

Title

When the residue of a probate estate is to pour over into an inter vivos trust, when does the property become a trust asset?

Text

Assume a will provides that the residue of the probate estate shall be transferred to the trustee of an inter vivos trust, said property to be held in accordance with the trust's terms. When does interest in the residue become a trust asset? (1) When the will is executed (signed and witnessed)? (2) When the testator dies? (3) When the executor/personal representative (PR) transfers possession to the trustee? Answer: 2. At the time of the testator's death, the trustee received a vested equitable property interest, subject to partial or total divestment in satisfaction of post-mortem third-party claims against the residue. In equity, possession of legal title and/or the subject property itself is not determinative of rights ownership. A trust beneficiary's equitable interest in the trust property, for example, whether present or future, vested or contingent, is itself an interest in property, though legal title to the trust corpus itself is in the trustee. Think of shares of beneficial interest in a trusteed mutual fund. So also a legatee's equitable interest in the probate estate is property, even when the PR has yet to relinquish legal title. In our fact pattern, the trustee, as of the time of death, received in his fiduciary capacity not legal title to the residue but an equitable property interest in the residue, which interest he held for the benefit of the trust beneficiaries. Fiduciary ownership brings with it fiduciary duties. As to why the equitable interest was vested subject to divestment rather than contingent, see §8.2.1 of *Loring and Rounds: A Trustee's Handbook* (2024), the relevant portion of which section is excerpted in the appendix below.

It is self-evident that the trustee received no rights in the testator's property while the testator was alive. A will speaks at death, not before.

In a dispute over the duty of an inter vivos trustee in a pour-over situation to monitor, pre-possession, the behavior of the PR, one trial court has failed to appreciate that possession is not an essential condition of rights ownership. The trustee, it held, had no duty prior to taking title to the residuary assets to take any action against the PR with respect to those assets, including investigating, questioning, or monitoring the PR's behavior. It further found no duty to "shape or "gather" the property that had yet to pour over into the trust. But the trustee had taken rights ownership of the residue as of the date of death and had immediately assumed fiduciary duties with respect thereto as a consequence. The appellate court also missed the property issue, referring to the pre-distribution residue as "potential" trust property "not yet part of the trust." See *Barash v. Lembo*, 303 A.3d 577 (Conn. 2023). Still, it correctly concluded that there was a pre-possession fiduciary duty, and perforce a pre-possession fiduciary right, to monitor the fiduciary behavior of the PR. That duty, according to the appellate court, was incident to the trustee's general duty to see to it that the trust received all the property due the trust. The doctrinal fallacy with that rationale is that, as a matter of equity, enforceable rights to the residue were already a trust asset. As such, the trustee owed the trust beneficiaries a fiduciary duty, and perforce possessed a fiduciary entitlement, to ride herd on the one, namely the PR, who had legal title to and temporary fiduciary control of the residuary's corpus.

Appendix

§8.2.1 *The Rule Against Perpetuities* [from *Loring and Rounds: A Trustee's Handbook* (2024)].

The concept of vesting. A vested equitable remainder under a trust is a future property interest that is subject to no condition precedent other than the termination of “the preceding equitable estate.”⁴⁸ An equitable remainder interest that is subject to a condition precedent other than “the termination of the preceding equitable estate” is a contingent property interest. Survivorship is a common condition precedent in the world of trusts. A current equitable property interest, in this context “a preceding equitable estate,” also can be either vested or contingent. A current equitable property interest in the income stream of a trust which interest is subject to the condition precedent of the trustee’s exercise of discretion to distribute the income to the current beneficiary rather than apply it to principal comes to mind.⁴⁹

The Rule is against the remoteness of vesting in interest,⁵⁰ not remoteness of *vesting in possession*.⁵¹ To illustrate the difference between the two, let us assume *A* transfers property to *B* in trust for Mr. Jones for life, remainder to Mrs. Jones, *who is alive* and currently lives in a common law jurisdiction.

From the time the trust is created, Mrs. Jones’s equitable remainder interest is *vested*, though not possessory.⁵² This is because at the time the trust is created, she is ascertained and during the life of Mr. Jones there is no event that will extinguish her interest. At the death of Mr. Jones, the underlying trust property passes outright and free of trust either to Mrs. Jones or to her probate estate,⁵³ *unless perhaps there is an applicable antilapse statute*.⁵⁴ In other words, Mrs. Jones then gets possession of the property, be she dead⁵⁵ or alive.

