

Property

- Module 11
- Preserving Marketability

Preserving Marketability

The Problem of Dead-Hand Control

- Balancing Respect for Grantor Intent with Flexible Allocation of Resources
- Common-Law Solution: The Rule Against Perpetuities

The Problem of Non-Conforming Grants:

- *Ford v. Allen*

Restraints on Alienation

- Post-Sale Restrictions on Intangible Property

Defeasible Fees and Restrictions on Use

- *Wills v. Pierce*
- *Smedley v. City of Waldron*

Ford v. Allen (Ct. Civ. App. Tex. 1975)

- Two holographic wills in 1960
- Mr. Ford passes in 1972, Mrs. Ford follows a month later
- Clyde Ford is their only child
- Mrs. Ford has three grand-children from a prior marriage
- Part of the language is void
 - Restraint on alienation (RonA)
 - Repugnant to the fee
- Or, a future interest by implication from the voided language?
- Numerus clausus; note 3, pg. 365-367
- RonA in modern, electronic contracting for intangible items such as information or content; note 4, pg. 367-368

'After the Payments of my Just Debts I devise all my property to my beloved wife Lola Mae Ford to do with as she See fit except that she is not to Sell, Morage (sic), or Lease any of our real Estate for more than Three (3) years without the written agreement of our son Clyde Melvin Ford.'

Wills v. Pierce (Ga. 1951)

- Original conveyance
- State of title?
- Effect of the condition put on the use of the property?
- Compare condition used versus, more generally, "as a home" or "for residential purposes"

The granting clause in the deed under consideration was: 'In consideration of the sum of one dollar to me paid, I ... do hereby sell and convey to [the grantee and] ... his heirs, a tract or parcel of land and appurtenances in fee simple.'

'The above property is conveyed to J. C. Wills [the grantee] to be used as a home by himself, his family and his heirs, upon condition that the same be used by him or them as a home and a residence, and further that upon the failure of the said condition and the abandonment of said property as a residence by [the grantee], ... his family or heirs, the same shall revert to [the grantor's] ... estate and go as directed by [the grantor's] ... will.'

Smedley v. City of Waldron (8th Cir. 1984)

- Harry Smedley suing because the city, allegedly, stopped using this Arkansas land for a reservoir, and let an oil and gas lease on it
- State of title
- Effects from: the land transfer was as a gift to the city and for a particular purpose
- Strength of evidence of grantor intent

5. The City of Waldron shall never sell, transfer, convey, lease, rent or otherwise dispose of the lands herein above described to other persons, firms, groups and/or corporations, except successors and/or assigns of itself, and if it attempts to do so, the lands immediately revert to Hannah Smedley and her heirs[.]

C/L Restraint on Alienation (RonA) Categories

- Disabling (of power to transfer)
 - Ford v. Allen (outright disabling)
- Promissory
 - Interaction with real covenants
 - Wills v. Pierce (effect of promissory aspect of conveyance, use for a limited purpose, is to inhibit alienation)
- Forfeiture
 - “law abhors a forfeiture”
- Reasonable RonA allowed unless FSA or vested future interest in FSA

C/L Rules Furthering Marketability

- Not responsible for:
 - Destruction of Contingent Remainders
 - A contingent remainder is destroyed if still contingent when the prior estate ends
 - Merger
 - Possessory life estate and the next vested estate in fee simple come into the same owner; there is no vested estate between them in time; then they merge; and interposing contingent remainders are destroyed (unless all this happens in the same conveyance)
 - Rule in Shelley's Case
 - The same conveyance attempts to create a life estate in a grantee and a remainder to that grantee's heirs; the conveyance of the remainder is read as a conveyance to the grantee (might then interact with Merger rule)
 - O to A for life, then to A's heirs
 - Doctrine of Worthier Title
 - The same inter vivos conveyance creates an inherently limited estate in a grantee and a remainder or executory interest to the grantor's heirs; the conveyance of the remainder is read as a conveyance to the grantor
 - O to A for life, then to O's heirs
- Responsible for to the extent covered in class and assigned reading
 - The "so called" Rule Against Perpetuities (RAP)

C/L RAP

- Applies to
 - contingent remainders
 - vested remainders subject to open
 - Executory interests (which also only exist in grantees)
 - NOTE: doesn't apply to POR or RofRentry; future interests in grantor
- Also . . . (outside class scope)
 - powers of appointment
 - rights of first refusal
 - options to buy
- Classic statement of the RAP:
 - "No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."

A PRACTICAL GUIDE TO THE
RULE AGAINST PERPETUITIES

ROBERT J. LYNN*

INTRODUCTION

THE CLASSIC American treatise on the common law Rule Against Perpetuities is John Chipman Gray's *The Rule Against Perpetuities*.¹ The classic article on the Rule is W. Barton Leach's "Perpetuities in a Nutshell."² Although several generations removed from Gray, Leach has joined him in shaping the Rule.³ Gray made the Rule a rule against remoteness of vesting.⁴ By insisting on the appropriate use of techniques which save gifts from invalidity under the Rule, Leach has made the Rule a sensible member of a family of related rules which regulate the devolution of wealth from generation to generation.⁵

Leach's attacks on the Rule in classic form antedate World War II. Intensified after the close of the war,⁶ they were paralleled by

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CONCLUSION

. . .

