons sharing in the gift or the ultimate size of the shares is determinable within the perpetuities period.[17] If *A* devises "to *B* for life, remainder to such of the children of *B* as attain twenty-five," and the word children is given its customary construction of children whenever born, the gift to children is bad because a child might be born to *B* after *A*'s death and less than four years before *B*'s death, and such after-born child might attain twenty-five beyond the perpetuities period. Although children of *B* alive at *A*'s death will attain twenty-five, or fail to, within their own lives so that a gift limited to them would be good, the fact that an afterborn child of *B* might qualify for a share after the perpetuities period has run invalidates the gift in its entirety. Invalidity turns on the possibility, no matter how fantastic, that *B* might have a child who might attain twenty-five at a remote time.

The harsh effects of the all-or-nothing character of a possibili-

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Lives, 1965 DUKE L.J. 720, 727-29.

[16] *See* Lynn, *Raising the Perpetuities Question: Conception, Adoption, "Wait and See," and Cy Pres*, 17 VAND L. REV. 1391, 1398-1402 (1964).

[17] This is the so-called "All-or-Nothing" rule of Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817).

ties approach are reduced by the new "wait and see" provision. For example, if *B* is capable of conceiving a child after *A*'s death, the validity of the remainder cannot be demonstrated at *A*'s death and so determination of validity is deferred. When events show that the ultimate number of *B*'s children sharing in the gift will be known within the perpetuities period, the gift is good under "wait and see," and no reformation under cy pres is required. But if the only children born to *B* were unborn at *A*'s death and all are under four years of age at *B*'s death, the gift to the children of *B* is bad under "wait and see" because the children of *B* cannot attain twenty-five within twenty-one years after the death of *B*, the only relevant measuring life.[18] Under Ohio's new cy pres feature, the gift can be reformed at *B*'s death to read "remainder to such of the children of *B* as attain twenty-one."

Powers of Appointment

Under the Rule Against Perpetuities in traditional form, the validity of an appointment made by the exercise of a general power to appoint by deed or will is determined by computing the perpetuities period from the time the power is exercised. The validity of an appointment made by the exercise of a general testamentary or a special power is determined by reading back or interpolating the appointment into the instrument creating the power and computing the perpetuities period from the time the power was created.[19] Unless the last sentence of subsection D in the reform statute is confined by judicial interpretation to its context, an appointment made by the exercise of a general testamentary or a special power is henceforth to be treated for perpetuities purposes like an appointment made by the exercise of a general power to appoint by deed or will,[20] and the perpetuities period is to be computed from the time the power is exercised, irrespective of whether the power is a general power to appoint by deed or will, a general testamentary power, or a special power. A comparable provision of the Delaware Code,[21] enacted in 1938, evoked a response in the Internal Revenue Code.[22] Such a possible change in the law of Ohio was not a part of the new statute as formulated

[18] *See* LYNN 115.

[19] *See* L. SIMES & A. SMITH, FUTURE INTERESTS § 1274 (2d ed. 1956). Ohio case law is in accord. *See* Cleveland Trust Co. v. McQuade, 106 Ohio App. 237, 142 N.E.2d 249 (1957).

[20] OHIO REV. CODE § 2131.08 (D) (Page Current Service 1967).

[21] DEL. CODE ANN. tit. 25, § 501 (1953).

by the Committee on Probate and Trust Law of the Ohio State Bar Association, and has nothing to recommend it.

REVOCABLE TRUSTS

The general rule is that if a contingent future interest is created by a revocable deed of trust, the deed of trust is treated like a will for perpetuities purposes and the perpetuities period begins to run on the death of the grantor, rather than at the delivery of the deed.[23] The amended statute explicitly states that this general rule is the rule in Ohio.[24]

EFFECTIVE DATE

Changes in the law frequently raise troublesome constitutional questions. In this respect property law enjoys no exemption. Carefully prepared statutes changing property law are occasionally invalidated because they are found to constitute an unconstitutional taking of property rights without due process of law. The perpetuities reform statute explicitly provides that the operation of the statute is prospective, only, in order to avoid this type of constitutional objection to the new statute.

CONCLUSION

Lawyers differ in opinion on methods of reforming the common law Rule Against Perpetuities. No purpose would be served by relating the alternatives that have been proposed from time to time or the comparable legislation enacted elsewhere.[25] Suffice it to say that the new Ohio Legislation has respectable antecedents.[26]

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[23] INT. REV. CODE of 1954, § 2041(a)(3). This section includes in the gross estate of the donee the value of property subject to a special power if the power is exercised by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of an interest in such property for a period ascertainable without regard to the date of the creation of the first power. Suppose that *A* bequeaths $100,000 in trust "to pay the net income to *B* for life, and then to pay the principal to such of the children of *B* as *B* shall by deed or will appoint, and in default of appointment to pay the principal to the issue of *B* who survive *B*, per stirpes." *B* is a bachelor at *A's* death. *B* by will appoints principal to his only child *C* for life, remainder to such of *C's* children as *C* shall by deed or will appoint, and in default of appointment, remainder to the issue of *C* who survive *C*, per stirpes. Under the Rule in traditional form, both the special power in *C* and the remainder in default of appointment to *C's* issue are void. Under DEL. CODE ANN. tit. 25, § 501 (1953) they are valid.

[24] *See* L. SIMES & A. SMITH, FUTURE INTERESTS § 1226 (2d ed. 1956).

[25] OHIO REV. CODE § 2131.08 (B).

[26] *See* ABA PERPETUITY LEGISLATION HANDBOOK 3-25 (3d ed. 1967).

The statute is short and cast in general terms. Thus it properly lends itself to construction as the needs of time require. The amended statute represents a compromise between a strict application of a rule of law and a policy of reformation of instruments that violate the traditional Rule. Ohio is fortunate in having achieved reformation of the Rule by a statute that is, in general, a good one.

[26] PA. STAT. ANN. tit. 20, §§ 301.4, 301.5 (1950). This, the first of the "wait and see" statutes, was enacted in Pennsylvania in 1947.