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PERPETUITIES IN PRIVATE TRUSTS IN WISCONSIN

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I. REVIEW OF THE PRESENT RULES

In 1849, Sections 14 and 15 of Chapter 56 of the Revised Statutes, limiting suspension of the power of alienation of real estate were enacted in this state. Such sections were, with certain exceptions not material to this paper, literal copies of some of the New York statutes on that subject. In New York the cases involving construction and application of the New York statutes exceeded 800 by the year 1941.¹

On the other hand, it is surprising to note in Wisconsin the statutes involving suspension of the power of alienation have been directly considered by the Supreme Court in only thirty-eight cases.²

The 38 cases may be classified by subject as follows: 13 cases involving private trusts—*DeWolf*, *Scott*, *Ford*, *Beurhaus*, *Becker*, *Holmes*, *Adelman*, *Harrington's Estate*, *Smith*, *Miller*, *Baker*, *Butter*, and *Walker*, in eight of which a power of sale, express or implied, was involved—*Ford*, *Becker*, *Holmes*, *Smith* (1922), *Miller*, *Baker* and *Butter*; twelve cases involving public or charitable uses or trusts—*Ruth*, *Dodge*, *Gould*, *Webster*, *Fadness*, *Protestant Home*, *Harrington vs. Pier*, *Danforth*, *Kavanaugh*, *Williams*, *Giblin* and *Matson*; four cases involving life estates—*Tyson*, *Eggleston*, *Meinert* and *Gallagher*; three cases involving accumulations—*Schilling*, *Hustad*, *Smith* (1947); two cases involving remainders—*Hughes*, *Stark*; two cases involving periods in gross and estate for years—*Kopmeier*, *Gray*; one case involving a reversion—*Kramer*; and one case involving a conditional fee—*Saxton*.

The conflicting views and difficulties as to the construction and application of the statutes limiting suspension of the power of alienation with particular regard to private trusts are demonstrated by the fact that, of the nineteen justices who wrote the majority opinions in the 38 Wisconsin cases, seven justices dissented in at least one of such cases:

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¹ GRAY, RULE AGAINST PERPETUITIES, §750 (4th Ed. 1942).

² *Ruth vs. Oberbrunner*, 40 Wis. 238 (1876);
Dodge vs. Williams, 46 Wis. 70, 50 N.W. 1103, rehearing denied, 51 N.W. 92, 46 Wis. 70 (1879);
Gould vs. Taylor Orphan Asylum, 46 Wis. 106, 50 N.W. 522 (1879);
DeWolf vs. Lawson, 61 Wis. 469, 21 N.W. 615, 50 Am. Rep. 148 (1884);
Scott vs. West, 63 Wis. 529, 24 N.W. 161, rehearing denied, 25 N.W. 18, 63 Wis. 529 (1885);
Webster vs. Morris, 66 Wis. 366, 28 N.W. 353, 57 Am. Rep. 278 (1886);
Ford vs. Ford, 70 Wis. 19, 33 N.W. 188, 5 Am. St. Rep. 117 (1887);

Cassoday, C. J., wrote six opinions and dissented twice;
 Rosenberry, C. J., wrote five opinions and dissented once;
 Winslow, C. J., wrote four opinions and dissented once;
 Marshall, J., wrote three opinions and dissented once;
 Siebecker, C. J., wrote one opinion and dissented once; and
 Vinje, C. J., wrote two opinions and dissented once;
 Owen, J., who wrote no majority opinion, dissented once.

The reason for the dearth of judicial review of cases involving perpetuities in Wisconsin is that the Supreme Court made extreme negative rulings from the very beginning with little or no opportunity for development by judicial construction.

