W H E R E T H E R E ' S A W I L L

The rule against perpetuities:

Time to re-examine?

By Dan W. Holbrook

"No 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."1

"This is a lawyer's law, made by lawyers for the use of lawyers, completely incomprehensible to the public. If it is working badly, it is the job of lawyers to change it."2

The Rule Against Perpetuities is changing rapidly. The common law rule served a valuable social objective. Indeed, in Tennessee, perpetuities are banned by the state Constitution.3 Nevertheless, the rule often did work badly. If A violated the rule, it was not A who suffered; rather an interest clearly intended for B would often go to C instead. The need for reform was evident.

Only eight states, plus the District of Columbia, still maintain the common law rule, unadorned by modern modifications.

Another seven states maintain the common law rule, but have added either or both of a "wait-and-see" approach (which allows a trust to continue rather than failing, and looks at events that actually happen rather than events that might occur but don't) or a "cy pres" approach (which authorizes a court to reform an invalid disposition in a manner that most closely approximates the trustor's intent).

In 1994, Tennessee became one of 23 states that have adopted the Uniform Statutory Rule Against Perpetuities (USRAP).4 USRAP upholds dispositions that violate the common law rule, but also contains both "wait-and-see" and "cy pres" to deal with a violation. The "permissible vesting period" of the "wait-and-see" is 90 years. If the interest does not (or could not) vest within 90 years, there are specific guidelines for judicial reformation.

Florida has dramatically modified its USRAP by increasing the 90-year permissible vesting period to 360 years, by expanding the guidelines for judicial reformation, and by allowing nonjudicial reformation.

The real action, however, is in the other 12 states, which have either repealed the rule entirely or allowed a trustor to "opt out" of the rule.5 Most of those states are open about their motive: to promote trust business. In other words, repeal is not generally enacted for reasons of policy, since USRAP adequately addresses the historic shortcomings of the rule. Rather, commerce has trumped policy, much to the chagrin of those who still believe the rule serves a vital purpose.

This is not to say that in those 12 states (plus Florida) property could be kept inalienable for centuries. In each case, there are substitute rules requiring that a trustee have power to sell real property, or power to terminate the trust.

Can Tennessee residents take advantage of the repeal in other states? Certainly. How? By establishing an adequate nexus with one of the 12 states (or Florida) to allow that state's law to apply to the trust. That will usually require a trustee from that other state.

Should Tennessee consider abolishing its rule too? This is a policy debate for the legislature, but of course any such change would first require a Constitutional amendment. Our version of USRAP is for now a reasonable place to be.

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1. J. Gray, The Rule Against Perpetuities §201 (4th ed. 1942).

2. W. Barton Leach, "Perpetuities in Perspective: Ending the Rule's Reign of Terror," 65 Harv. L. Rev. 721, 728 (1952).

3. "[P]erpetuities ... are contrary to the genius of a free State, and shall not be allowed." Const. 1870, Art. 1, §22.

4. See Holbrook, "A Practitioner's Guide to Perpetuities Reform in Tennessee," 30 Tenn. Bar J. 12 (1994).

5. The 12 states where the rule is either repealed or can be bypassed intentionally are Alaska, Arizona, Delaware, Idaho, Illinois, Maine, Maryland, New Jersey, Ohio, Rhode Island, South Dakota and Wisconsin.

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