Contingent Remainders as Assets of a Bankrupt's Estate

Charles H. Davison

Follow this and additional works at: https://ideas.dickinsonlaw.psu.edu/dlra

Recommended Citation
Charles H. Davison, Contingent Remainders as Assets of a Bankrupt's Estate, 45 DICK. L. REV. 223 (1941). Available at: https://ideas.dickinsonlaw.psu.edu/dlra/vol45/iss3/7

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.
CONTINGENT REMAINDERS AS ASSETS OF A BANKRUPT'S ESTATE

A recent decision of the Pennsylvania Supreme Court would seem to change the previous law in this state as to whether or not a contingent remainder owned by a bankrupt passes to his trustee in bankruptcy. This case is *In re Cunningham's Estate.*

The interest there involved was in property making up a part of a residuary estate, which property the testator had placed in trust, to continue while his wife was alive and unmarried. The wife was to use the income, as she saw fit, for the support and education of their children and for her own support. The will provided that a portion of the corpus of the trust should, "at the death or re-marriage of my wife, pass per stirpes to my children or descendants living at the time of such death or re-marriage. . . ." The bankrupt was the son of the testator. After the death of the testator, but while the wife was still alive, the son assigned all his interest in the estate, to the extent of $25,345, as collateral security for two notes, totaling that amount, which he had indorsed. Subsequent to the assignment, but while his mother was still alive, he became bankrupt. The widow then died. The court held that the part of the corpus to which the bankrupt would otherwise have been entitled should be divided, $25,345 thereof going to his assignee and the rest of it to his trustee in bankruptcy.

What was the nature of the interest which the son had in the estate at the time he made the assignment and at the time he became bankrupt? Was it vested or contingent? There is no question but that it was not vested in the sense in which that word is properly used. Not only was this part of the residue referred to by the testator as the "unvested half," but in addition there was a contingency attached to his taking the property. As was pointed out by the court, if he survived the death or re-marriage of his mother, then a share of the residuary estate would go to him.

Nor was the interest of the class sometimes referred to as being "vested subject to divest"—that is subject to a condition subsequent rather than a condition precedent. As to such an interest, if the condition is incorporated into the description of, or the gift to, the remainderman, the remainder is contingent, and not "vested subject to divest." The condition here was part of the description of the remaindermen. The gift was to "children or descendants living at the time of such death or re-marriage." As was said in *Johnston's Estate,* "There is no distinct gift to the whole class of children; those only are to take who survive the determination of the particular estate." The condition here describes those who are to take and so the son's interest is not "vested subject to divest."

---

1. 340 Pa. 265, 16 A(2d) 712 (1940).
But contingent interests have been divided into two groups. One of these is that in which the only contingency is as to the event upon which the gift is to take effect. The other type of contingent remainder is one in which the contingency is that the person who is to get the property is unascertained. We are interested in determining into which one of these classes the interest of the son in the present case should fall. The court does not expressly state or clearly indicate which kind they consider the interest to be. However, prior Pennsylvania cases do recognize such a distinction, and the legal incidents of a particular interest depend on which class it is determined to be. Our courts speak of a contingency in which the person is unascertained as being one affecting the remainderman’s capacity to take. Thus, the Federal District Court said, in applying the law of Pennsylvania:

"Where the contingency relates to the person . . . it would seem that the existence of the remaindermen cannot be disassociated from their capacity to take, and that, as such capacity cannot exist before their ascertainment by the death of the first taker, they cannot be regarded as in esse before that event, so far as the alienability or transmissibility of any interest or title under the limitation is concerned."

