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Trusts and Estates

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TRUSTS AND ESTATES

I. CHARITABLE TRUSTS - WISCONSIN STATUTE SECTION 701.10

A variety of cases dealing with various aspects of decedents' trusts and estates came before the court in the past year. Of particular interest are two cases involving charitable trusts, *In re Charitable Trust, Oshkosh Foundation*[1] and *Estate of Sharp*,[2] the former dealing with the *cy pres* doctrine and its variations[3] and the latter limiting the attorney general's power to intervene in an estate proceeding involving a testamentary charitable trust.

Charitable Trust, Oshkosh Foundation involved a charitable trust created in 1928 to which contributions of a general charitable intent could be made for the benefit of the "inhabitants of the City of Oshkosh." The respondent trustee argued that the limitation to the inhabitants of Oshkosh was impracticable and petitioned the trial court for an amendment to the trust instrument to include certain surrounding municipalities. It was argued that the influence of the city extended beyond its geographic limits. The trustee gave a number of examples illustrating this point such as the area served by the Oshkosh United Fund, the extent of the city sewage system, and the areas included within the school district. By showing the impracticality of the geographic limit, the trustee hoped to show the need for a modification of the trust provisions to include all of the Oshkosh metropolitan area, either under the *cy pres* doctrine or the doctrine of equitable deviation. Failing that, it was urged that under a reasonable interpretation of the trust provision, the charitable intent of persons contributing to the trust would be to aid agencies serving both inhabitants and non-inhabitants of the city. All these arguments failed.

The *cy pres* doctrine, the first argument of the trustee, is a common law doctrine which provides that when a charitable purpose cannot be fulfilled according to the terms of its creation because of impossibility, illegality or impracticality, an attempt will

1. 61 Wis. 2d 432, 213 N.W.2d 54 (1973).

2. 63 Wis. 2d 254, 217 N.W.2d 258 (1974).

3. The trustee-respondent was an unwilling proponent of the *cy pres* doctrine in this case. He argued:

> Respondent reiterates that the doctine of cy pres was not applicable and was so found not to be applicable by the trial court in its memorandum decision. [Respondent's brief, p. 10, In re Charitable Trust, Oshkosh Foundation, 61 Wis. 2d 432 (1973)].

The court, nevertheless, treated this issue at length.

be made to do the "next-best similar charitable thing."[4] While this doctrine had not always enjoyed a highly favored position with the Wisconsin Supreme Court,[5] it has been established by statute since 1933[6] and was included, with changes, in the recent revision of trust statutes as Wisconsin Statute section 701.10(2)(a).[7] The court was critical of the trustee's attempt to characterize the geographic limits imposed by the trust provision as impracticable merely because they had become undesirable or would be more useful in another form. It acknowledged the difficulty in determining whether a provision is impracticable or only undesirable and conceded that the difference is "one of degree rather than kind."[8] The court, however, approved the rule that "the doctrine of *cy pres* was inapplicable because it was practicable even if undesirable to carry out the particular purpose designated by the testator."[9] Testimony indicated that there was neither a lack of charitable requests within the city nor a lack of suitable scholarship applicants, and that in fact, there were not sufficient funds to meet the demand for scholarships within the city itself. The court concluded that under the circumstances the doctrine was inapplicable.

The second argument of the trustee, equitable deviation or approximation,[10] met with the same lack of success. The doctrine is nothing more than the equitable power to alter the terms of the trust where compliance with the trust instrument is impossible or

4. 61 Wis. 2d at 437, 213 N.W.2d at 57; 2 RESTATEMENT (SECOND) OF TRUSTS § 399; 4 SCOTT, LAW OF TRUSTS § 399 (hereinafter "SCOTT"); 4 BOGART, TRUSTS AND TRUSTEES § 431-442 (hereinafter cited as "BOGART").

