RECENT DEVELOPMENTS

JUDICIAL AMENDMENT OF A DEVISE IN VIOLATION OF THE RULE AGAINST PERPETUITIES

In re Foster's Estate
190 Kan. 498, 376 P.2d 784 (1962)

A testatrix created a testamentary trust which contained almost her entire estate, including some six thousand acres of Kansas farm land. The daughter of the testatrix was to receive 14/20 of the income for life with 6/20 of the income to be reinvested in the trust property or in new property. The corpus was distributable to the daughter's children at the death of the daughter or when the youngest child of the body of the daughter reached twenty-three, whichever event occurred later. In the event of the death of one of the children of the daughter before the date of distribution, such child's interest was to pass to his or her children, or if there were no such children, to be distributed equally among his or her surviving siblings. At the death of the testatrix, her daughter, an only child, was thirty-eight years old and had three children.

The executors filed a motion asking that the will be construed, and the motion was seconded by the daughter, who contended that the will was invalid as it violated the Rule Against Perpetuities, the rule against unlawful restraint on alienation, and the rule against unlawful accumulations. The latter two rules are dependent on the time period permitted under the Rule Against Perpetuities. The guardian ad litem for the daughter's children contended their interest was vested, and thus did not violate the Rule.

The district court found that the gift to the testatrix's grandchildren violated all three rules, but held that the clause of the will postponing distribution of the trust corpus until they reached twenty-three would be stricken and the gift upheld. The supreme court affirmed the decision of the district court with one judge concurring in part and dissenting in part and two judges dissenting.[1] The court held that the gift to the grandchildren was contingent, citing *Beverlin v. First Nat'l Bank*[2] and Simes[3] without discussion. They found authority for affirming the district court's action of excising the invalidating clause and upholding the will, in four Kansas cases, *Beverlin v. First Nat'l Bank*,[4] *McEwen v. Enoch*,[5] *Dreisbach v. Spring*,[6] *Blake-Curtis v. Blake*,[7] and in Gray.[8] Neither Gray nor any of the cases cited seem to be authority for the court's action.[9]

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1 *In re* Foster's Estate, 190 Kan. 498, 376 P.2d 784 (1962).

2 151 Kan. 307, 98 P.2d 200 (1940).

3 2 Simes, Law Of Future Interests § 499, at 359 (1st ed. 1936).

4 *Supra* note 2.

5 167 Kan. 119, 204 P.2d 736 (1949).

6 93 Kan. 240, 144 P. 195 (1914).

7 149 Kan. 512, 89 P.2d 15 (1939).

8 Gray, The Rule Against Perpetuities § 247, at 260-261 (4th ed. 1942).

9 *Ibid.* Gray says that if future interests are voided by the Rule Against Perpe-

In *Beverlin v. First Nat'l Bank* the testator left property to his two daughters in trust until the daughters each attained the age of forty years. In the event a daughter died before reaching forty and without surviving children, her share vested in the surviving daughter. If the deceased daughter left surviving children, the share would be held in trust until the time when the deceased daughter would have attained the age of forty, and the children had reached the age of twenty-five. The court held that although the gift to the children was a contingent class gift in violation of the Rule Against Perpetuities, the prior interests of the daughters of the testator were unaffected.

In both *Dreisbach v. Spring* and *Blake-Curtis v. Blake* it was also held that a section of a will which is invalid may be stricken out and the testamentary plan given effect if the testamentary plan can be carried out without reference to the void section.

In *McEwen v. Enoch,* a settlor created a trust for the benefit of his eleven- and fifteen-year-old grandchildren. The income was to be used until the younger child reached forty, or until the time when she would have reached forty. The trust was then to terminate, and the corpus was to pass absolutely to the grandchildren or their heirs. In the event of the birth of additional grandchildren, any additional grandchildren and their heirs were to share equally with the living grandchildren. The court held that the gifts to the heirs violated the Rule Against Perpetuities, and accelerated the gifts to the living grandchildren, so that they became absolute gifts at the time the purported trust was created.

