Wills & Estates
Winter 2018

Lecture Notes – No. 14

"THE RULE AGAINST PERPETUITIES"

Ugh.

At last, Bob discovered the previously lost simple explanation of the Rule Against Perpetuities

Since around the 13th century, the common law has attempted to limit or to expand, alternatively, the ability of property owners to place restrictions on how their property can be passed to others. Sometimes proprietors have been motivated by dynastic concerns ('let's keep the property in the family forever') or the evasion of some sort of obligation or tax payable when property passes to another person. An example: the grant 'to A and the heirs of his body' was intended to keep property within the male lineage of the proprietor ('fee tail') and was sanctioned by the statute *De Donis Conditionalibus* in 1285. Fee tail gave rise to a host of problems and was restricted

gradually by the courts as the perpetual restraint of alienation. In its stead other forms of restriction arose, were scaled back and eventually abolished - but not before this seemingly endless cycle of 'development' littered the common law of property with enough abstruse points of law to keep generations of legal historians and law students busy.

For present purposes, it is important to understand the principle as a matter of common law, and, its modified form within Ontario law as provided for in the provincial *Perpetuities Act*. On the whole, perpetuities problems are easy to avoid.

(a) Vesting Problems

'Vested':

- A **'vested interest'** means a present or future interest in property which the law will presently protect.

- A **'contingent interest'** is not vested; rather, it may be conditional on something happening and one may not be able to deal with it until it vests (i.e. sell it).

- A vested interest may be **'defeasible'** or **'indefeasible'**; that is, it may vest now but can be defeated later (defeasible). Thus, 'to A for life, remainder to B for life, remainder to C' features three vested interests where all A, B, and C are alive. B's interest may be defeated by his or her death before A's death, and thus it is 'defeasible' and if defeated B would technically be **'divested'**.

- In general, the law in interpreting a conveyance will prefer **'early vesting'** as it is more certain and convenient; see *Duffield v Duffield* (1829), 3 Bligh's New Reports 260.

- Equally where there is a condition and it may operate as a condition precedent or subsequent, the law presumes a condition precedent (so as to allow early vesting).

To glance at, shudder, and hurry onwards:

'The Rules in Edwards v Edwards'
(1852), 15 Beav. 357

These rules deal with future interests where the owner conveys property to others in the form of a life estate followed by remainder interests. The orientation of these rules is to provide clarity in respect of when a contingency operates (on the death of the life tenant or otherwise) so that one may know with certainty in whom the remainder vests and when.

Here the testator left property in trust (she could not take directly) for his wife for life, and thereafter to his three children, with the provision that:

> **'if any of my children shall die, and leaving no children, his or her share shall be equally divided between the other two.'**

The widow died; the three children survived her, but subsequently a son died without issue. The Court held that **his share did not pass to his brother and sister, but became absolute in him when he survived his mother even though he subsequently died without issue.** The interpretation arises based on the (presumed) intention of the testator.

The Court pointed out four classes of cases in which questions of this description arise.

> First, **'to A, but if he shall die, then to B'**. There is no contingency arising from 'if' because A is certain to die. Thus, it is presumed the testator intended that A should not take if he died before the testator, but that the property should go to B in that event, thus preventing a possible lapse. **Rather than cut down the absolute estate in A and make it a life estate with remainder to B, the clause is given a substitutionary construction**; i.e. if A outlives the testator, he takes; if not, B takes.
>
> Second, **'to A, but if he dies without issue, then to B'**. Here, a real contingency is expressed without reference to the time of death, and it would seem that the ordinary meaning should be given the words, so that **upon A's death without surviving issue, whenever his death occurs, B should be entitled to take the property.**
>
> Third, **'to W for life, remainder to A, but if A dies, then to B'**. Since there is no real contingency expressed, **one assumes that the testator intended the gift over to take effect on the death of A before the period of possession or distribution**; and here, as distinguished from the first class, the period of distribution is at the termination of the life estate, rather than at the death of the testator. Therefore, **if A survives the life tenant, the gift to him becomes absolute, and only upon his death before the death of the life tenant can the alternative remainder to B take effect.**
>
> Fourth, **'to W for life, remainder to A, but if A die without issue, then to B'**. The contingency must be construed to mean the occurrence of the contingent event before the period of distribution, and thus **only upon the death of A without issue in the lifetime of the life tenant can the alternative remainder to B operate. If A survives the life tenant, his interest becomes absolute**, even though he may subsequently die without issue. The principle is said allow vesting as soon as possible.