5. Comment, 49 MARQ. L. REV. 386, 397 et seq.

6. Wis. Laws 1933, ch. 413.

7. WIS. STAT. § 701.10(2)(a) reads:

If a purpose of a charitable trust is or becomes impractical, unlawful or impossible, the court may order the trust continued for one or more other charitable purposes designated by the settlor or, in the absence of such designation, order the property devoted to one or more other charitable purposes either by continuing the trust or by distributing the property to one or more established charitable entities. In determining the alternative plan for disposition of the property, the court shall take into account current and future community needs in the general field of charity within which the original charitable purpose falls, other charitable interest of the settlor, the amount of principal and income available under the trust and other relevant factors. The provisions of this subsection do not apply insofar as the settlor expressly provides in the creating instrument for an alternative disposition if the original trust fails; nor do they apply to gifts by several persons to a charitable entity on a subscription basis if the court finds that the donors intended their gifts to be limited to the original purpose and such purpose fails initially.

8. 61 Wis. 2d at 437, 213 N.W.2d at 57.

9. *Id.* note 6.

10. 2 RESTATEMENT (SECOND) TRUSTS § 381; 4 SCOTT § 381; BOGART § 394, 561.

illegal, or where unknown or unanticipated circumstances would impair the result intended by the settlor. Unlike *cy pres*, equitable deviation does not look to the impossibility or illegality of the intended benefit, but to the impossibility of the attending means, methods or details of administration, such as the type of securities the trustee is directed to hold or permission to mortgage certain property. Administrative details are subordinate to the fundamental object of the grantor. Where such details interfere with the primary intent of the trust, equitable deviation holds that they must give way. By enlarging the geographic limits of the class of people benefited by the trust, the beneficiaries of the trust would be changed, which can hardly be considered a mere administrative detail. Because the proposed amendment attempted to modify the primary intent of the trust, the court held that the doctrine of equitable deviation was inapplicable.

Nevertheless, it could be suggested that the court ignored some essential evidence in deciding that the doctrine of equitable deviation was inapplicable. In finding that the intent of the trust provision included a desire to limit the beneficiaries to the inhabitants of the city, the court ruled out equitable deviation by definition. The trust had been created in 1928 but had remained largely unfunded until 1955. It was hoped that the trust would receive contributions from the public, and they were accepted regardless of restriction.[11] Since the trust, by its provisions, was created for the benefit of "the inhabitants of the City of Oshkosh as now or hereafter constituted,"[12] it could be argued that the city was merely thought of as the administrative unit most logical at the time and that the development of a metropolitan area, of which the city was only one component, could not have been anticipated.

The trustee's last argument contended that the trust provisions should be interpreted as being intended to aid charitable agencies serving the Oshkosh metropolitan area, even if the particular beneficiary was outside the city limits. As to this argument the court merely pointed out that this was not an action to construe the terms of the trust, which was presumably a ". . . careful and painstaking expression of the use and purposes to which the settlor's financial accumulations shall be devoted,"[13] but rather an

11. Appellant's Brief, p. 3-5, In re Charitable Trust, Oshkosh Foundation, 61 Wis. 2d 432, 213 N.W.2d 54 (1973).

12. 61 Wis. 2d 254, n. 1.

13. 61 Wis. 2d at 442, 213 N.W.2d at 59, quoting with approval, First Nat'l Bank and Trust Co. of Wyoming v. Brimmer, 504 P.2d 1367, 1371 (Wyo. 1973).

action to amend the trust which does not call for construction.

Charitable Trust, Oshkosh Foundation reaffirms prior case law that a court will not substitute its judgment for that of the settlor, and will probably have a dampening effect on future challenges to trusts that may have become merely undesirable or unpopular. Theoretically, potential settlors may also be more disposed to create charitable trusts, knowing that the courts are less likely to interfere with them at some future date.

Estate of Sharp dealt with an entirely different aspect of charitable trusts. The principal issue in this case was whether the attorney general could intervene in a probate proceeding involving a charitable trust created under a will. The decedent left an estate of $440,000.00. The balance of the estate remaining after specific bequests was placed in a charitable trust. A judgment on the final account of the estate was entered in 1967 without notice to the attorney general. Prior to this, letters of trust had been issued and the attorney general had been notified of the trustees' intent to begin administration of the trust. In late 1967 an order was entered approving the trusts' annual accounts of the previous years, ending August 31, 1967. The following year the original judge retired. The attorney general petitioned the replacement judge for a vacation of the probate judgment and the order approving the annual accounts, and requested a dismissal and surcharge to the trustees based on the allegedly excessive fees charged by them. The trustees defended by arguing that the attorney general was not an interested party in the estate proceeding and that the judgment approving the trust accounts was final and could not be reopened one year after its entry without a showing of fraud. No fraud was alleged.