⁴⁸See generally John Chipman Gray, *The Rule Against Perpetuities*, Appendix M, §970 (4th ed. 1942).

⁴⁹See, e.g., *Newcomer v. Nat’l City Bank*, 19 N.E.3d 492, 511–515 (Ohio 2014).

⁵⁰Lewin ¶5-22.

⁵¹Bogert §213; John Chipman Gray, *The Rule Against Perpetuities*, Appendix M, §972 (4th ed. 1942).

⁵²See generally John Chipman Gray, *The Rule Against Perpetuities* §102 (4th ed. 1942). A legal future interest requires a previous estate to support it. See generally §8.27 of this handbook. Because no equitable future interest incident to a trust relationship requires a previous supporting estate, legal title being in the trustee, there is technically no such thing as an equitable remainder. Thus, Professor John Chipman Gray, exhibiting his characteristic scholarly precision, has labeled the equitable equivalent of a legal remainder a quasi remainder. See generally John Chipman Gray, *The Rule Against Perpetuities* §324 (4th ed. 1942).

⁵³But see UPC §2-707 (providing that property would pass to the “descendants” of Mrs. Jones). See generally Halbach & Waggoner, *The UPC’s New Survivorship and Antilapse Provisions*, 55 Alb. L. Rev. 1091, 1131–1133 (1992); Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148, 149–150, 166 (1995). In a case where property is distributable by a trustee to a closed probate estate, a court can avoid the inconvenience and expense of having the estate reopened by ordering the trustee to make distribution directly to those who are entitled to the estate. See, e.g., *Cooling v. Sec. Tr. Co.*, 29 Del. Ch. 286, 76 A.2d 1, 5 (1950).

⁵⁴See, e.g., UPC §2-707(b) (“A future interest under the terms of a trust is contingent on the beneficiary’s surviving the distribution date.”). The UPC’s trust antilapse regime, however, is merely a rule of construction. See UPC §2-701. Thus, in trusts like “income to ... [C]... for life, remainder in corpus to ... [D]... whether or not ... [D]... survives ... [C]...,” or “income to ... [C]... for life, remainder in corpus to ... [D]... or [D’s]... estate,” this section would not apply and, “should ... [D]... predecease ... [C]..., ... [D’s]... future interest would pass through ... [D’s]... estate to ... [D’s]... successors in interest, who would be entitled to possession or enjoyment at ... [C’s]... death.” UPC §2-707 cmt. See generally §8.15.55 of this handbook (antilapse [the trust application]).

⁵⁵Had she died intestate without heirs at law and had the trust been comprised of personal property, then the doctrine of *bona vacantia* might be applicable, in which case the property would pass to the Crown or the state. See §8.15.46 of this handbook (*bona vacantia* doctrine).

Had Mrs. Jones had been dead at the time A transferred title to the property to B (the trustee), no equitable future property interest could have passed to her or her personal representative (probate estate). One cannot make a gift to one lacking juridical personality, such as a dead person. The Restatement (Third) of Property's articulation of the principle is garbled, at least in the case of the irrevocable transfer in trust. Here it is: "A beneficiary of a present or a future interest who is deceased when the donative document takes effect as a dispositive instrument takes no interest."⁵⁶ Take Mrs. Jones. She being alive at the time A created the trust relationship is a beneficiary of that relationship, not of the equitable remainder that is incident to it. As to the equitable remainder itself, which is a property interest, she is its actual owner. Had she been dead at the time of the transfer, Mrs. Jones could neither be a beneficiary of the trust relationship nor the recipient of an ownership interest in an equitable remainder incident to that relationship. The Restatement (Third) appears to have confused beneficiary status with beneficial ownership, and then conflated the two.