The line, if one can be drawn, dividing conditions which affect the capacity of the individual to take the interest, from those which apply merely to the event upon which an ascertained person is to take is a very narrow one. It is frequently difficult to distinguish in principle between the cases. Thus, an interest may be subject to a condition which the court says affects the owner’s capacity to take and the legal incident will attach to it accordingly, while another interest may be subject to a contingency which, as a matter of fact, would seem to leave the owner with as little chance of ever enjoying the estate, and this condition the court will say does not affect the owner’s capacity to take. In Packer’s Estate (No. 2), a testamentary trust was created to last for twenty-one years after the death of the last surviving child of the testator. The will provided that at the end of that period the trustees should pay whatever property they then had to the descendants of the beneficiaries of the trust, and if there were no such descendants then living, it should be divided into three parts, one part to go to the children of a deceased daughter. The interest of the children of the daughter was held to be a “vested

---

4This is the so-called “vested interest in a contingent remainder.” Example: To A for life, remainder to B, if A should die without children.
5Example: To A for life, remainder to the heirs of B; and B is still living.
6It is perhaps some indication that they consider it in the latter class when, in speaking of cases cited by counsel for the son, the court said, “It is enough to say that those (the cases) from this jurisdiction dealt with expectancies and not with contingent interests existing at the time of the assignment.”
7E. G., whether or not the interest will pass by descent (See Chess’s Appeal, 87 Pa. 362 (1878), or by assignment (discussed infra, notes 20 to 28 and text thereto).
8In re Twaddell, 110 Fed. 145, 149 (1901).
9246 Pa. 116, 92 Atl. 70 (1914).
interest in a contingent remainder," the court saying that "no conditions are connected with the capacities of the legatees to take." An opposite conclusion was reached on very similar facts in *Patterson v. Caldwell*.

In that case there was a spendthrift trust, the income to be paid to the children of the testator or to the children of deceased children. The trust was to last until the last surviving child or grandchild should die or until the end of twenty-one years after the testator's death, whichever event should happen first, and at that time the principal was to be transferred to those then entitled to the income. The court said, "But it is impossible to determine now who will at that time be entitled to receive the income and constitute the beneficiaries under the provisions of the will which dispose of the principal." That is, the persons to take were unascertained or as was said in *In re Twaddell*, the contingency affected their capacity to take. The nature of the legal incidents attaching to the interest in the one case were different than in the other. In the *Packer* case it was held that the interest could pass by descent, while in *Patterson v. Caldwell* it was held that the interest was not subject to an attachment execution. What justification can there be for a distinction such as this? In the first case the daughter's children, in order to actually enjoy the estate, would have to outlive the last surviving beneficiary of the trust by twenty-one years, and even then they would get nothing if there were any descendants of the beneficiaries then living. In the latter case the only prerequisite to actual enjoyment of the principal by a child of the testator was that he survive the testator by twenty-one years. Yet the interest in the former case was determined to be a "vested interest in a contingent remainder," and in the latter case it was said to be vested in no way. While it is true that the share that each child of the daughter was to get was known in the *Packer* case, this was so only because the interest was held to be "vested," and so this certainty of share can hardly be given as an argument that the interest should be held "vested." There would be the same certainty present in *Patterson v. Caldwell* if the interest there had been held "vested."

It is apparent then that the courts do not, in determining what legal incidents shall attach to a contingent interest, consider the chance the one claiming the interest has of actually enjoying the estate. What really controls in answering this problem is what the court determines to be the testator's intent as to the nature of the interest he created. This intent is found by an examination of the words used in the will creating the interest. To go a step further, it can be said that, except in a few rare cases, the words used by the testator determine the interest which he creates, since he had no intent on the subject. Beginning with the well-recognized fact that the courts favor vested interests, it would seem to follow that it would

---

10124 Pa. 455, 17 Atl. 18 (1899).
11110 Fed. 145 (1901).
12Chew's Appeal, 37 Pa. 23 (1860).
be harder for a testator to create a purely contingent interest than it would be to create a "vested interest in a contingent remainder," and this is in fact the situation. In a gift to "A so long as he shall live, and to his legal heirs, if he have any at his death, and if he have no such heirs, then to B, C, and D," the interest of B, C, and D was held to be a "vested interest in a contingent remainder." Clearly here, if a distinction must be made, the persons to take were ascertained, and the only contingency was as to the event. In 