The attorney general's application to the trial court for relief from the final order approving the trustees' accounting through August, 1967, was subject to a one year limitation under Wisconsin Statute section 269.46. The attorney general had delayed thirty-four months. The supreme court pointed out that where there is no showing of fraud, the only basis for action by the trial court more than a year after the final entry of a judgment or order is an appeal, not a motion to vacate upon the retirement of the unfavorable judge. The order vacating the judgment on the final accounts was therefore reversed.

This reasoning could only be applied to that portion of the appeal dealing with the testamentary trust, since the motion of the attorney general to vacate the order closing the estate came well within the statutory time limit. The court nevertheless found that

even though a will contains provisions for the creation of a testamentary charitable trust, the attorney general is without power to intervene in an estate proceeding. The rationale for this decision was developed rather simply. Under the Wisconsin constitution the powers of the attorney general are limited to those provided for by legislative enactment or by the constitution itself. The court then looked to three sections of the Wisconsin statutes and concluded that there was no legislative intent to create a power in the attorney general to intervene in a probate proceeding.

The first statute section the court looked to was Wisconsin Statute section 231.34[14] which dealt with the enforcement of charitable trusts. While the attorney general has broad powers in initiating action for the invalidation, termination or enforcement of charitable trusts, it was decided that this power did not exist prior to the creation of the trust. The court then looked at Wisconsin Statute section 317.06,[15] which required notification to be sent to the attorney general before an action on the annual accounts of charitable trusts could be final. This section was held to be inapplicable

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14. WIS. STAT. § 231.34 reads:

Enforcement of public trust

(1) An action may be brought by the attorney-general in the name of the state, upon his own information or upon the complaint of any interested party for the enforcement of a public charitable trust.

(2) Such action may be brought in the name of the state by any 10 or more interested parties on their own complaint, when the attorney-general refuses to act.

(3) The term "interested party" herein shall comprise a donor to the trust or a member of prospective member of the class for the benefit of which the trust was established.

This statute was repealed and recreated as WIS. STAT. § 701.10(3) by Wis. Laws 1969, ch. 283, § 2. *Cf.* note 16.

15. WIS. STAT. § 317.06 was created by Wis. Laws, 1909, ch. 233. Wis. Laws 1969, ch. 339, § 22 repealed and recreated this statute as WIS. STAT. § 323.30. Wis. Laws 1969, ch. 283, § 12 repealed this section. Prior to its repeal, the statute read:

(1) Every trustee of a testamentary trust for charitable purposes shall, prior to March of each year; account to the court having jurisdiction thereof for the preceding calendar year and shall further account from time to time as required by the court; and he may be examined by the court upon any matter relating to his account and his conduct of such trust.

(2) The Court shall promptly examine such account and if it be not satisfactory it shall be examined on notice and the court shall make such order as may be necessary to carry out the provisions of the trust.

(3) The court may remove the trustee for failure to comply with this section or with the order of the court, and appoint another trustee as provided by law or the terms of the will creating such trust.

(4) No action of the court upon such account shall be final except it be upon notice mailed to the attorney general and published under s. 324.20.

to an estate proceeding. Lastly, the court looked to Wisconsin Statute section 324.18(1)(b) which requires:

> (b) Notice to Attorney General of proceedings involving charitable trust. Notice of all hearings or proceedings where a public charitable trust is involved shall be mailed to the attorney general at least 20 days before the hearing or proceeding.

This section was created under the supreme court's rule-making power and not by the legislature as required by the consitution.[16] Consequently, the court was unwilling to use this statute as a basis for allowing the attorney general to intervene in an estate proceeding. None of these statutes, then, provided for the intervention by the attorney general in an estate proceeding. The power, therefore, was held not to exist.

This decision creates an unfortunate situation. By preventing the attorney general from intervening in an estate proceeding under Wisconsin Statute section 231.34, the court will impliedly disallow intervention under section 701.10(b), which was created to replace section 231.34.[17] If the attorney general is prevented from intervening in an estate proceeding involving a testamentary charitable trust because this statute only provides for enforcement after the trust is created, anyone else designated to enforce a charitable trust under this statute section will also be prevented from intervening in an estate proceeding. This leaves the charitable trust without representation which violates the concept of an adversary system.