Note: the intentions of the testator here are constructed by the court and are not in any way related to the actual intention of an individual testator. Thus the courts created presumptions, exceptions, and counter-presumptions. As one judge commented: there are 'ghosts of dissatisfied testators... who... wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills;' see *Perrin v Morgan* [1943] 1 AC 399, 415.

Re Brailsford
[1916] 2 Ch. 536

Here the testator left real estate to trustees in trust for his wife for life, and after her death to his son, "his heirs and assigns," with a double gift over in case he should die either without leaving or leaving issue. The widow pre-deceased the son. It was held that the gift to the son was indefeasibly vested in him on the death of his mother.

Per Sargant J:

> As was pointed out by James L.J. in *Olivant v. Wright*, the fourth rule of construction laid down in *Edwards v. Edwards*, which was overruled by the House of Lords in *O'Mahoney v. Burdett*, had laid down that the introduction of a previous life estate altered the onus probandi and raised a presumption that the death referred to was a death in the lifetime of the tenant for life unless a contrary intention appeared in the will. That was overruled by the House of Lords, and **it is now established that the contingency is to be deemed a continuing contingency in the event of the death of the devisee or legatee at any time unless a contrary intention appears by the will.**
>
> It is contended in the present case that there is a sufficient expression of a contrary intention. It is said that the manifest intention is that there shall be a division of the property at the death of the widow. No doubt the property in question will in all probability be the only property of the testator and will be divided in this sense, that the real estate devised to the son will be handed over to him, although the other property may be retained by the trustees in order to carry out the trust for the separate use of the daughter. But on the whole I do not lay any great stress upon this view of the matter, since the case is not the case of trustees dividing personal estate and so not being able to hand over the property hereafter. The property here is real estate, and if there is any gift over at a future time that is made by way of legal limitation and would operate without any intervention on the part of the trustees. This consideration, therefore, is not in my opinion sufficient to bring the case within *Olivant v. Wright*.
>
> **But a much more cogent reason for the contention is to be found in the fact that the property is expressly devised to the son, "his heirs and assigns," while if the two alternative gifts over are to be read as taking effect on the son's death whenever it occurs, the combined effect of the gifts over is to out down what is prima facie an absolute interest to one which is in substance indistinguishable from a life estate.** It is true that in point of law there is no objection to the gift of an estate in fee simple coupled with two executory devises which are exhaustive and provide for every event; but it is a curious intention to ascribe to the testator that where by marked words of limitation he has placed the devisee in the position of an absolute owner he should immediately afterwards reduce him practically to a position no better than that of a life tenant; and, bearing in mind that the presumption laid down in *O'Mahoney v. Burdett* is only a prima facie presumption, **I think that the marked use of words giving an estate of inheritance to the devisee is so far repugnant to a construction of the**

will which would reduce him practically to the position of a life tenant as to make it reasonable and proper for the Court to limit the time for the operation of the gifts over in such a way as to put the son in the position of being possibly entitled to become at some time during his life the absolute owner of the property.

Re Archer
(1907), 14 O.L.R. 374 (K.B.)

Where the will provides that a gift that would otherwise vest does not do so because some event has taken place doesn't fail because the person who would otherwise receive the gift cannot do so (unless that was T's intent).

Re Barton
[1941] S.C.R. 426

Where a specific gift is subject to the discretion of trustees to pay the whole or such part of that interest as they see fit, the gift of the corpus is nonetheless vested in the beneficiary despite that beneficiary having to fulfill a condition (here, attainment of an age).

Re Stephens
[1978] 5 W.W.R. 444 (B.C.S.C.)