Section 2-707 of the Uniform Probate Code. An early-vesting presumption has been a critical component of traditional perpetuities doctrine.⁵⁷ Perhaps no longer. The UPC, specifically §2-707, provides that a future interest under the terms of a trust is contingent on the beneficiary surviving the distribution date. That presumption is coupled with a complicated antilapse feature, which is discussed in §8.15.55 of this handbook. Thus, should Mrs. Jones predecease Mr. Jones, her probate estate would be out of luck. The Restatement (Third) of Property (Wills and Other Donative Transfers) shies away from endorsing some kind of equitable presumption comparable to the UPC's statutory one. The traditional "rule of construction is the rule best suited within the confines of the common-law tradition to approximate the likely preference of the transferor, and is supported by the constructional preference for the construction that does not disinherit a line of descent."⁵⁸ The Restatement (Third), however, does call upon the state legislatures to enact UPC §2-707, suggesting that it "provide[s] a more direct and efficient means of protecting equality among different lines of descent" than having the trust property augment the probate estate of a beneficiary who predeceases the distribution date, as did Mrs. Jones.⁵⁹

Likely preferences? Protecting equality among different lines of descent? One commentator was struck by the fact that §2-707 had made it to promulgation unsupported by any credible "empirical evidence indicating that most trust settlors want a remainderman to lose the remainder if he does not survive the life tenant, substituting his descendants for him if he leaves descendants."⁶⁰ In other words, the drafters appear to have been "proceeding purely on their own speculation."⁶¹ The same might be said for the authors of the Restatement (Third) of Property.

Vested equitable interests subject to divestment. If Mrs. Jones's interest were vested subject to divestment upon the happening of a condition subsequent (e.g., if her interest passes to X in the event, say, that E marries F),⁶² then X's contingent interest is said to be executory, provided E and F are alive at the

⁵⁶Rest. (Third) of Property (Wills and Other Donative Transfers) §26.1.

⁵⁷For an application of the traditional early-vesting principle, see *In re Est. of Woodworth*, 22 Cal. Rptr. 2d 676 (Ct. App. 1993).

⁵⁸Rest. (Third) of Property (Wills and Other Donative Transfers) §26.3 cmt. c.

⁵⁹Rest. (Third) of Property (Wills and Other Donative Transfers) §26.3 cmt. h. *But see* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, Or More Like the Internal Revenue Code?*, 77 Minn. L. Rev. 639, 640 (1993) ("To be blunt, the 1990 version ... [of the UPC]... is also quite pretentious.").

⁶⁰Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148, 149–150 (1995).

⁶¹Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 Mich. L. Rev. 148, 149–150 (1995).

⁶²*See generally* §8.30 of this handbook (the difference between a vested equitable remainder subject to divestment and a vested (transmissible) contingent equitable remainder).

time the underlying property is transferred in trust.⁶³ X's contingent equitable executory interest is subject to the traditional Rule against Perpetuities.⁶⁴ Mrs. Jones's equitable remainder interest vested *ab initio* and therefore cannot be obnoxious to the Rule.⁶⁵ As we shall see, however, neither interest in our particular hypothetical would have a Rule problem in any case, both spouses being lives in being.⁶⁶

The Restatement (Third) of Property further complicates matters by pretzeling the traditional vested equitable future interest that is subject to a condition subsequent into an interest that is subject to a condition precedent.⁶⁷ "A condition subsequent is a condition that is expressed as a condition that, if satisfied on or before the distribution date, extinguishes the possibility that the future interest will take effect in possession or enjoyment."⁶⁸ This intentional conflation is unfortunate as the transmissibility of the vested remainder subject to divestment is easier to grasp conceptually than the transmissibility of the contingent remainder, a topic we take up generally in §8.30 of this handbook. Moreover, while all such vested remainders are transmissible, the same cannot be said for all versions of the contingent remainder.⁶⁹

Vested income interests. Note, also, that if Mr. Jones had been entitled to an income interest for a fixed period, say ten years, rather than for life, then in the event of his death before the end of the fixed period, the trust's income stream would have flowed into his probate estate for the balance of the period, unless the terms of the trust had provided otherwise.⁷⁰ If the terms of the trust had provided that Mrs. Jones's vested equitable remainder interest would become possessory only upon the expiration of the ten-year period, then the underlying trust property could have ultimately ended up in her probate estate as well in the event she also had died in the interim. This is, of course, all classic default law.⁷¹ The terms of the trust could easily have provided for "gifts over" to others in the event of the premature death of the current beneficiary and in the event of the death before possession of the remainderman. The "gifts over" would be examples of equitable interests that are contingent.