The court's resistance to allow the attorney general to intervene in estate proceedings involving testamentary charitable trusts is difficult to understand. While the court may have been reluctant to allow the attorney general to intervene under Wisconsin Statute section 324.18 because it was judicially created, the fact remains

16. 271 Wis. xi.

17. WIS. STAT. § 701.10(3) reads:

(3) ENFORCEMENT; NOTICE TO ATTORNEY GENERAL.

(a) A proceeding to enforce a charitable trust may be brought by:

1. An established charitable entity named in the governing instrument to which income or principal must or may be paid under the terms of the trust;

2. The attorney general in the name of the state upon his own information or, in his discretion, upon complaint of any person;

3. Any settlor or group of settlors who contributed half or more of the principal; or

4. A cotrustee.

(b) In a proceeding affecting a charitable trust, notice must be given to the attorney general, but, except as provided in sub.(2), notice need not be given where the income or principal must be paid exclusively to one or more established charitable entities named in the governing instrument.

that this section was repealed and recreated by the legislature and is presently embodied in Wisconsin Statute section 879.03(2)(c).[18] It seems anomalous that the legislature would create a provision requiring the attorney general to be advised of pending actions involving a charitable trust and then withhold any power to appear, or in any other way affect the proceeding for which the notice was given.

Other jurisdictions that have dealt with this issue have not been so reluctant to allow their attorneys general to intervene in proceedings dealing with charitable trusts. Pennsylvania[19] and Rhode Island[20] have allowed their respective attorneys general to intervene in suits for the construction of wills involving charitable trusts. California has allowed its attorney general to be a party to a suit where a will contest challenged a gift to charity.[21] Michigan has required its prosecuting attorneys (who are designated to enforce charitable trusts in that state) to represent unknown charitable beneficiaries even over the protest of the prosecuting attorney.[22] Kentucky,[23] on the other hand, relied on an Ohio[24] case in holding that a challenge to a will, even if it involved a charitable trust, was a petition for a determination of the validity of the document purporting to be the last will of the decedent and is only indirectly challenging a charitable trust. The opinion went on to say that the attorney general's primary duty is the enforcement of the commonwealth's interests, including tax collection. Because charitable gifts are tax exempt, this would place the attorney general in an inconsistent position not intended by the legislature. The Ohio decision relied on by the Kentucky court, however, has apparently been overruled sub silentio,[25] leaving Kentucky alone in this holding.

Prior to *Estate of Sharp*, Wisconsin too had held that an attorney general could be a party to an action involving a testamentary

18. WIS. STAT. § 879.03(2)(c) reads:

(2) WHO ENTITLED TO NOTICE. The following persons are entitled to notice: . . .

(c) The attorney general where a public charitable trust is involved, and in all cases mentioned in s. 852.01(3).

[WIS. STAT. § 852.01(3) deals with escheatment and has no application here.] This section was created by Wis. Laws 1969, ch. 339, § 26.

19. In re Veogtly's Estate, 396 Pa. 90, 151 A.2d 593 (1959).

20. Leo v. Armington, 74 R.I. 124, 59 A.2d 371 (1948).

21. In re Los Angeles County Pioneer Society, 40 Cal. 2d 852, 257 P.2d 1 (1953).

22. Powers' Estate, 362 Mich. 222, 106 N.W.2d 833 (1961).

23. Commonwealth ex rel. Ferguson v. Gardner, 327 S.W.2d 947 (Ky. 1959).

24. Spang v. Cleveland Trust Co., 1 Ohio Op. 2d 288, 134 N.E.2d 586 (1956).

25. Blair v. Bonton, 15 Ohio Op. 2d 474, 176 N.E.2d 280 (1956).

charitable trust not in existence. In *Estate of Goodrich*,[26] a charitable trust had been improperly terminated and the corpus paid over to the charitable organization for whose benefit the trust was created. The court had no problem in allowing the attorney general to act on behalf of the charitable trust which was not then in existence, notwithstanding the fact that the court simultaneously endorsed the jurisdiction of the trial court in terminating the trust.