The court's holdings may be summarized as follows:

- (1) The common law rule against perpetuities was repealed and abrogated in its entirety.
- (2) The statutory rule applied only to real estate and there was no rule of any kind applicable to personal property prior to July, 1925.³
- (3) The statutes have no applicability whatever to remoteness of vesting.⁴

Fadness vs. Braunborg, 73 Wis. 257, 41 N.W. 84 (1889);
 Hughes vs. Hughes, 91 Wis. 138, 64 N.W. 851 (1895);
 Beurhaus vs. City of Watertown, 94 Wis. 617, 69 N.W. 986 (1897);
 Tyson vs. Houghton, 96 Wis. 59, 71 N.W. 94 (1897);
 Harrington vs. Pier, 105 Wis. 485, 82 N.W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924 (1900);
 In re Kopmeier, 113 Wis. 233, 89 N.W. 134 (1902);
 Becker vs. Chester, 115 Wis. 90, 91 N.W. 87 (1902);
 Holmes vs. Walter, 118 Wis. 409, 95 N.W. 380, 62 L. R. A. 986 (1903);
 Danforth vs. City of Oshkosh, 119 Wis. 262, 97 N.W. 258 (1903);
 In re Adelman's Will, 138 Wis. 120, 119 N.W. 929 (1909);
 In re Harrington's Will, 142 Wis. 447, 125 N.W. 986 (1910);
 In re Kavanaugh's Estate, 143 Wis. 90, 126 N.W. 672, 28 L. R. A. (N. S.) 470 (1910);
 Eggleston vs. Swartz, 145 Wis. 106, 129 N.W. 48 (1910);
 In re Stark's Will, 149 Wis. 631, 134 N.W. 389 (1912);
 Williams vs. City of Oconomowoc, 167 Wis. 281, 166 N.W. 322 (1918);
 Meinert vs. Roeglin, 169 Wis. 531, 173 N.W. 224 (1919);

Giblin vs. Giblin, 173 Wis. 632, 182 N.W. 357 (1921);
 In re Smith's Will, 176 Wis. 494, 186 N.W. 180 (1922);
 Kramer vs. Nelson, 189 Wis. 560, 208 N.W. 252 (1926);
 Miller vs. Douglas, 192 Wis. 468, 213 N.W. 320 (1927);
 Saxton vs. Webber, 83 Wis. 617, 53 N.W. 905, 20 L. R. A. 509 (1892);
 Milwaukee Protestant Home for the Aged vs. Becher, 87 Wis. 409, 58 N.W. 774 (1894);
 Baker vs. Stern, 194 Wis. 233, 216 N.W. 147, 58 A.L.R. 462 (1927);
 Matson vs. Town of Caledonia, 200 Wis. 43, 227 N.W. 298 (1929);
 In re Schilling's Will, 205 Wis. 259, 237 N.W. 122, 75 A.L.R. 184 (1931);
 Gray vs. Stadler, 228 Wis. 596, 280 N.W. 675, rehearing denied, 281 N.W. 280, 228 Wis. 596 (1938);
 In re Gallagher's Estate, 231 Wis. 621, 282 N.W. 615 (1939);
 In re Hustad's Estate, 236 Wis. 615, 296 N.W. 74 (1941);
 In re Butter's Will, 239 Wis. 249, 1 N.W. (2d) 87 (1941);
 In re Smith's Will, 253 Wis. 72, 33 N.W. (2d) 320 (1947);
 In re Walker's Will, 258 Wis. 65, 45 N.W. (2d) 94, 33 A.L.R. (2d) 991 (1950).

³ Enactment of Chap. 287, Laws of 1925; Dodge v. Williams, *supra* note 2, 46 Wis. at 97.

⁴ Holmes v. Walter, *supra* note 2, 118 Wis. at 421, Becker v. Chester, *supra* note 2, 115 Wis. at 135; Butter's Will, *supra* note 2, 239 Wis. at 255; Walker's Will, *supra* note 2, 258 Wis. at 72.

(4) An express or implied mandatory or discretionary power of sale or reinvestment in the trustee removes any and all suspension of power of alienation as to both real estate and personal property alike, constituting the trust res.⁵

II. THE RULE AS TO PRIVATE TRUSTS

The result is that a private trust with such a power is not void under the above rules even though the trust in the converted fund is perpetual. The law in Wisconsin in this regard is quite firm and unequivocal, despite the two recent attempts to upset it.

