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Future Interests

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common sense rule is that once the privilege is waived, the waiver cannot be recalled. The information is no longer secret and its confidentiality cannot be restored again by the withdrawal of the waiver. The purpose of the statute has been defeated; therefore, the privilege no longer exists.[11] "When confidence ceases, privilege ceases."

CLINTON DEWITT

FUTURE INTERESTS

General Testamentary Powers and the Rule Against Perpetuities

The Probate Court of Cuyahoga County in *Cleveland Trust Co. v. McQuade*[1] rendered a significant decision on the application of the common law rule against perpetuities to interests created under a general power to appoint by will and not by deed.

In this litigation, S(settlor) created in 1922 a revocable inter vivos trust with T(trustee) which became irrevocable the same year upon the death of S. The trust agreement gave D(donee of power) a general testamentary power to appoint a stated portion of the trust property. D died testate in 1953, and appointed in his will this portion of the trust property to T in trust for named beneficiaries. All of the interests created under this power by D's will were valid under the rule against perpeuities if the period of the rule were computed from the date of the exercise of the power, but not if this period were computed from the date of the creation of the power.

T, as trustee under the 1922 trust and as executor and trustee under D's will, brought an action for a declaratory judgment to determine the proper application of the rule against perpetuities to D's appointments. The probate court decided to follow the minority view as set forth in the Wisconsin case of *Miller v. Douglass*,[2] and held that since a general testamentary power is substantially the same as a general power to appoint by will or deed, the period of the rule against perpetuities as to both types of powers is to be computed from the date of the exercise of the power.

This policy decision of the probate court is based substantially upon *general criticisms* of the rule against perpetuities by Professors W Barton

[11] The decisions are legion. Representative ones are: Pittsburg, Cincinnati, C. & St.-L.Ry. v. O'Connor, 171 Ind. 686, 85 N.E. 969 (1908); Demonbrun v. McHaffie, 348 Mo. 1120, 156 S.W.2d 923 (1941); Apter v. Home Life Ins. Co., 266 N.Y. 333, 194 N.E. 846, 98 A.L.R. 1281 (1935); Capron v. Douglass, 193 N.Y. 11, 85 N.E. 827 (1908).

Leach[3] and Lewis M. Simes.[4] On the ground that the earlier American decisions which do not support the probate court's decision were based upon economic considerations which no longer exist, as Professors Leach and Simes have explained in their writings, the probate court decided what it believed should be the law today in Ohio. What is the law on this point in Ohio will not be known until the Ohio Supreme Court decides the same issue.

On the specific issue before the probate court, both Professor Simes[5] and Professor Leach[6] disagree with its decision.

Ohio had a special statute on perpetuities prior to 1932. No one seemed to understand fully this statute.[7] It is believed that the common law rule against perpetuities and not this early statute applied to future interests in personal property.[8] Therefore since under the doctrine of equitable conversion all the trust property was considered personalty, it is possible that the present Ohio statute[9] which provides that the common law rule against perpetuities applies to personalty, is merely declaratory of the Ohio common law. Consequently, in the instant case the probate court might have avoided the statutory construction problem as to the meaning of the phrase "common law rule against perpetuities" as used in section 2131.08 of the Ohio Revised Code.

If the doctrine of equitable conversion had not applied to the trust property in the instant case, then the probate court would have had to apply the rule against perpetuities of Montana as to land in Montana, of Tennessee as to land in Tennessee, and of Ohio as to any land in Ohio and personalty. This possible situation clearly shows the need for a uniform rule against perpetuities. The probate court recognized from recent criticisms of the common law rule against perpetuities, which the court relied upon for its decision, the general inadequacies of this common law rule. The immediate problem of the lawyers of all states is the drafting of an acceptable statutory rule against perpetuities.[10]

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[1] 72 Ohio L. Abs. 120, 133 N.E.2d 664 (Prob. 1955)

[2] 192 Wis. 486, 213 N.W 320 (1927)

[3] Leach, *Perpetuities in Perspective: Ending the Rules Reign of Terror*, 65 HARV. L. REV. 721 (1952)

[4] SIMES, PUBLIC POLICY AND THE DEAD HAND (1955)

[5] 2 SIMES, LAW OF FUTURE INTERESTS § 528 (1936); SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 1275 (2d ed. 1956)

[6] 6 AMERICAN LAW OF PROPERTY § 24.34 (1952); MORRIS AND LEACH, THE RULE AGAINST PERPETUITIES 138 (1956)

[7] PAGE'S OHIO GEN. CODE ANN. § 10512-8, Comment (1938).