In Packers Estate, supra, the exact words of the will were that after the end of the trust the property should "then be handed over, paid, transferred and delivered to my then living issue who may be descended from my said three children. . . . In case there should be no one descendant of my said three children then living, the property and estate then in the hands of the trustees . . . shall be divided into three parts and the one thereof shall go to the children of my daughter, L." (L was not one of the three children already mentioned.) In such a case it would seem that the court might have said that the children of L were unascertained, that only those living at the time of distribution should take. However, since a vested interest is favored, the court said there was no contingency as to the person here, but only as to event and so the interest of the children of L was a "vested interest in a contingent remainder."

In the creation of a purely contingent interest (that is one which is not a "vested interest in a contingent remainder") the terminology which can be used is very limited. In fact the only words that the writer was able to find in Pennsylvania cases which the court held to create an interest such as this were the words "then living" or "then surviving" or similar words of like import, or a gift to the "heirs of person still living." In Roney's Estate the testator devised the residue of his estate to his executor, in trust, to pay annuities to certain named brothers and sisters during their respective lives, and upon the decease of the brothers and sisters, one-half of the corpus was to go to "W. P., he surviving and the other half part thereof, or in the event of the said W. P. being then deceased, the whole of said residue to and among the then surviving children of my brother,

---

14 In Manderson v. Lukens, 23 Pa. 31 (1854), there was a devise to the widow for life and upon her death the estate was to be equally divided between the testator's children "which may then be alive." The children's interest was held to be a "vested interest in a contingent remainder." In three subsequent cases (Womrath v. McCormick, 51 Pa. 504 (1866); Crawford v. Ford, 7 W. N. C. 532 (1879); and Laguerenne's Estate, 12 W. N. C. 110 (1882)), this case was taken for authority for the holding in those cases that even phrases such as "then living" would not create a purely contingent interest. However, although the case has been frequently cited, it has not been followed as such authority since 1882 and in Tiran v. Herzog, 12 Pa. Super. 55 (1900), it was explained that other language in the will showed that merely time of enjoyment was postponed. See also note in L. R. A. 1917 D. 602. Therefore Manderson v. Lukens and the cases based upon it cannot, particularly in view of the many subsequent holdings to the contrary (note 17) be considered as establishing the rule that such language will create a "vested interest in a contingent remainder."

15 Bennett v. Morris, 5 Rawle 8 (1835).
16 227 Pa. 127, 75 Atl. 106 (1910).
J. R. W. P. died before the last of the brothers and sisters, and so he took no share in the estate. The residue was held to go only to the children of J. R. who survived the brothers and sisters. The gift was “Contingent on their being alive at the death of the last survivor of the testator’s brothers and sisters. Until the happening of that event, it could not be known who would be entitled to take.” That is, the person to take was unascertained. There are many Pennsylvania cases which hold that such language will create a purely contingent interest, and it would seem that words of this nature only would have such a result. Thus, in Grominger’s Estate, where there was a gift for life and upon the life tenant’s death the property was to be divided among the testator’s children, “if any living,” the interest of the children was held to be a vested one, the court pointing out that the phrase “then living” or “then be living” was not used in the will.

In Cunningham’s Estate those who ultimately were to take the residue were the “children or descendants living at the time of such death or re-marrying” and, while, as was previously noted, the court did not expressly so hold, the interest would fall in the group of cases in which the contingency is that the person who is to take is unascertained. The interest of the son here was not, in view of the preceding discussion, a “vested interest in a contingent remainder” but rather what we have referred to as a purely contingent interest, and the legal incidents should attach accordingly.

