

RECENT DEVELOPMENTS

CLASS GIFT SAVED ALTHOUGH ARGUABLY INVALID UNDER RULE AGAINST PERPETUITIES

Carter v. Berry

243 Miss. 321, 136 So. 2d 871 (1962),
aff'd on rehearing, 243 Miss. 356, 140 So. 2d 843 (1962)

A testator left property to his executors and trustees in trust to pay twenty percent of the income from the corpus to each of his two sisters for life, to hold and manage the other sixty percent of income, and at the death of one sister, Edra Mai, to deliver twenty percent of the trust estate to her children surviving her. The remaining eighty percent of the trust estate was to be held by the trustees until the testator's youngest grandchild, whether alive at the testator's death or thereafter born, reached the age of twenty-five years. At that time the estate was to be divided among the grandchildren, but in no event was the trust to continue for a longer period than thirty-five years from 1955, the date of execution of the will. The trustees were authorized to invade the corpus for the support or education of any grandchild, and any money so spent was to be charged against that grandchild's share. The trust also contained a spendthrift clause. At the testator's death he was survived by his two sisters and by two daughters. One daughter had three children at that time, but the other daughter had none. No provision was made for the daughters in the will because the testator had set up irrevocable inter vivos trusts for their benefit. In an action for construction of the will the chancellor sustained the daughters' contention that the testamentary trust for the benefit of the grandchildren violated the Rule Against Perpetuities.¹ The Supreme Court of Mississippi reversed, holding that the gift to grandchildren was vested, and thus did not violate the Rule. In a second hearing on suggestion of error, the court based its prior ruling on an alternate ground: Conceding that if the interest were construed to be contingent, it would violate the Rule, the Court applied the cy pres doctrine to reduce the twenty-five-year period to twenty-one years.² The cy pres doctrine is a rule for the construction of instruments in equity whereby the intention of the party is carried out as nearly as possible when it would be impossible or illegal to give it literal effect.³

¹ Gray, *The Rule Against Perpetuities* § 201 (4th ed. 1942): "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."

² *Carter v. Berry*, 243 Miss. 321, 136 So. 2d 871 (1962), *aff'd on rehearing*, 243 Miss. 356, 140 So. 2d 843 (1962).

³ Stewart, "Perpetuities—Cy Pres Doctrine Utilized To Reform Invalid Class Gift," 25 Ga. B.J. 206, 208 (1962):

A familiar example of the use of this doctrine is the application of a fund to some charitable purpose other than the one originally intended by the testator,

The court in the instant case refused to follow *Leake v. Robinson*, a decision often attacked in American legal writings, but generally followed wherever a gift is made to members of a class, some of whose interests might vest beyond the period of the Rule Against Perpetuities.⁴ The doctrine of *Leake* requires a gift to a class to stand or fall as a unit. If the interest of any member of the class might vest beyond the period of the Rule, then none of the members may take. This outcome is so harsh that the courts have carved out exceptions to the doctrine. An exception is made where life estates are given to the children of a living person and remainders to their issue. All of the life estates are valid, but the children in the class are treated separately so that only the gifts of principal to the issue of children unborn on the date of the gift are invalid.⁵ The harshness of the doctrine has also been avoided by so construing the language in an instrument that afterborn members of a class, whose inclusion would cause a violation of the Rule, are excluded.⁶ Of course these exceptions result in unequal treatment for class members since persons who were intended to be included are not.

Despite a lengthy opinion, the court in the instant case failed to classify the interests of the grandchildren. That portion of the estate which the grandchildren were to get at a certain time following its utilization as a source of income by one sister is a remainder because there is a preceding life

when the original gift fails for some appropriate reason. In such a case the court inquires into the general charitable intent of the testator and then makes a disposition of the gift to carry out the intention of the testator *cy pres* (as nearly as possible).

See also Quarles, "The Cy Pres Doctrine: Its Application to Cases Involving the Rule Against Perpetuities and Trusts for Accumulation," 21 N.Y.U.L. Rev. 384 (1946).

⁴ 2 Meriv. 363, 35 Eng. Rep. 979 (Ch. 1817). Professor W. Barton Leach has attacked this English decision and its philosophy in many articles. A collection of them is cited in *Carter v. Berry*, *supra* note 2, at 367, 140 So. 2d at 850. Most of the reforms in this area have come about through legislation. Lynn, "Reforming the Common Law Rule Against Perpetuities," 28 U. Chi. L. Rev. 488 (1961).