Hopefully the legislature will recognize the disadvantages of prohibiting an attorney general from defending a testamentary charitable trust and will enact enabling legislation. The situation as it stands can only encourage a person whose interest lies in invalidating a testamentary charitable trust or the will under which it is created in challenging the trust or will, knowing the trust stands defenseless.

II. LIMITATION IN CLAIMS AGAINST AN ESTATE

Frequently a housekeeper, nurse or other person in a similar capacity performs services for an elderly individual over a period of time with assurances from that person that he or she will be compensated for his or her services from the estate. However, recovery for the services rendered more than two years before the date of death may be barred by Wisconsin Statute section 893.21(5).[27] This statute of limitations issue was treated recently by the court in *Estate of Nale*.[28]

In *Estate of Nale*, respondent left her home in Necedah to keep house and assist the decedent until his death. Following decedent's death, respondent filed a claim for the reasonable value of her services, which was challenged by the administrator. Upon trial, a jury returned a special verdict finding that respondent and decedent had entered into an agreement whereby respondent was to be compensated for her services at or after the death of decedent, and awarded damages. The trial court's award of damages included services rendered more than two years before decedent's death. The administrator appealed, arguing in part that Wisconsin Statute section 893.21(5) barred recovery for a claim based on personal services provided two years or more before the death of decedent.

On appeal, the court distinguished a claim for recovery based

26. 271 Wis. 59, 72 N.W.2d 698 (1955).

27. WIS. STAT. § 893.21(5) reads:

(5) Any action to recover unpaid salary, wages, or other compensation for personal services, except fees for professional services.

28. 61 Wis. 2d 654, 213 N.W.2d 552 (1973).

on quantum meruit or for recovery based upon an expressed contract for weekly, monthly or annual payments from the situation at bar. In these instances compensation is set at a fixed date or at specific intervals. In the instant case however, respondent had no right to demand payment until the death of decedent. In a situation such as this, the statute of limitation begins to run from the death of the decedent and not from the performance of the service. Respondent, therefore, could maintain an action for the reasonable value of her services at any time within six years[29] of the death of the decedent, even though the claim may have included services rendered many years prior.

III. TAXATION OF FUTURE INTERESTS

Only one case involving estate taxes came before the court this term, *Estate of Scheriffus*,[30] and it is of declining significance because of the revision of the inheritance tax in 1971.[31] The action involved Wisconsin Statute section 72.15(5),[32] which provided that the tax on future interests shall be immediately due at the time of death and paid out of the property transferred, and Wisconsin Statute section 72.15(8),[33] which provided that the tax on a con-

29. WIS. STAT. § 893.19(3).

30. 62 Wis. 2d 687, 215 N.W.2d 547 (1974).

31. Wis. Laws 1971, ch. 310, § 1.

32. WIS. STAT. § 72.15(5) (1969) read:

BASIS FOR APPRAISAL OF FUTURE ESTATES.

Whenever a transfer of property is made upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon the transfer or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and rate of interest employed by the commissioner of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that for every future or limited estate, income, interest or annuity the value of which is not based upon an assumed rate of interest the rate of interest for making such computation shall be five per cent per annum. The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the estate equal to the present value of such future or limited estate, income, interest or annuity, and not upon any earnings or income of said property produced after death, and such earnings or income shall not be exempt from the income tax. Such tax shall be due and payable forthwith out of the property transferred.

33. WIS. STAT. § 72.15(8) (1969) read:

ESTATES IN TRUST

(8) Sec. 72.15(8), Stats. 1965, provides:

When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may

tingent interest is determined on the lowest value of the property transferred, taking into consideration the contingencies and providing for a redetermination of the tax upon the happening of the condition or contingency. The question presented for determination was the correct statute section to be applied to the testamentary trust in suit. The terms of the trust created a life estate for decedent's nephew and his nephew's wife with a remainder to charity. Income or principal was to be paid to the life beneficiaries at the discretion of the trustee. The nephew's wife gave up any right to take under the trust during her husband's life.

The trial court determined that taxes were to be assessed on the value of the successive life estates without provision for the redetermination of taxes in the event the wife should predecease the nephew, and the executor appealed. Affirming the lower court's decision, the supreme court held that section 72.15(5) applied to vested future interests and section 72.15(8) applied to contingent future interests. At the onset, however, the court warned that this decision is of limited value as precedent. The testator's death occurred in 1965 and the inheritance tax statutes have since been substantially altered.