Although Gray's classic formulation of the Rule is often invoked only as a formality in recent perpetuities cases, it does not follow that the common law Rule Against Perpetuities has lost all function. On the contrary, in its fumbling fashion the Rule does keep madmen with property in check, both directly, by invalidating dispositions that transgress permissible limits, and indirectly, by alerting draftsmen to the dangers of intemperate, indiscriminate creation of future interests. Irrespective of the form which the Rule takes, there are likely to be cases which apply it badly; and in the close cases, the actual grounds for decision will probably remain conjectural. The common law Rule Against Perpetuities is neither perfect in conception nor clear in application, but due primarily to Leach, it has been modernized. Simes's fears notwithstanding,¹⁰⁴ it will be with us for a long, long time.

C/L RAP

- Classic statement of the RAP:
 - "No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."
 - A rule against remoteness of vesting for future interests in grantees (remainders or executory interests)
 - If the interest might still be contingent too far into the future, that future interest is void (note that in this sentence the word "contingent" is used functionally, not as a label of an interest)
 - The challenging part is learning about how to think in order to "measure" when vesting is too remote

C/L RAP

- Example conveyance that has a future interest that fails the RAP and thus would be struck from the conveyance – is void the moment it is created
 - O to A, but if the land ever ceases to be used for a farm then to B
 - State of title the moment the conveyance creates the interests
 - A has a possessory estate in fee simple subject to a shifting executory interest
 - B has a shifting executory interest
 - State of title after application of the RAP, the instant after the conveyance is effective
 - A has a possessory estate in fee simple absolute
 - I can't prove that B's interest must vest within the time period of "a life in being plus 21 years" starting from the effective date of the conveyance

C/L RAP

- The question becomes: is there any possibility that an interest might not vest within the time period ("life in being plus 21 years")
 - One example where vesting is too remote allows one to conclude that the interest fails the RAP
- Two future interests that survive the RAP
 - O to A for life, then to A's children [A has no children]
 - O to A for life, then to A's children [A has two children, B and C]
- An interest fails the RAP only if its fate might still be undecided at the end of the permitted time period
- In the two examples on this slide, A is the "validating life"
 - sometimes called the "valid measuring life" when such a life allows one to prove that the interest is valid under the RAP

C/L RAP

- Another interest that violates the RAP
 - O to A for life, then to A's children who reach 30 [B and C are A's children and are 32 and 30 respectively]
 - State of title?
 - Scenario: after the conveyance, A (a male) conceives D, dies the next day, ten months later B and C die when D is one month old
 - Lives in being: A, B, C
 - NOT a life in being: D; D did not exist at the time of the conveyance
 - Might the "subject to open" aspect of what D, B, and C own **not vest** longer than a "life in being plus 21 years"
 - Yes, why? – the nature of the condition – reaching the age of 30

C/L RAP

- Another example
 - O to A for life, then to B for life, then to O's widow
 - What is the vulnerable future interest and why?
- Possible measuring lives
 - Lives in being: O, A, B
 - NOT a life in being: O's widow (not ascertainable until O dies)
- Under the RAP, fate of the contingent remainder in fee simple absolute to O's widow?
 - The RAP does not invalidate the interest – why?

C/L RAP

- Another example
 - O to A for life, then to A's first child if he or she reaches 25 [A has no children]
 - What is the vulnerable future interest and why?
- Possible measuring lives
 - Lives in being: O, A
- Under the RAP, fate of the contingent remainder in fee simple absolute?
 - The RAP invalidates the interest – why?
 - What is the “story line” that lets us show one example where vesting is too remote?
- State of the title after application of the RAP?

C/L RAP

- Other scenarios where an interest might be at risk of violating the RAP
 - Conditions not personal to someone
 - Age or time period limitations more than 21 years
 - An interest given to a generation after the next generation

C/L RAP

- An interest given to a generation after the next generation
 - O to A for life, then to A's grandchildren [A has one child B and one grandchild C]
 - State of title?
 - A has a possessory estate in life estate
 - C has a vested remainder in fee simple subject to open
 - Lives in being?
 - Consider all generations
 - Scenario where vesting is too remote?

RAP – other items of interest

- You are not responsible for these
 - charitable exemption (both the possessory estate and vulnerable future interest go to charitable organizations)
 - Equitable reformation by a court
 - Statutory modifications
 - “wait and see” for the common law period
 - Wait 90 years
 - Saving clauses
 - Stylized
 - “notwithstanding any other provision herein, the trust shall terminate, at the latest, 21 years after the death of the surviving child of A who was born at the time of the creation of the trust”