A vested interest may be defeated by a subsequent condition or a contingency provided that the Court can assess from the beginning, precisely and distinctly, the date that the interest will determine according to the condition.

Re Taylor
[1972] 3 O.R. 349 (H.C.J.)

The presumption of early vesting is that wherever the words used in a will permit a construction that results in early vesting, the gift will be vested rather than contingent.

Re Squire
[1962] O.R. 863

A legatee may accelerate payment that is otherwise to be postponed where he or she is absolutely entitled to the gift on the same reasoning as the collapsing of a trust by all *sui juris* beneficiaries.

Re Krause
(1985), 18 D.L.R. (4th) 631 (Alta. C.A.)

A gift to 'my surviving brothers and sisters' was held to be a contrary intention to the anti- lapse provisions where one sister predeceased the testator; she did not 'survive' the testator and thus her gift failed to vest.

(b) Interests that Vest in Violation of the Rule against Perpetuities

The 'rule against perpetuities' is better thought of as the 'rule against remoteness of vesting'; it acts to set the maximum time *between* {the grant of an interest in property} *and* {the time that same interest does or might vest} in some person.

Why have the rule at all? Historically, the law of real property after the Norman conquest (1066 and all that) featured the principle of primogeniture. That is, inheritance by the first born son. Over time the common law shed this in favour of almost completely free alienation. However, and given that land was the most valuable asset one could own for a very long time, there was a tendency in aristocratic families to try and reproduce constraints on alienation. Hence, the "rule against perpetuities" was developed as a check.

The rule itself can be traced back at least to ***The Duke of Norfolk's Case* (1681), 23 ER 388.** At the time that the case was decided, the common law had allowed for various techniques to restrict alienation based on contingent interests. The court held that whatever the nature of the contingency it must be capable of bring fulfilled 'within the Compass of one life.'

In contemporary legal thinking, the rule acts to balance two competing policy interests in contemporary legal thinking: freedom of disposition of proprietary interests and the need to maintain the economic exploitation of property. There is a concern that property which might vest too far in the future might fall into disuse. At the same time, there is a recognition that past or present generations should not be able to rule from the grave over the disposition or property far into the future.

***Common Law Form of the Rule: if there is a possibility* that the interest might vest outside the allotted time, then the grant is void at common law.**

***Statutory Form of the Rule:* rather than determine whether the rules is breached on a theoretical possibility, we 'wait and see' whether the rule is violated.** Thus, under the provincial Perpetuities Act, s. 4(1): "[e]very contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish, (a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or (b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

The basic common law rule:

an interest is only valid <u>if it is incapable of vesting outside the perpetuity period</u> which is calculated as <u>the life or lives in being at the time of the creation of that interest, plus 21 years</u>. If it is possible that the interest will vest outside the perpetuity period, then the interest is void as a matter of law.

The 'perpetuity period' itself is perhaps the most confusing part of the rule.

The form of the rule doesn't mean that the time period in question relates to just any person who was alive at the making of the grant, it is taken to mean the lives of persons *relevant to the grant* – the grantor and the grantees, or person that may obtain interests under the grant. The grant might even specify another person or set of people whose lives operate to determine the perpetuity period. Sometimes other people are necessarily involved, a grant to one's grandchild may make the life of one's child important.

Example 1:

> **"To B, the child of my good friend A, provided that she has a child during A's life or 20 years after his death."**

Here there is the grant of a contingent interest – a conditional gift of property, the gift to B being contingent on her having a child before or within 20 years her parent A's death.

The relevant life in being is that of A; therefore, (his life + 21 years) is the perpetuity period. The satisfaction of the condition *cannot* not fall outside the period as it is calculated as (his life + 20 years) an thus is valid.

Example 2:

> **The donor makes a deed giving an *inter vivos* gift of his property "to my grandchildren who attain age 21".**

Assume the donor had at least one child when the deed was executed.

The relevant time period is **<u>the life of donor</u>**. The grant **<u>must</u>** fail at common law.