⁵ *Cattlin v. Brown*, 11 Hare 372, 1 Eq. R. 550, 68 Eng. Rep. 1319 (1853), is the leading decision on this point. For a recent American case applying its doctrine of severable shares, see *Second Bank-State Street Trust Co. v. Second Bank-State Street Trust Co.*, 335 Mass. 407, 140 N.E.2d 201 (1957). A typical application of *Cattlin* is where life estates in property are given to the children of *A*, a living person, and remainders in fee to *A*'s grandchildren. It is clear that any children of *A*, a person living at the creation of the interests, will be born within his lifetime, so that all of the life estates are valid. However, children could be born to afterborn children of *A* more than twenty-one years after lives in being at the creation of the interests. Under *Leake v. Robinson*, all of the remainders in fee are invalid. However, under the doctrine of severable shares, children of *A* are treated separately and their children as separate subclasses. Children of children of *A* living at the creation of the interests will be born within the lives of those children of *A*, so their remainders in fee are valid. Children of children of *A* born after the creation of the interests *might* be born more than twenty-one years after lives in being at the time of the creation of the interests, so their remainders in fee are invalid.

⁶ *Colt v. Industrial Trust Co.*, 50 R.I. 242, 146 Atl. 628 (1929).

estate to support it. The other portion of the estate which the grandchildren were to receive is a present interest with possession postponed, if the gift is construed to be vested. If the gift is construed to be contingent, the interest is executory since it is unsupported by a life estate. The most contentious point in the case is whether the interests are vested or contingent. The absence of any gift following the bequest to the grandchildren, or words of survivorship, and the discretionary feature whereby the trustees could expend the corpus and charge the expenditure against a grandchild's share, indicate that a vested construction is proper. The Rule Against Perpetuities does not apply in such a case because it is a rule only against remoteness of vesting.

However, the words "divided" and "delivered," and the spendthrift clause with no right of disposition in any grandchild, favor a contingent construction. Furthermore, the bequest to the testator's widow, which was to be taken from income and corpus before any other distribution was made,⁷ led counsel for the executors to admit that a grandchild would have to survive the termination of the trust estate to share in distribution.⁸ If the gift in the instant case is contingent, it might vest beyond the period allowed by the Rule. This is because a grandchild of the testator might be born after the testator's death, all relevant persons might then die immediately, and more than 21 years would elapse before his interest vested. The conventional approach of the courts to this problem is to construe the property interests involved without reference to the Rule. Contingent remainders or executory interests which might vest remotely are then invalidated.⁹ Leach has made a vigorous and persuasive frontal assault on this application of the Rule because it hinges solely on the classification and construction of interests.¹⁰

The decision of the *Carter* court to follow the New Hampshire case of *Egerly v. Barker*¹¹ was apparently influenced by a clear testamentary scheme to benefit the grandchildren, and by the testator's express desire that his daughters should not take since they had been well provided for in the *inter vivos* trust.¹² The influence on the court in the instant case of reformers, particularly Leach, is also noticeable. An Ohio court confronted by a similar

⁷ The widow renounced the gift made by will and settled with the estate, so that her rights were not at issue. *Carter v. Berry*, *supra* note 2, at 337, 136 So. 2d at 873.

⁸ *Id.* at 365, 140 So. 2d at 849.

⁹ Application of the Rule has been likened to an exercise in logic or mathematics. "It is a dangerous thing to make such a radical change in a part of the law which is concatenated with almost mathematical precision." Gray, *The Rule Against Perpetuities* § 871 (4th ed. 1942).

¹⁰ Leach, "The Rule Against Perpetuities and Gifts to Classes," 51 *Harv. L. Rev.* 1329 (1938).

¹¹ 66 N.H. 434, 31 Atl. 900 (1891). This case was decided by Chief Justice Doe, a man highly regarded by scholars in the field. Leach & Tudor, *The Rule Against Perpetuities* 183 (1957).

¹² "I have made no provision herein for either of my two daughters . . . for the reason that I have heretofore made . . . adequate provision for them with Trust Agreements. . . ." *Carter v. Berry*, *supra* note 2, at 340, 136 So. 2d at 874.

situation would do well to consider the merits of cy pres.¹³ The reduction of a period of time which makes it possible for interests to violate the Rule Against Perpetuities allows a court to achieve a result patently more equitable than that achieved in *Leake v. Robinson*. Certainly the policy behind the Rule Against Perpetuities, an aversion to an ancestor's control of the devolution of property for many generations, is served by this result.¹⁴ The trust in the instant case would not endure for longer than thirty-five years from 1955, the date of execution of the will, so there seems to be no valid reason for not effectuating the intention of the testator through the doctrine of cy pres.¹⁵

¹³ Research failed to disclose any Ohio cases directly in point.

¹⁴ Simes, *Public Policy and the Dead Hand* 59 (1955).

¹⁵ Colonel Samuel P. Colt's testamentary scheme was stretched to the limits of credibility in a series of cases culminating with *Industrial National Bank v. Morey*, 86 R.I. 15, 133 A.2d 724 (1957).