In revising the inheritance tax statutes, the legislature incorporated section 72.15(5) in the new Wisconsin Statute section 72.28(1)(c),[34] and repealed section 72.15(8). Valuation is now fi-

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be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon such transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of sections 72.01 to 72.24, inclusive, and such tax so imposed shall be due and payable forthwith out of the property transferred; provided, however, that on the happening of any contingency or condition whereby the said property or any part thereof is transferred to a person or corporation, which under the provisions of sections 72.01 to 72.24, inclusive, is required to pay a tax at a higher rate than the tax imposed, then such transferree shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in sections 72.01 to 72.24, inclusive; provided further, that if on the happening of any such contingency or condition the said property or any part thereof is transferred to persons or corporations, which under the provisions of sections 72.01 to 72.24, would be required to pay less tax on the transfer than has been paid, a return shall be made to the person or persons entitled thereto of so much of the tax as will reduce the same to the amount which would have been assessed originally on such transfer, had the date of the happening of such condition or contingency and the persons ultimately receiving such property been known when the original assessment was made. Such return of tax shall be made in the manner provided in section 72.08.

34. WIS. STAT. § 72.28(1)(c) reads:

(c) *Future or limited estates.*

1. Method of valuation.

a. Determination of the value of every future or limited estate, income, interest or

nally made at the time of death and no provisions have been made for a subsequent redetermination.

It might also be noted that the classification of future interests relied on by the court in this decision has also been changed. Wisconsin Statute section 230.13[35] had classified future interests as vested or contingent. Earlier, however, the court had rejected this classification, choosing rather to rely on the classification in the Restatement of Property[36] and Wisconsin case law.[37] Why it chose to revert to the vested-contingent classification is unclear and may create confusion. The legislature, however, has followed the earlier judicial lead and embodied the Restatement classification in Wisconsin Statute section 700.05.[38]

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annuity dependent upon any life or lives in being shall be based on tables designated by the department. These tables shall be those used by the internal revenue service for like computations.

b. If valuation cannot be established under subd. 1. a, the commissioner of insurance, upon application of the department or county court shall determine the value. The commissioner's report shall be presumptive evidence that his method of computation is correct.

2. Payment. The tax, based on the value determined by subd. 1, is upon a transfer of a proportion of the principal of corpus of the estate equal to its present value and not upon any income of that property produced after death, which income shall be subject to the income tax. The tax imposed by this subchapter is due and payable out of the property transferred without right of recoupment from the life tenant.

35. WIS. STAT. § 230.15 (1969) reads:

Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right, by virtue of it, to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain.

36. 2 RESTATEMENT, PROPERTY § 157, classifies remainders as follows:

A remainder can be

(a) indefeasibly vested; or
(b) vested subject to open; or
(c) vested subject to complete defeasance; or
(d) subject to a condition precedent.

37. Will of Wehr, 36 Wis. 2d 154, 152 N.W.2d 868 (1967).

38. WIS. STATS. § 700.05 reads:

Remainders are classified as:

(1) Indefeasibly vested, if the interest is created in favor of one or more ascertained persons in being and is certain to become a present interest at some time in the future;

(2) Vested subject to open, if the interest is created in favor of a class of persons, one or more of whom are ascertained and in being, and if the interest is certain to become a present interest at some time in the future, but the share of the ascertained remaindermen is subject to diminution by reason of other persons becoming entitled to share as members of the class;

(3) Vested subject to complete defeasance, if the interest is created in favor of one or more ascertained persons in being and would become a present interest on

Estate of Scheriffus is precedent only to cases involving estates created earlier than the effective date of Wisconsin Statute section 72.28(1)(c), May 14, 1972. Its value therefore is quite limited, as the court indicates.

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the expiration of the preceding interests but may end or may be completely defeated as provided by the transferor at, before or after the expiration of the preceding interests;

(4) Subject to a condition precedent, if the interest is created in favor of one or more unborn or unascertainable persons or in favor of one or more presently ascertainable persons upon the occurrence of an uncertain event.