The perpetuity period runs from *the time that the grant is created*; that is, when deed is executed. Is there a possibility that an interest might vest outside the period of the life of the donor plus 21 years?

Yes - it is possible that the grantor will have more children after the deed is executed and that such a child may have children. Thus, the unborn child (grandchild) of an unborn child (son or daughter of the donor) might have an interest in the property, and that interest may vest beyond the death of the grantor plus 21 years.

The jurisprudence subsequently developed assumptions respecting such matters as lifespan or the age at which women may no longer conceive – the point being to predict the future for the sake of the rule.

Because it was a harsh and confusing rule, it was softened by statute.

Selected provisions of the provincial Perpetuities Act

2. Except as provided by this Act, the rule of law known as the rule against perpetuities continues to have full effect.

3. No limitation creating a contingent interest in property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.

Presumption of validity and "Wait and See"

4. (1) Every contingent interest in property that is capable of vesting within or beyond the perpetuity period is presumptively valid until actual events establish,

(a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of section 8 or 9, shall be treated as void or declared to be void; or

(b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

Measurement of perpetuity period

6. (1) Except as provided in section 9, subsection 13 (3) and subsections 15 (2) and (3), the perpetuity period shall be measured in the same way as if this Act had not been passed, but, **in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.**

(2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.

(3) Where there is no life satisfying the conditions of subsection (1), the perpetuity period is twenty-one years.

Presumptions and evidence as to future parenthood

7. (1) Where, in any proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then,

(a) it shall be presumed,
(i) that a male is able to have a child at the age of fourteen years or over, but not under that age, and
(ii) that a female is able to have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but

(b) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

(2) Subject to subsection (3), where any question is decided in relation to a limitation of interest by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question that arises concerning the rule against perpetuities in relation to the same limitation or interest despite the fact that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

(3) Where a question is decided by treating a person as unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would, apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

(4) The possibility that a person may at any time have a child by adoption or by means other than by procreating or giving birth to a child shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection (3) applies to such child or children.

Reduction of age

8. (1) Where a limitation creates an interest in property by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and actual events existing at the time the interest was created or at any subsequent time establish,

(a) that the interest, would, but for this section, be void as incapable of vesting within the perpetuity period; but

(b) that it would not be void if the specified age had been twenty-one years,

the limitation shall be read as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would, if specified instead, have prevented the interest from being so void.

Exclusion of class members to avoid remoteness

(2) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents subsection (1) from operating to save a limitation creating an interest in favour of a class of persons from being void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly.

***Thus,* the statute (i) ameliorates the basic operation of the rule against contingent future interests by adopting a 'wait and see' approach; (ii) dispenses with the common law presumption that there is no limit on the ability to have children in terms of age; and (iii) provides that age attainment clauses that would fail are merely read down to ensure compliance with the rule.**

Is any of this really a serious concern any more?

[No. Perpetuities are easily avoided.]

THE RULE AGAINST ACCUMULATIONS OF INCOME

The rationale for the rule against accumulations of income is to prevent the income under a trust or conveyance being tied up for an unreasonable length of time. At common law the rule was that an accumulation beyond the perpetuity period was invalid; *Harrison v Harrison* (1787), 4 Ves. 338.

In *Thelluson v Woodford* (1799), 4 Ves. 227, such a Will was upheld against a public outcry against its perceived unfair terms to the testator's family. The legislative response of the British Parliament was the *Accumulations Act of 1800*. Under the original statute, no income should be accumulated for any longer term than either (a) the life of the settlor; or (b) the term of twenty-one years from his death; or (c) during the minority of any person living or *en ventre sa mere* at the time of the death of the grantor; or (d) during the minority of any person who, if of full age, would be entitled to the income directed to be accumulated. After the satisfaction of one of these periods, income that continues to flow in to the trust must be distributed.

