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PERPETUITIES AND ACCUMULATIONS ACT 2009

The Perpetuities and Accumulations Act 2009 provides a practical way for trustees *of any trust created at any time* to overcome the complex problem of trying to calculate the perpetuity period. If the trustees express in a deed that they believe 'that it is difficult or not reasonably practicable for them to ascertain whether the lives have ended', the perpetuity period will be fixed at 100 years (s.12). Apart from that kind of case, the 2009 Act applies to all trusts taking effect on or after 6 April 2010, but not to any trusts effective before that date. The principal changes introduced by the 2009 Act for post- 2010 trusts can be summarised as follows:

1. The rule against perpetuities is restricted in its application to successive estates and interests in property and to powers of appointment. It ceases to apply to rights over property such as options, rights of pre- emption, and future easements. The rule no longer applies to occupational pension schemes, personal pension schemes, and public service pension schemes (ss.2(4), 20(4)).
2. There is a single perpetuity period of 125 years and the principle of 'wait and see' applies to this period (which will apply regardless of any express provision to the contrary). Trustees are permitted during the 'wait and see' period to apply income and capital in favour of a beneficiary (in the exercise of their powers of maintenance and advancement, respectively) (see Chapter 9) and such applications will stand even if it is later established that the beneficiary will not be able to satisfy the contingency before the end of the perpetuity period.

3. Regarding the rule against accumulation of income: statutory restrictions are repealed except in relation to charitable trusts (to which special considerations apply, see s.14, next).

The good news of the Perpetuities and Accumulations Act 2009 is that all post- Act trusts are subject to the simple 125- year period specified in the Act. The bad news is that older trusts are subject to the previous law. For the time being we therefore have three rules of remoteness of vesting running concurrently (common law, the 1964 Act, and the 2009 Act), an outcome that the Law Commission acknowledged to be the price of reform (Law Com No. 251, para. [1.20]).

The first method of calculation is the most straightforward. According to the Perpetuities and Accumulations Act 1964,[1] if the instrument by which a disposition is made specifies a perpetuity period of not more than 80 years, there is no need to look any further. One simply applies the rule against remoteness of vesting, as set out in the Act, on the basis of the period specified in the instrument.

Matters become more complicated if no perpetuity period is specified in the instrument by which the disposition is made. One must then calculate the perpetuity period according to the common law rule of remoteness of vesting. This provides that, if an interest is disposed of in favour of X subject to a 'contingency' (a requirement that may or may not be met), it will be void for perpetuity from the date of the disposition unless the contingency will certainly be met, if it will be met at all, not later than *21 years after the death of all 'lives in being'*.[2] 'Lives in being' are persons who, at the 'effective date of the disposition' are alive or in their mother's womb[3]—assuming that the latter are subsequently born.[4] (An *inter vivos* deed of gift or trust is effective at the date of its execution; a testamentary gift or trust is effective at the date of the donor's death.) However, the only relevant 'lives in being' are those persons who are expressly or impliedly referred to in the instrument by which the disposition is made. So the lives in being at the date of execution of an *inter vivos* trust in favour of 'such of my grandchildren as qualify as lawyers' include the grandchildren, the settlor, and any of the settlor's children, but no others. Lives in being can be expressly appointed who have no connection with the settlor or the intended beneficiary of the disposition, hence it would be perfectly valid for a settlor expressly to provide that the perpetuity period will end '21 years after the death of all living lineal descendants of

[1] Section 1(1).

[2] See J. C. Gray, *The Rule Against Perpetuities*, 4th edn (Boston: Little Brown & Co, 1942) para. 201.

[3] Referred to in the cases as a life in being '*en ventre sa mere*' (French) or '*in ventre matris*' (Latin).

[4] *Re Wilmer's Trusts* [1903] 2 Ch 411.