While the court's solution in the instant case to the problem of remoteness of vesting of a class gift is unorthodox, it is in accord with the attempt on the part of a number of courts to circumscribe the English case of *Leake v. Robinson,*[10] the majority rule as to vesting of class gifts for the purpose of the Rule Against Perpetuities. *Leake v. Robinson* requires a class gift to stand or fall as a unit. If the interest of any member of the class might vest remotely, all their interests are declared invalid. This rule has been soundly criticized by Leach in "The Rule Against Perpetuities and Gifts to Classes."[11]

A construction of the grandchildren's interest which the court might have adopted is that the 6/20 of the corpus of the trust is a present vested interest with possession postponed, subject to open up and let in afterborn grandchildren, and subject to complete divestment by a grandchild's death before distribution. The 14/20 of the corpus supported by a life estate in the daughter would be a vested remainder subject to complete divestment by a grandchild's death before the distribution date. If vested at the testatrix's death or at birth, all gifts to the grandchildren are good. The daughter is the life in being and all of her children must be born within her lifetime.

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tuities, the prior interests are what they would have been if the future interests had been omitted.

[10] 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817).

[11] 51 Harv. L. Rev. 1329 (1938).

The difficulty with this analysis is that the divesting interests of afterborn grandchildren which divest interests of other afterborn grandchildren, and the divesting interests of the children of afterborn grandchildren *could* possibly vest remotely, and are invalid. The court is then forced to consider whether to save some divesting interests as was done in a recent Georgia case,[12] or to invalidate all divesting interests, leaving an absolute fee in the grandchildren. The latter course would seem more reasonable than invalidating some divesting interests while preserving others. However, it would frustrate the testamentary scheme in part, and the court would then have to decide whether the scheme was so distorted as to render it impossible of effectuation. The court could find precedent for preserving the remaining portion of a testatrix's scheme when forced to invalidate a part of it as in violation of the Rule Against Perpetuities in two cases which it cites, *Dreibach v. Spring*,[13] and *Blake-Curtis v. Blake*.[14]

Another interpretation which the court could have adopted would be the exclusion of grandchildren born after the testatrix's death from the class. This would have protected the divesting interests of the great-grandchildren, for the property would then have to vest within the period of the Rule. This solution is unsatisfactory because the testatrix probably meant to include the youngest child of her daughter, since there is nothing in the will which makes it more probable than not that she was speaking of the youngest child living at her death. Further, it results in unequal treatment of class members.

The solution which is closest to the one the court adopted is that which is discussed in the *American Law of Property*,[15] and utilized in *First Portland Nat'l Bank v. Rodrique*.[16] In that case the four named children of the testator and their issue (or the surviving siblings of the four named children) were given an interest in the corpus of a trust consisting of shares of capital

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[12] Lanier v. Lanier, 218 Ga. 137, 126 S.E.2d 776 (1962).

[13] *Supra* note 6.

[14] *Supra* note 7.

[15] 6 American Law of Property § 24.49 (1st ed. 1952) states that even if one of two alternative interests is too remote, the other alternative interest is valid, if the contingency occurs upon which it is to take effect. Thus if *T* bequeaths a life estate to *A* and at *A*'s death to such of *A*'s children as reach twenty-five, but if no children of *A* survive him to *B*, the alternative interest in *B* is good if *A* in fact dies with no surviving children. § 24.54 states that when a gift is made upon either of two alternative contingencies, one of which is remote and one of which must occur if at all within the period prescribed by the Rule, the court will "wait and see" if the invalid contingency occurs before invalidating the gift. Thus if *T* bequeaths a fund in trust to pay the income to *A* for life, then to any surviving wife of *A* for life, then to pay the principal to those surviving children of *A*, either at *A*'s death or the death of a surviving wife of *A*, if at the death of *A* he leaves no surviving wife, the gift to the children of *A* is valid. If at the death of *A* there is a surviving wife, the gift to the children is void, for the surviving wife of *A* may be a person unborn at *T*'s death and *A* may predecease her by more than twenty-one years.