[8] SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 1438 (2d ed. 1956)

[9] OHIO REV. CODE § 2131.08.

[10] SIMES, PUBLIC POLICY AND THE DEAD HAND 71 (1955); Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954); Bordwell, *Per-*

Implication of Survivorship

The Ohio Supreme Court in *First Nat'l Bank v. Tenney*[11] informed the Ohio bar first, that it is glad the bar no longer questions the validity of a revocable trust, and second, that there is no implied requirement of survivorship by a remainderman because his remainder is subject to being defeated by a reserved power in the settlor to revoke or amend a trust.[12] The court commends the classification of remainders in section 157 of the Restatement of the Law of Property, because the use of the classification should avoid the confusion which results from describing as a "contingent remainder" a remainder which is vested but is subject to being completely or partially divested.

The inclination to imply a requirement of survivorship is evident in some law students who mistakenly believe that a person who has an indefeasibly vested remainder must survive the life tenant in order to take. Apparently, this general inclination continues when these students become lawyers.

Life Estate With Power of Alienation

In *Kern v. Kern*[13] a testator who died in 1943 devised and bequeathed the residue of his *personal and real property* to his wife "to have the use, control and benefit of the same for her own support, using so much thereof as may be necessary to care for herself both in health and sickness so long as she may live." Testator's son had been his partner in the sheet metal business. Therefore, before testator's estate had been administered and at a time when the widow had ample funds for her support, the son agreed to buy from the widow all of the real property used in the business. The widow conveyed this real property in 1944 to the son in fee simple by warranty deed. Five years later the son learned that his title might be defective. He filed a petition in the common pleas court for a declaratory judgment to quiet his title. The defendants to this suit were the widow and a minor granddaughter who was represented by a guardian ad litem. The guardian filed a general denial but the court entered judgment in 1949 for the son.

In 1953, within one year after the granddaughter became of age, she filed a petition to vacate the declaratory judgment of 1949 on the ground

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petuities from the Point of View of the Draughtsman, 11 RUTGERS L. REV. 429 (1956).

[11] 165 Ohio St. 513, 138 N.E.2d 15 (1956) This decision is also discussed in the TRUSTS section, *infra.*

[12] RESTATEMENT, PROPERTY §§ 261, 318, Comment 1 (1940); 2 POWELL, REAL PROPERTY § 334 (1950).

[13] 100 Ohio App. 327, 331, 136 N.E.2d 675, 678 (1955).

of fraud on the court and that the court erred as a matter of law. The common pleas court denied this petition, and the granddaughter appealed to the court of appeals.

The court of appeals reversed the judgment of the common pleas court because the common pleas court erred as a matter of law and not because of any fraud.

Ohio follows the general rule that a person who has a life estate and an unlimited power to convey the property by deed does not have a fee simple absolute.[14] Therefore the widow did not have a fee simple absolute. She had only a life estate and a limited power to convey when necessary for her support. From the evidence before the court of appeals, the granddaughter had proved a prima facie case showing error of law in the entering of the judgment in 1949. Under a liberal definition of "necessary," the court of appeals could not sustain the exercise of the power of sale because the widow did not need additional funds for her support.

In view of the fact that this case is based on the lack of power in the life tenant to convey the title, any bona fide purchaser of the real property from the testator's son between 1944 and the judgment in 1949 would not have been protected by section 2325.03 of the Ohio Revised Code. Title examiners will have to examine carefully the facts surrounding the exercise of limited powers of appointments.

The case of *Erman v. Erman*[15] is similar to *Kern v. Kern* in that it involved a determination of the interest of a legatee who received $12,500 *in cash* to use and dispose of "principal and income, during her lifetime, with full power to consume or dispose of the principal as she sees fit." At the legatee's death any principal remaining went to named persons.

From a practical point of view, including the difficulty of tracing personalty, whenever a testator considers the value of a gift of cash or other personalty such as securities too small to be included in a trust, as in the instant case, the gift should be absolute and not for life with or without the power to consume.

It was contended in the instant case that the legatee received absolute title because she received a life estate and a general power of alienation by deed. The court of appeals properly rejected this contention. In doing so, the court apparently relied to some degree on a Kentucky decision[16] which reduced to a life estate an apparent fee simple estate, be-

[14] 1 HAUSSER, OHIO PRACTICE § 1171 (1952); SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 1488 (2d ed. 1956).

[15] 136 N.E.2d 385, 386 (Ohio App. 1956)

[16] Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784, 17 A.L.R. 2d 1 (1948). For