This being true, because trusts of any size in real estate and/or personal property contain provisions for investment or reinvestment of trust assets or must of necessity include such a power by implication, the rule against perpetuities in Wisconsin, insofar as applied to trusts, is a virtual nullity and has no or a negligible significance; and hence, the lack of judicial review. A more obvious invitation to circumvention of any prohibition against perpetuities can hardly be imagined. Perhaps, the most that can be said is that the rule is workable because it is ineffective to prevent perpetuities in trusts.

The strong language of Mr. Chief Justice Cassody is still very pertinent when he attempted:

. . . to expose what I regard as a legal monstrosity, in the hope that the legislature may do something to relieve the state of Wisconsin from being the only state in the Union where personal property may be given in trust for a private purpose and rendered inalienable for all time.⁶

This language is quoted with purpose and intent in the *Schilling* case.⁷

In both the *Butter* and *Walker* cases the court referred to the fact that the desirability of prolonged trusts is a matter for the legislature.

III. DESIRABILITY OF CHANGE

The history of the common law rule against perpetuities amply demonstrates that the continued welfare of society requires the placing of restraints upon the fettering of property.

Perpetual private trusts are not desirable but should, on the contrary, be prohibited, and proper restrictions should be placed upon unduly prolonged trusts. The social interest in preserving property from excessive fettering rests:⁸

(a) partly upon the necessities of maintaining a going society controlled primarily by its living members;

⁵ *Becker v. Chester*, *supra* note 2, 115 Wis. at 115; *Butter's Will*, *supra* note 2, 239 Wis. at 255; *Walker's Will*, *supra* note 2, 258 Wis. at 72.

⁶ Dissent in *Becker v. Chester*, *supra* note 2, 115 Wis. at 147.

⁷ In re *Schilling's Will*, *supra* note 2, 205 Wis. at 269.

⁸ RESTATEMENT, PROPERTY, Div. IV, introductory note at page 2132 (1944).

(b) partly upon the social desirability of facilitating the utilization of wealth;

(c) partly upon the like desirability of keeping property responsive to the current exigencies of its current beneficial owners; and

(d) partly upon the competitive basis of modern society.

To paraphrase the *Restatement* Note, the rule against perpetuities provides a balance between the desire of the current owner of property to prolong indefinitely into the future his control over the devolution and use thereof and the desire of the person who will in the future become the owner of the affected land or other thing, to be free from the dead hand; the rule minimizes the fear of loss of investment normally felt by the owner of a present interest subject to an outstanding future interest; full development and full use of the affected thing, as well as the making of new investments therein, are encouraged; a means is provided for forwarding the circulation of property, by removing barriers to the transfer of property; the probability is increased that specific land or other tangible things will come into the ownership of a person who sees an available mode for its utilization; the division of ownership into successive interests lessens the sum realizable upon a sale of the separated interests, and thus diminishes the total purchasing power of the wealth represented by the thing in which such divided interests have been created; limitations unalterably effective over a long period of time hamper the normal operation of the competitive struggle, and persons less fit in the social struggle, are thereby enabled to retain property disproportionate to their skills.

The following quotation from the *Restatement* Note succinctly states the issue before us here specifically involved:⁹

Similarly, when assets are transferred to a trustee who is given unqualified power to change the form of the trust res, no inalienability of any specific tangible thing can be said to be caused by the limitation of future interests under or after the trust. Nevertheless, it is well established law that the rule against perpetuities applies not only to limitations made concerning intangibles, such as bonds and shares, but also to limitations of the beneficial interests under a trust where the trustee has unqualified power to change the trust res. Both of these situations have one common factor, namely, that a given quantum of wealth is sought to be committed to the satisfaction of specific and stated ends. Such a commitment, for its duration, lessens the availability of these assets for the meeting of current newly arising exigencies. Law which is animated by the idea that the world and its wealth exist for the living cannot tolerate too long a commitment of this sort. Thus the rule against perpetuities, by regulating the future interests which can be created in these two situations, assists in keeping property reasonably

⁹ *Id.* at 2131-32.

free to answer the exigencies, as they arise, of the possessor and of his family. In these applications of the rule, it no longer is preventing lessened freedom of alienation. Its function has broadened to include the prevention of limitations which 'freeze' or 'tie up' or 'fetter' property for too long a time, even though no specific thing has been made inalienable, even for a moment.