Let us now consider the alienability of an interest such as the son had in the Cunningham case. As has already been mentioned, an interest subject to a condition which is determined to apply only to the event upon which the owner is to take may have different legal incidents than has an interest whose owner is unascertained. An example of this is the transferability of such interests at common law. The rule is set forth in the American State Reports:

“Though formerly the rule prevailed that a contingent remainderman could not alienate his remainder, because it was rather a possibility than an estate, it is now well settled, even in those states where the common law rule still prevails, that where the contingency upon

17 Some of the more recent ones are: Heath’s Estate, 286 Pa. 335, 133 Atl. 558 (1926); Price’s Estate, 279 Pa. 511, 124 Atl. 179 (1924); Alburgher’s Estate (No. 2), 274 Pa. 15, 117 Atl. 452 (1922); and Bureth’s Estate, 270 Pa. 397, 113 Atl. 685 (1921).
18 268 Pa. 184, 110 Atl. 465 (1920).
19 Since, as we have seen, there is no justification for giving different legal results to the various “classes” of contingent remainders, it might be desirable to attach the same incident to all of the “classes.” But a discussion on this point would necessitate a consideration of whether or not legal incidents of the same nature should attach to the contingent interests for all purposes, etc., and is not within the scope of this note.
20 For a good discussion on “The Transmissibility of Future Interests in Pennsylvania” see: Note (1938) 42 DICK. L. REV. 92.
21 17 American State Reports 840. See also 23 R. C. L. 573.
which the remainder is to vest is not in respect to the person, but the event, where the person is ascertained who is to take if the event happens, he may grant or devise the remainder, and the grantee or devisee will come into the title of the remainderman with his chance of having the estate. If, however, the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, the remainderman has no interest which he can transmit either by deed or devise."

An examination of the Pennsylvania cases discloses that our courts follow this rule in a modified form. Thus, it has been held that an interest is freely alienable if the person to take it is ascertained and in being, and the only contingency is as to event. If the contingency is that the person is unascertained, the Pennsylvania cases hold that the interest cannot be assigned, but depart from the strict language of the rule above set forth in allowing the assignment of such interests in an indirect manner. There is language supporting this last statement in a great many cases, but only a few were found in which a holding that a contingent interest cannot be directly assigned was necessary to support the court's decision. One of these was Patterson v. Caldwell, supra, where, it will be recalled, the interest was determined to be one in which the person was unascertained. The question was whether or not such an interest was subject to an attachment execution against the property of an individual who might eventually come into actual enjoyment of the estate. The court held that the attachment could not be sustained because the interest was contingent and so not directly assignable. The court said:

"It is further contended by the defendant in error that whatever may pass by assignment is subject to attachment. This proposition is not tenable. In law an assignment is not effectual unless the subject matter of it has actual potential existence. But equity will uphold assignments of contingent interests and expectancies, and things resting in mere possibilities, if fairly made and not against public policy; not as a transfer operating in praesenti, for that can only be of a thing in esse, but as a present contract to take effect and attach as soon as the thing comes in esse."

There are a number of Pennsylvania cases which, in connection with the transferability of such interests, simply hold them "assignable," and at a glance might be taken as authority for a rule that these interests can be directly transferred. However, a closer examination of the opinions will disclose that the court is talking about the fairness of the transaction, etc., thus showing that what the court is really

---

22 Wickersham's Appeal, 1 Sadler 51, 18 W. N. C. 36, 1 Atl. 913 (1885).
doing, as a court of equity, is specifically enforcing the assignment as a contract to assign.  

There is another indirect manner by which remainder interests that are purely contingent can pass, and that is by what is called estoppel by deed. It is said in *American State Reports*:

“At common law, however, before the contingency happened, the remainder could not be conveyed, except by way of estoppel, since it was considered that the remainder was not an estate, but a mere chance of having one. Thus, if the remainderman, during the continuance of the particular estate, seeks to convey his interest by quit-claim deed, he will not be estopped from claiming the remainder when the contingency happens; still if he makes a deed during the existence of the particular estate, purporting to convey his contingent interest, and the deed covenants against all claims made by or under him, he will be estopped by his covenant to claim the land at the termination of the particular estate, and the estoppel will operate to convey the remainder to his grantee.”

There is a case which indicates that this theory would be applicable to work a transfer of such interests in Pennsylvania, although the court does not go into the problem deeply.