Nonpossessory vested interests. On the other hand, were A to make a simple unconditional gift of the property outright and free of trust directly to Mrs. Jones, bypassing the trustee altogether, Mrs. Jones's interest at the time of transfer would be both *vested* and *possessory*. For purposes of the Rule, however, vesting only is what matters.⁷² Under either of the above Jones scenarios, by the way, the current equitable income interest fully vested in Mr. Jones *ab initio*. Under neither is survivorship the type of condition precedent that would have made *his* interest contingent at the time the underlying property was transferred in trust, or thereafter.⁷³

⁶³See generally Sheldon F. Kurtz, Moynihan's Introduction to the Law of Real Property §9, 251–254 (5th ed. 2002); §8.15.80 of this handbook (springing and shifting equitable executory interests).

⁶⁴See, e.g., Warner v. Whitman, 353 Mass. 468, 233 N.E.2d 14 (1968) (involving a collection of executory equitable interests in the income stream of a trust).

⁶⁵See John Chipman Gray, The Rule Against Perpetuities §102 (4th ed. 1942).

⁶⁶But cf. Warner v. Whitman, 353 Mass. 468, 233 N.E.2d 14 (1968) (offering an example of how shifting executory equitable interests in the income stream of a trust could violate the Rule against Perpetuities as traditionally applied).

⁶⁷Rest. (Third) of Property (Wills and Other Donative Transfers) §26.2 cmt. c ("This Restatement declines to perpetuate a difference in classification between a condition precedent and a condition subsequent.").

⁶⁸Rest. (Third) of Property (Wills and Other Donative Transfers) §26.2 cmt. b.

⁶⁹See generally §8.30 of this handbook.

⁷⁰See generally 3 Scott & Ascher §14.10.1.

⁷¹But cf. §8.15.55 of this handbook (antilapse [*the trust application*]).

⁷²See, e.g., Bradley v. Shaffer, 535 S.W.3d 242 (Tex. App. 2017) ("It is immaterial that full possession and enjoyment of the property is postponed beyond the time period for the rule against perpetuities as long as the beneficial interests become vested within the applicable period.").

⁷³See, e.g., Hochberg v. Proctor, 441 Mass. 403, 414–415, 805 N.E.2d 979, 989 (2004).

Members of unincorporated associations. Or take a trust for the individual members of an unincorporated association. If the class of beneficiaries is fixed at the time the trust is created, the trust is enforceable. If the trust is for the benefit of the individual members of the association as it is constituted from time to time, “their interests would not comply with the vesting requirements of the traditional rule against perpetuities,”⁷⁴ the condition precedent of membership being a fatal flaw.⁷⁵

The perpetual trust with a gift over to a noncharity. An irrevocable trust for a charitable purpose with a gift over to a named individual should the trust at some point in the future fail would not violate the Rule even if the failure could occur long after the individual had died, provided the individual was in existence at the time of the trust’s creation.⁷⁶ Even if the failure might happen more than twenty-one years after the death of the last life-in-being, the gift over to the individual or the personal representative of the individual’s probate estate would be valid because the individual took *ab initio* a vested (transmissible) contingent equitable remainder interest.⁷⁷ Recall that the Rule is about interests that could vest *remotely*.⁷⁸ The oxymoronic concept of the vested (transmissible) contingent equitable remainder is taken up in §8.30 of this handbook.

Conclusion. An exhaustive study of the Rule is beyond the scope of this book; moreover, it would duplicate the efforts of others.⁷⁹ Rather, the trustee should use the guidelines that follow to assist in developing a methodology for ruling out Rule problems and for framing appropriate questions for counsel when such problems are encountered. Ideally, the trustee will be able to confront the Rule efficiently and cost-effectively, with courage and with confidence.

⁷⁴Rest. (Third) of Trusts §43 cmt. e(1).

⁷⁵See John Chipman Gray, *The Rule Against Perpetuities*, Appendix H, §§896, 896.1 & 896.2 (4th ed. 1942).

⁷⁶See generally John Chipman Gray, *The Rule Against Perpetuities*, Appendix M (4th ed. 1942).

⁷⁷See 6 Scott & Ascher §39.7.6 (Gift Over from Charity to NonCharity); John Chipman Gray, *The Rule Against Perpetuities*, Appendix M (4th ed. 1942).

⁷⁸See, e.g., *Hochberg v. Proctor*, 441 Mass. 403, 805 N.E.2d 979 (2004).

⁷⁹See Bogert §213 nn.1, 2 and accompanying text.