IV. NECESSITY FOR CHANGE

The need for a workable rule limiting the length of private trusts is more urgent than ever in view of the fact that in recent years numerous trusts have been and are being created which may extend beyond lives in being and thirty years. The creation of such trusts, both inter vivos and testamentary, is the result of estate planning designed primarily to minimize state inheritance and federal estate taxes. The impact of such taxes is, of course, reduced by prolongation of final and absolute vestiture of complete ownership of the trust corpus. A necessary, but unfortunate, by-product, however, is, as above indicated, the withdrawal from a free society of, in each case, the quantum of wealth constituting the trust res. And the more wide-spread this form of avoidance of taxation becomes, the greater will be the future problems as to perpetuities involving private trusts.

Undoubtedly, the prime reason for the present status of the rule in Wisconsin has been the justifiable reluctance of the Supreme Court to impose and enforce the drastic and disastrous result of a violation of the rule by adjudging that the future estate was "void in its creation." In estate planning, to reject the entire testamentary or other plan or scheme merely because of a remote possibility of failure of one alternative of the plan would indicate an extreme and unrealistic approach to the matter. Yet in reviewing the results of such planning, the courts have had only two alternatives, either to declare the entire conveyance, transfer or will void and a nullity or to adopt a standard which in its application in Wisconsin at least has become too lenient, and has defeated the reason for the rule.

These alternatives have been given consideration in other jurisdictions. There is increasing realization of the need for reappraisal and reexamination of the rule against perpetuities, both in the United States and in Great Britain. Numerous law review articles have appeared throughout the university law schools inviting legislative changes in the rule.

V. POSSIBLE ALTERNATIVES

The most noteworthy of such changes is that involving the "wait and see" principle, to-wit, a determination of validity based upon actual rather than possible events.

In November, 1956, there was presented to the English Parliament a Command Paper in the form of the Fourth Report of the Law Reform Committee recommending substantial legislative changes in

the Rule against Perpetuities. The Law Reform Committee was established in 1952; the study took over two years; the report consists of 35 pages pertaining not only to the wait and see principle, but also to the period of the rule, *cy-pres*, the presumption against possibility of issue, class gifts, administrative powers, options, possibilities of reverter, rights of entry and others. The committee recommended in particular that validity should depend not on facts which may occur but on the facts which do in fact occur; the principle should be "wait and see."¹⁰

In Massachusetts, Maine and Connecticut this principle was adopted in identical language in the year 1955.¹¹ Section 1 of the Massachusetts statute reads as follows:

In applying the rule against perpetuities to an interest in real or personal property limited to take effect at or after termination of one or more life estates in, or lives of, persons in being when the period of said rule commences to run, the validity of the interest shall be determined on the basis of facts existing at the termination of such one or more life estates or lives. . . .

A second remedial step has been a reduction of an otherwise valid interest to 21 years where invalidity depends upon an excessive period of time. Section 2 of the Massachusetts statute is as follows:

If an interest in real or personal property would violate the rule against perpetuities as modified by section one because such interest is contingent upon any person attaining or failing to attain an age in excess of twenty-one, the age contingency shall be reduced to twenty-one, as to all persons subject to the same age contingency.

CONCLUSION

Thorough study and careful deliberation are an absolute necessity in considering any revision of the rule against perpetuities in Wisconsin. But upon integration of the bar with its attendant advantages in function and personnel and with the excellent law school facilities available, there are wonderful opportunities for review of the wealth of material available on the subject and for preparation of adequate remedial legislation. It is to be hoped that this article may lead to a second look at perpetuities in Wisconsin, with particular regard to imposition of effective restraints upon perpetual private trusts and to liberalization of the alternatives available in the event of a violation of the rule.

¹⁰ Leach, *Perpetuities Reform By Legislation: England*, 70 HARV. L. REV. 1411 (1957); 222 L.T. 331; 107 L.J. 67.

¹¹ MASS. LAWS ANN., c. 184-A, §§1-3 (1955); ME. REV. ST. SUPP. 1955, §§27-29 (1954); CONN. LAWS 269 (1955).