*In re Cunningham's Estate* was a case very similar to those in which the court merely speaks of the interest as being “assignable.” The court in this case said, “There is no doubt under our cases that the interest was assignable.” Assignable how? Directly or indirectly? In view of what we have already discussed concerning the rule in Pennsylvania, it is apparent that when the court says the interest was assignable under our cases they mean that it was indirectly assignable. Furthermore, the court refers to the fairness of the transaction. In speaking of a contention by the son that the assignment was “unconscionable and inequitable,” the court says, “This contention may at once be dismissed with the statement that a study of the record shows there is not the slightest evidence to support it.” This is language which, as mentioned above, shows that the court is treating the assignment as a contract enforceable in equity. The court also pointed out that the problem was adequately dealt with by the court below, and it is clear that the court below considered the interest as passing by means of equity treating the assignment

---


25 17 American State Reports 841.

as a contract to assign and specifically enforcing it. In its opinion the lower court noted that there was a good and valuable consideration, and the court also quotes and relies on the language of Norris's Estate:

"What was said in Kuhne's Estate, 163 Pa. 438, 440, 30 A. 215, may be noted at this point: 'At law a valid transfer can be made of anything in actual existence. What the assignor has he may dispose of. What he has not, although he may hope or expect to acquire it, he can make no title to because he has no title himself. But such sales and assignments have been sustained in courts of equity whenever good conscience seemed to require it, and not otherwise: (citing cases). If the consideration for such an agreement is a fair and honest one, the assignment will be treated as an agreement to transfer when the assignee's title accrues, and will be held to take effect as an assignment when the expectant interest vests in the assignor.'"

Clearly the court considered the interest as passing as a result of equity specifically enforcing a contract to assign.

We are now ready to consider the passing of such an interest to a trustee in bankruptcy. Before the amendment to the Bankruptcy Act in 1938 the act provided that:

"The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with title of the bankrupt, as of the date he was adjudged a bankrupt, except insofar as it is to property which is exempt, to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon or sold under a judicial process against him. . . ."

"Transferred" was defined by the act, before 1938, as including "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."

While it might seem that the phrases italicised in the above quotations from the Act would be broad enough to include a transfer in an indirect manner and that a purely contingent interest such as we have been discuss-

27 The writer acknowledges the kindness of President Judge Thomas P. Trimble, of the Orphans' Court of Allegheny County, in making available a copy of the opinion of the lower court.
28 329 Pa. 483, 493, 198 Atl. 142 (1938).
ing should pass to the trustee in bankruptcy if it can be assigned in any way at all, this was not the construction generally given to these provisions. In the case of In re Whetmore the interest of the bankrupt was of this nature, and the court determined the law of the state where the land was located to be that the interest could not be directly assigned and so did not pass to the trustee. The court said:

"Nor was it material that the bankrupt might for a valuable consideration prior to the filing of the petition by contract in the form of an assignment, or by executory contract, have barred or precluded himself from enjoying or have become to permit others to have the exclusive benefit of, the fund in question. . . . While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee. If the contingency or uncertainty be such as relates to the person, and not merely to the event, and he who is to take remainders unascertained by name, designation or description, obviously no given individual while so unascertained can be held to have a property right to or in the subject matter of the gift or limitation."

In 1938 the Bankruptcy Act was greatly revised and many additions were made to it. The first section above quoted was not materially changed in any of its provisions which would affect the exact point now under discussion. It still provides that title shall pass to the trustee in bankruptcy if, prior to the filing of the petition, the bankrupt "could by any means have transferred" it. But there is a change in the definition of "transfer," and it now includes:

"The sale and every other and different mode, direct or indirect, of disposing of or parting with property or an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise."

31 Whether or not an interest is assignable is determined by the law of the state in which the land is located. In re Twaddell, 110 Fed. 145 (1901). Thus, if by the state law an interest such as we are considering was directly assignable, it would pass to the trustee in bankruptcy. If the state law held that such interests could be transferred in no way (not even indirectly), it would not pass to the trustee, at least before the assignment.