[16] 157 Me. 277, 172 A.2d 107 (1961).

stock. Their interest was to vest in possession upon the occurrence of either of two alternative conditions: either (1) upon the death of the testator's widow, if the trust had been in effect for more than twenty-five years (or if the stock should have been sold; or (2) if not, upon either the selling of the stock or the passage of the twenty-five years.

The court held that the second contingency caused a violation of the Rule Against Perpetuities because all lives in being could have immediately ceased at the testator's death, and the corpus of the trust might not vest for more than twenty-one years. But they reasoned that on an alternative contingency theory there need be no violation of the Rule. At the time of the trial twenty-five years had passed since the death of the testator; the widow was still living; and the trust would terminate and all interests vest not later than her death. However, in the instant case this solution would have lead to postponement of a settlement for an unknown period of time, as neither contingency had yet occurred. The dissent of Justice Jackson, who also wrote the majority opinion, suggests that the court considered this solution, for he says that the will could probably have been carried out in its entirety, as the testator's daughter would probably live much longer than until her youngest child reached twenty-three.[17] He does not comment as to why the court rejected this solution.

The most acceptable solution would have been to follow the policy of the New Hampshire court in *Edgerly v. Barker*,[18] as did the Mississippi court in *Carter v. Berry*.[19] Utilizing cy pres these two courts declared that where a gift fails because of an age condition in excess of twenty-one, the age shall be reduced to twenty-one. Assuming that the interests are contingent, this solution would prevent the possibility of interests vesting in minor children, a result which the testatrix was obviously attempting to avoid, but which the court's solution permits.

The merit of the common law Rule Against Perpetuities is the subject of debate in a number of jurisdictions.[20] Leach has branded it as "an elderly female clothed in the dress of a bygone period who obtrudes her personality into current affairs with bursts of indecorous energy."[21] He advocates the formation of a committee charged with the duty of preparing legislation

[17] 376 P.2d at 791.

[18] 66 N.H. 434, 31 Atl. 900 (1891).

[19] 243 Miss. 321, 136 So. 2d 871, 140 So. 2d 843 (1962).

[20] In 1947, as a part of its new state act, the Pennsylvania legislature enacted the following:

> Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.

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

Vermont adopted a "wait and see" test for validity of future interests in 1957. Vt. Stat. Ann. tit. 27, § 350.03 (1959).

[21] Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 Harv. L. Rev. 721, 725 (1952).

which would retain the virtues of the Rule while eliminating its tendency to destroy interests which pose no threat either to the free alienability of land or to the free flow of funds. He suggests that the committee might consider action very similar to that taken by the court in the instant case, by suggesting to the legislature enactment of a statute incorperating:

> A provision that where a violation of the Rule is found, the offending interest will be reshaped by the court if this can be done within the limits of the Rule without alteration of the essential purpose of the testator or settlor.[22]

Simes favors a cy pres doctrine, applicable to private trusts, which would permit the court to remold them when future interests created by such trusts are invalid under the Rule.[23]

Without deciding what kind of rule against the suspension of alienation of property by a deceased person is desirable, one can still sympathize with the court's action in this case. The attempted trust violated a mere technicality rather than the spirit of the Rule, for at the latest the property would vest two years beyond the prescribed period. While the cases cited by the court are not authority for the method employed, they are decisions favoring the policy of effectuating the intention of a testator if at all possible. In a case such as this where there is a minor infraction of a technical rule, it seems desirable to carry out the testatrix's intent.

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[22] *Id.* at 748.

[23] Simes, "Is the Rule Against Perpetuities Doomed?" 52 Mich. L. Rev. 179 (1953).