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As Others See Us

PAYMENT OF CORPUS WHEN YOUNGEST GRAND-CHILD REACHES TWENTY-FIVE AS WITHIN RULE AGAINST PERPETUITIES

The Michigan Law Review of March, 1931, volume 29, number 5, page 642 has the following comment on a recent Pennsylvania decision.

"T devised all his real and personal property to his wife and daughter with right to use the income for life; portion remaining on their death in trust until youngest grandchild should reach 25, when any then living should receive the corpus; in default of such remaindermen, to pass to others named. There was one grandchild living at T's death. *Held*, no violation of the rule against perpetuities, for grandchildren would take vested remainders. *Endsley v. Hagey*, 301 Pa. 158, 151 Atl. 799.

"It is not necessary to discuss the problem as to whether a legal contingent remainder is within the rule against perpetuities, for this is an equitable remainder. See 28 *Mich. L. Rev.* 455. Whether this is a vested or contingent remainder is a more difficult problem than whether it is within the rule against perpetuities. The court found there was a vested remainder in the living grandchild subject to open for after-born children. It should be noted that under the court's construction (though nowhere expressly stated) there is a divesting of each grandchild's share only if all die before 25, and no divesting of those dying under 25 in favor of each other (no cross-remainders). This inference is justified in that the court does not discuss the problem of cross-remainders, and in view of the distinction drawn between this case and the case of *Kountz's Estate*, 213 Pa. 390, 62 Atl. 1103. Such a construction by the court avoids the perpetuity problem, for each grandchild's share is determined at the life tenant's death. The court could argue: (1) "when any then living" referred to the time of distribution and did not attach to the substance of the gift;

(2) the fact that there is no express grant will not, as a matter of law, prevent an immediate vesting. *Belfield v Booth*, 63 Conn. 299, 27 Atl. 585; *Anthony v. Anthony*, 55 Conn. 256, 11 Atl. 45. (2) If a construction is open that will avoid an illegal perpetuity, the court should take it. *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645; *Wengerd's Estate*, 143 Pa. 615, 22 Atl. 869. But the only gift is the direction to pay. An application of the "divide and pay over" rule would declare this a contingent remainder. *Kales, Future Interests*, 2d ed., sec. 500. It seems more reasonable that "when any then living" means that only those living when the youngest reaches 25 should take, and that the class is not determined until that time. If that is the true meaning, it would seem to be a contingent remainder. *Gray, Rule Against Perpetuities*, 3d ed., sec. 369; *Taylor v. Crosson* 11 Del. Ch. 145, 98 Atl. 375; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259; *Mockbee v. Grooms*, 300 Mo. 446, 254 S. W. 170; *Gillen v. Hadley*, (N. J. 1930) 150 Atl. 779. The fact that the grandchildren receive no income is some indication of a contingent remainder. *Kales, Future Interests*, 2d ed., sec. 510, 511. Clearly, if we were to hold this a contingent remainder we would have a violation of the rule against perpetuities, for it is possible that a child might be born to the daughter of T after T's death, and that such child would not reach 25 within 21 years after his mother's death. It is, of course, arguable that there is a vested remainder in the living grandchild, subject to open for after-born grandchildren; subject to divest as to those dying under 25 in favor of survivors (cross-remainders); subject to divest to others named if no grandchild reaches 25. This seems even closer to T's intent than the construction of the court except that there is no provision in the will for cross-remainders. This construction involves a violation of the rule against perpetuities. It is true that no child can be born after the daughter's death and that the minimum share of any grandchild is then determined. But if there is a divest in favor of survivors (cross-remainders) the maximum share is possibly not determined until 25 years after the daughter's

death. So the class is not ascertainable within the period required by the rule, and this is the one exception to the rule that a vested remainder is not within the rule against perpetuities. *Gray, Rule Against Perpetuities, 3d ed., sec. 110a, 205a; Jarman on Wills, 7th ed., 303; In Re Gage, (1898) 1 Ch. 498.* It is also to be noted that "such", in view of "youngest grandchild", can not mean only those living at T's death, as there was only one then living. It might possibly apply to those living at the life tenant's death but this would only cut off the devise over when there were grandchildren living at that time, and would not cause the maximum share of each grandchild to be ascertained within the period. In England, when the person making the will dies after 1925 there would be a substitution of 21 for 25, and no difficulty as to the rule against perpetuities. *Law of Property Act, (15 Geo. 5. c. 20, sec. 163).*"