32 Buck's Estate, 11 D. & C. (Pa.) 638 (1928), is a rather recent lower court decision which seems to give the Act this construction. See also Suskin & Berry, Inc. v. Rumley, 37 F. (2d) 304 (1930), and In re Martin, 47 F. (2d) 498 (1931).


This amended definition is much broader than the previous one quoted and, by the words italicised, would seem to make the rule now that contingent interests, even though in no sense vested, should pass to the trustee in bankruptcy. It would seem that the Supreme Court in the Cunningham case was interpreting the act in this manner although they do not expressly so state. They merely quote the amended sections of the Bankruptcy Act and say, "Having, as we have, held an assignable interest (in the bankrupt son), it passed pursuant to the act of Congress." In speaking of the interest as an "assignable" one, the court meant—or at least we have so tried to show—that it was assignable in an indirect manner. In view of the construction given to the Bankruptcy Act before its amendment in 1938—that interest which could be transferred only indirectly would not pass to the trustee in bankruptcy—the court must have meant that the result of the amendment is that such interests, or at least an interest such as the one here involved (a contingent interest which is not a "vested interest in a contingent remainder") will pass to the trustee.

Before leaving this subject the writer would like to point out another problem which arises under the Bankruptcy Act, as amended, and which has not as yet, to our knowledge, been answered, and to suggest a possible answer. An expectancy—the interest that one person has who is likely to share in the estate of another person upon the death of the latter—like a purely contingent interest, is not considered as being a present one and so cannot be directly assigned and, before the amendment to the definition of "transfer" in 1938, did not pass to a trustee in bankruptcy. Will this amended definition have the affect of changing this rule so that an expectancy will now pass to the trustee? We think that it will not have this affect, and for two reasons. In the first place the courts have been more reluctant to allow an expectancy to be taken for the benefit of creditors than they have contingent interests. They say there is less chance of the expectant heir ever actually enjoying the estate and so the price which the interest would bring at a forced sale might prove grossly inadequate. In addition, there is a provision present in the amended Bankruptcy Act which was not there before and which seems to indicate that Congress intended that expectancies should not pass to the trustee. The provision is that, "All property which vests in the bankrupt within six months after bankruptcy, by bequest, devise, or inheritance shall vest in the trustee. . . ." In other words, unless the property vests within six months—if it is still an expectancy at the end of that period—it will not pass to the trustee. It is at least doubtful that the courts will hold that such interests so pass.

In conclusion we should like to suggest again that there should be uniformity,

88 In re Baker, 13 F(2d) 707 (1926); 1 Simms, Law of Future Interests (1936) 413, 414.
at least for a single purpose, as to the legal incidents which attach to contingent interests. Thus, if a contingent interest of one nature is to pass to the trustee in bankruptcy, all contingent interests should so pass; or if one is not to pass, none should pass. As we have seen, there is no justification for saying that the present claimant of a contingent interest of one class has more of a chance of actually enjoying the estate than has the owner of an interest which is determined to be in another class. The same thing can be said as between contingent interests and expectancies. And the writer believes that the preferable rule is that none of these interests should pass to the trustee. We agree with what the courts say as to expectancies—that they are likely to bring a greatly inadequate price if sold at a forced sale—and we feel that this is a good reason for not allowing them to pass to the trustee in bankruptcy. As was said by the Supreme Court of Errors of Connecticut in Smith v. Gilbert:

"While it is unjust that one should keep from his creditors property which can be fairly sold or applied to the satisfaction of his debts, it is equally unjust that a creditor should seize and destroy an interest of his debtor which is so uncertain and contingent that it cannot be fairly sold or appraised."

We contend that this is the case of the various contingent interests, they being just as uncertain as expectancies, and that none of them should pass to the trustee.

Charles H. Davison

401 Simes, Law of Future Interests (1936) 413.
4171 Conn. 149, 41 Atl. 284 (1898).
42Italics added.