Selected provisions of the provincial Accumulations Act

The *Accumulations Act* provides:

> 1. **(1) No disposition of any real or personal property shall direct the income thereof to be wholly or partially accumulated for any longer than one of the following terms:**
>
> 1. The life of the grantor.
>
> 2. Twenty-one years from the date of making an *inter vivos* disposition.
>
> 3. The duration of the minority or respective minorities of any person or persons living or conceived but not born at the date of making an *inter vivos* disposition.
>
> 4. Twenty-one years from the death of the grantor, settlor or testator.
>
> 5. The duration of the minority or respective minorities of any person or persons living or conceived but not born at the death of the grantor, settlor or testator.
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> 6. The duration of the minority or respective minorities of any person or persons who, under the instrument directing the accumulations, would, for the time being, if of full age, be entitled to the income directed to be accumulated.

The terms stipulated in the statute are alternatives; any will suffice to invoke the rule. Please note that in determining the application of the rule both implied and explicit accumulations are relevant.

Terminating the Accumulation

Failure to comply voids the relevant provision under section 1 (6):

> Where an accumulation is directed contrary to this Act, such direction is null and void, and the rents, issues, profits and produce of the property so directed to be accumulated shall, so long as they are directed to be accumulated contrary to this Act, go to and be received by such person as would have been entitled thereto if such accumulation had not been so directed.

Adamson Estate v. McIntyre
(1997), 16 E.T.R. (2d) 189 (Ont. Gen. Div.); cb. p.805, note 3

Dunn J.:

> 3 The issue is to determine who is to receive the 'extra income' in the estate when the Accumulation Act, R.S.O. nullifies the continued accumulation of income after 21 years. Is such income an intestacy, or is the residuary beneficiary entitled to it?
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> Facts
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> 4 **The testator died March 31, 1973 having made a will the year before. That will provides certain specific bequests to friends and some of her next of kin. The residue of the estate is set aside for the life of the testatrix's sister and $150.00 per month is directed to be paid to her for life - out of the income of the capital. On her death the residue is divided into 2 parts; one part given to the C.N.I.B. and the other 1/2 to be divided among certain other named charities.** (See Appendix A for the text of the will.)
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> 5 The life annuitant, Freida McIntyre, has received the monthly sum for over 21 years. The will also allowed for discretionary encroachment on the capital for her benefit in the event of illness, incapacity or other need. Substantial encroachments for these provisions have been made over the years. (See Appendix B.)
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> 6 The estate residue, originally valued at some $160,000.00 in 1973 has obviously been managed well. In addition to paying the annuitant for the monthly bequest, the substantial encroachments and costs etc., the residue as at the relevant date now sits at the princely sum of approximately $300,000.00.
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> ...
>
> **9 Twenty-one years have elapsed since the date of the death of the testator. Each year the capitalized residue earns income that exceeds that needed to pay the life annuitant and usually whatever encroachments are authorized, and all costs.** The Accumulations Act prohibits further accumulations of 'excess income'. Instead, the Act requires that such ex-cess income be distributed "to ... such person as

would have been entitled thereto such accumulation has not been directed".

10 Under the will and the Act, who is entitled to the 'excess income'? The charities as final residual beneficiaries claim such excess. On the other hand, the next of kin of the testatrix claim entitlement by virtue of an intestacy of that part of the estate represented by the excess income.

...

18 The lapse or illegality in our case, as a result of the Accumulations Act effects only the earned income beyond 21 years, that is not disposed of to the life annuitant or required for costs or expenses of the estate. This 'excess interest' earned beyond the 21 year peri-od does not appear to be disposed of by the will. It does not appear to be a legacy or de-vise, contrary to law that should revert to and from part of the residue.

19 Approaching the problem from another direction, the residual beneficiaries suggest that because of the Accumulations Act their entitlement to the excess income (otherwise capitalized as residue) is crystallized at the 21 year period.

20 The intention of the testator appears contrary to this approach. Their interest under the will is defeasible and not crystallized until the death of the life annuitant. The extent and determination of who is entitled to the residue will not be known until that time.

...

28 I conclude then that there is an intestacy in the will for that portion of the income earned the accumulated and crystallized residue as at the end of the 21st year that is not required to satisfy the provision for the life annuitant and encroachments properly made and costs of administration. To that extent only, the next of kin of the testatrix will be enti-tled to share in the income.