Queen Elizabeth II'.[5] However, a trust in which the lives in being are specified to be 'all persons who shall be living at my death' will fail for uncertainty.[6] There was even a failed attempt in one Irish case to use animals as measuring lives.[7]

The third method of calculating the perpetuity period will only be resorted to if a disposition is void under the common law rule. The third method, set out in the Perpetuities and Accumulations Act 1964, s. 3, provides that the perpetuity period ends 21 years after the death of all 'statutory lives' in being. The basic point to grasp is that 'statutory lives' are more numerous than common law lives in being. They include, for example, not only the person in whose favour a gift is made, but the parents and grandparents of every such person. The Act states that some categories of statutory lives should be disregarded if they cannot practicably be ascertained,[8] but, unfortunately, the Act fails to identify which lives should be disregarded and in what circumstances. The Act can also be criticized because it states that the donee of a power is a life in being for the purpose of determining the validity of the power,[9] but it fails to state whether the donee is a life in being for the purpose of determining the validity of a disposition made by exercising the power. The law governing remoteness of vesting has just become a little more complicated, albeit with the promise of simplicity in the longer term. This is as a result of the Perpetuities and Accumulations Act 2009, which came into force on 6 April 2010. The reforms introduced by the 2009 Act are outlined later, just before we move on to the topic of illegality.

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[5] In *Re Villar* [1929] 1 Ch 243, the testator directed that capital left in trust by his will should not vest until '20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death'. In *Wyndham v. Egremont* [2009] EWHC 2076 (Ch) a royal lives clause originally executed on 20 May 1940 specified '20 years from the death of the last survivor of the issue, whether children or more remote, of His late Majesty King George V living on 20 May 1940'.

[6] In *Re Moore* [1901] 1 Ch 936.

[7] *Re Kelly* [1932] IR 255.

[8] Section 3(4)(a).

[9] Section 3(5)(b)(v).

The strictness of the common law rule

According to the common law rule against remoteness of vesting, a disposition subject to a contingency (a condition which might not be met) will be void for perpetuity if there is the slightest possibility that the contingency might be met, if it is met at all, outside the perpetuity period. The rule is said to be concerned with possibilities, not probabilities. Thus it permits the assumption that a 60-year-old woman might bear a child[10] (probably in recognition of the possibility of divine providence,[11] rather than in anticipation of recent advances in fertility science). The court in *Re Gaite's WT*[12] was apparently prepared to apply the common law rule on the assumption that a five-year-old girl was physically capable of giving birth, but, because a child of that age could not give birth to children within a legal marriage,[13] it was held that the possibility should not be taken into account when applying a legal rule.

Class gifts

Gifts and trusts are often made in favour of a class: for example 'nephews' or 'employees'. A 'class' for this purpose comprises persons who

> come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares.[14]

Unfortunately, according to the basic common law rule against remoteness of vesting, a contingent gift or trust in favour of a class will be void unless *all* potential members of the class are certain to satisfy the contingency within the perpetuity period. In practice, this can produce harsh results. Thus, if today a settlor disposes of £1,000 on trust for all of his nieces who qualify as barristers, the disposition will fail and none of

[10] *Re Dawson* (1888) LR 39 Ch D 155.

[11] The Bible recounts how Abraham's wife, Sarah, gave birth at the age of 90 (Genesis 17:17).

[12] [1949] 1 All ER 459.

[13] Marriage Act 1929.

[14] *Pearks v. Moseley* (1880) LR 5 App Cas 714 *per* Lord Selborne LC at 723.

the nieces will take any benefit under it—even if today he has three living nieces and one of those is already a barrister. This is because every one of the lives in being (the three nieces and the settlor) *might* die tomorrow, in which event the 21 years of the perpetuity period will start to run. Yet, assuming the settlor is survived by a fertile brother or sister, a fourth niece may be born a year from now. This fourth niece is not certain to qualify as a barrister before the end of the perpetuity period—indeed, only a precocious student could—so the gift to her must fail for perpetuity and, because it was a class gift, the gift to the entire class will fail.[15] This does not seem fair to the three nieces who are already alive. Why should they lose out because of the remote possibility, first, that they will all three of them suddenly die and, second, that a fourth niece will be born who will qualify as a barrister in record time?

In *Andrews v. Partington*,[16] the court took pity on beneficiaries in a comparable predicament to our three nieces. It was held that where there is a gift to a class each member of the class who at the date of the gift has already satisfied the contingency (each member who has qualified as a barrister in our example) is entitled to take her share of it at once. The class is closed at the date of the gift to include only those members of the class ('nieces') who are then alive and any members of the closed class who later satisfy the contingency will be entitled to take their share. If they die without having satisfied the contingency, their share will be divided equally between the surviving members of the closed class, being those members of the class who have already satisfied the contingency and those who still might satisfy the contingency.

If members of the class are alive at the effective date of the gift but none has at that time met the contingency, the rule in *Andrews v. Partington* permits the trustees to wait to see if any beneficiary satisfies the contingency within the perpetuity period. The first to do so may take her share at that time.[17] The size of her share is again worked out by closing the class of potential beneficiaries to include only those persons who answer the class description ('niece') at the date at which the first member of the class satisfies the contingency (qualifies as a barrister). Any person

[15] This was also the problem in *Re Dawson* (1888) LR 39 Ch D 155.

[16] (1791) 3 Bro CC 401. See, generally, H. C. Morris (1954) 70 LQR 61.

[17] *Re Clifford's Settlement Trusts* [1981] 1 Ch 63.

answering the class description who is born after the class has closed and any person who cannot possibly satisfy the contingency within the perpetuity period will be excluded from taking any part of the fund.[18]

The rule in *Andrews v. Partington* is merely a convenient rule of construction. It can therefore be displaced by an express intention to exclude it.[19] In *Re Tom's Settlement*,[20] an express provision that the class should close on a particular date was held to have excluded the rule in *Andrews v. Partington*.

Total failure to satisfy the contingency

It should not be forgotten that the common law rule only applies to contingent dispositions, and that a disposition will be ineffective, quite apart from any issue of perpetuity, if the intended beneficiary is simply unable to meet the contingency. Thus a gift 'to Sarah if she qualifies as a medical doctor before the age of 30' will fail if she reaches the age of 30 and has not yet qualified.

The Perpetuities and Accumulations Act 1964

The 1964 Act applies a statutory rule against remoteness of vesting to dispositions coming into effect after 15 July 1964. The statutory rule is more generous than the common law rule and ought therefore to have rendered the common law rule otiose, but the common law rule must still be applied first. Only if a disposition is void for remoteness of vesting according to the common law rule can the statutory rule be applied to save it. The most significant aspect of the statutory rule against remoteness of vesting is that it presumes a disposition to be valid until there is no possibility of it vesting within the perpetuity period, whereas the common law rule declares a disposition to be void from the outset if there is any possibility that it might vest outside the perpetuity period. The statute operates a 'wait and see' approach.[21] One very important consequence of the statutory presumption in favour of validity is that trustees are permitted during the 'wait and see' period to apply income and capital in

[18] *Hawkins on Wills* (C. P. Sanger, ed.), 3rd edn (London: Sweet & Maxwell, 1925) at 96.

[19] Law Commission Report No. 251, para. 5.26.

[20] [1987] 1 WLR 1021.

[21] Section 3.

favour of a beneficiary (in the exercise of their powers of maintenance and advancement, respectively),[22] and such applications will stand even if it is later established that the beneficiary will not be able to satisfy the contingency before the end of the perpetuity period. The 'wait and see' perpetuity period ends 21 years after the death of the last surviving statutory life in being,[23] unless the number of statutory lives is so large as to render it impracticable to ascertain the date of the death of the survivor.[24] If there are no statutory lives in being, the period is a bare 21 years, as is the case at common law when there are no lives in being.

Class-closing rules under the Act

Under the 1964 Act, class-closing provisions operate in combination with the 'wait and see' principle so as to exclude from the closed class of potential beneficiaries only such persons as will certainly fail to satisfy the contingency within the perpetuity period. In other words, the trustees are permitted to wait until the end of the perpetuity period to see which members of the class have, by that time, satisfied the contingency[25] (with or without the benefit of age reduction);[26] all such members will take their shares. However, the class will be closed to exclude any members of the class who have not yet been born and any members who have failed, or certainly will fail, to satisfy the contingency by the end of the perpetuity period.

Fertility presumptions

The 1964 Act not only presumes validity until such time as the disposition is certain to vest outside the perpetuity period, it also introduces common-sense presumptions as to fertility. It is presumed that a male of 14 years or over can become a father, but that a younger male cannot; it is presumed that a female can give birth at the age of 12 years or over, but not under that age or over the age of 55.[27] These presumptions

[22] See Chapter 9.

[23] See earlier.

[24] Section 3(4).

[25] Section 4(4).

[26] See later.

[27] Section 2(1)(a).

also apply to the potential of a person to have a child by adoption, legitimation, or other means.[28] In the case of a living person, medical evidence may be admitted to show that he or she will or will not be able to have a child at the time in question.[29] Of course, developments in reproductive science might one day require the basic presumptions to be revised or removed entirely.

Age reduction

The trustees are permitted to wait and see whether any beneficiaries will attain the contingent age before the end of the perpetuity period. As soon as it is apparent that a beneficiary will not be able to attain the contingent age within the perpetuity period, the contingent age will be reduced as regards that beneficiary *to whatever extent is necessary* to ensure that her interest may vest within the perpetuity period.[30] So, in the case of a trust for grandchildren upon their reaching the age of 30, any grandchild who is still only aged 25 at the end of the perpetuity period will only be required to attain the age of 25, and likewise any grandchild who is then aged 22 will only be required to attain the age of 22. However, any grandchild who is below the age of 21 at the end of the perpetuity period will get nothing, because, even under the Act, the contingent age will not be reduced below the age of 21. A slightly different rule applies to contingent gifts made before the Perpetuities and Accumulations Act 1964 came into force on 15 July 1964.[31]

The problem of the unascertained spouse

The identity of a surviving spouse can never be conclusively ascertained until the death of the other spouse. This uncertainty would render several dispositions void for remoteness of vesting, were it not for a special rule which ensures that a gift will never fail for perpetuity on account of an unascertained spouse. Consider a testamentary gift 'to Larry for life, with remainder to any wife of Larry who may survive him for life, with remainder to such of his brothers living at the death of that wife'. It is possible that, at the effective date of the gift (the date of the testator's

[28] Section 2(4).

[29] Section 2(1)(b).

[30] Section 4(1).

[31] Law of Property Act 1925, s. 163.

death), the person who is destined to be Larry's widow has not yet been conceived, so the common law rule against remoteness of vesting will be applied on the assumption that the future widow is not a life in being. The lives in being will therefore be Larry and any of his brothers alive at the testator's death, and the perpetuity period will end 21 years after the death of the last of them. The gift to the widow cannot be void for remoteness, because her interest will vest on Larry's death and it will therefore vest, if it vests at all, within the perpetuity period. However, the difficulty comes in relation to the gift to the brothers. Their interests will not vest until the widow dies, but it cannot be said for certain that the widow will die within the perpetuity period. In relation to the brothers who are lives in being there is no real problem, because if they take an interest at all, they *must* take it within the perpetuity period. The real problem arises in relation to brothers who may come into existence after the testator's death. It follows from the fact that such later-born brothers will not be lives in being and the fact that the widow might die outside the perpetuity period that the interests of those brothers might not vest until after the end of the perpetuity period. The gift to such later-born brothers would therefore be void for remoteness were it not for s. 5 of the 1964 Act, which provides that no disposition will be void for remoteness of vesting if it is void merely because it is limited by reference to the time of death of a surviving spouse.

The next page contains a flow chart summary of the rules against perpetuity

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