

## Title

Confusion reigns as to the nature of a current permissible beneficiary's equitable property rights under a fully discretionary trust

## Text

One court has characterized the equitable interest as vested. See *Pfannenstiehl v Pfannenstiehl* (I), 88 Mass. App. Ct. 121 (2015). Wrong. See *Pfannenstiehl v. Pfannenstiehl* (II), 475 Mass. 105 (2016). The property interest is contingent, the critical condition precedent being that trustee elects to make distributions of income and/or principal. On the other hand, one English commentator has characterized such an interest as “future property.” See Lewin ¶2-35. But this characterization also is wrong. A contingent equitable property interest is not an expectancy. It is a present property interest that is subject to at least one condition precedent, such as conception/birth, survivorship, or the exercise of trustee discretion. Thus, it would not be wrong, though ill-advised, to say that at the time of settlement contingent equitable property rights vested in the permissible beneficiaries. In other words, contingent interests were acquired at settlement, the acquisition itself not being subject to any conditions precedent.” The vesting of interests under trusts is taken up generally in §8.2.1.3 of *Loring and Rounds: A Trustee’s Handbook* (2020), which section is reproduced in the Appendix below.

## Appendix

### §8.2.1.3 The Vesting of Interests Under Trusts [from *Loring and Rounds: A Trustee’s Handbook* (2020)].

*A great deal of difficulty has beset courts and lawyers in interpreting this generally accepted terminology of contingent remainders and vested remainders subject to be divested or vested defeasible remainders. A long step has been taken in Restatement of the Law of Property, Section 157, in reducing this confusion. The term, contingent remainder, has been abandoned in the Restatement in favor of the term, remainder subject to a condition precedent. Such change makes less likely confusion between an interest subject to a condition precedent and a vested defeasible interest subject to a condition subsequent.*<sup>142</sup>

A reversion, whether legal or equitable, and a vested remainder, whether legal or equitable, are not subject to the Rule.<sup>143</sup> Other types of future interests are not vested and therefore generally are subject to the Rule.<sup>144</sup> “Today when we speak of a remainder as being ‘vested,’ we mean that it has certain definite characteristics, namely that the remainderman is a presently identifiable person and that the remainder is not

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<sup>142</sup>*First Nat’l Bank v. Tenney*, 165 Ohio St. 513, 516, 138 N.E.2d 15, 17–18 (1956). See generally §8.30 of this handbook (the difference between a vested equitable remainder subject to divestment and a vested (transmissible) contingent equitable remainder).

<sup>143</sup>John Chipman Gray, *The Rule Against Perpetuities* §205 (4th ed. 1942) (noting, however, in §205.2 that “[w]hen a remainder is given to a class, and such remainder is vested in certain members of the class, subject to open and let in other members, born afterwards or afterward fulfilling a condition, the shares in such remainder or interest may be obnoxious to the Rule against Perpetuities, because their number and therefore their size may not be determinable until too remote a period”).

<sup>144</sup>John Chipman Gray, *The Rule Against Perpetuities* §205 (4th ed. 1942).

subject to a condition precedent.”<sup>145</sup> A trust remainderman’s interest is vested, for example, if the interest is not subject to the condition precedent that he or she survive the current beneficiary.<sup>146</sup> When an ascertained person is entitled, whether dead or alive, to an ascertained portion of the trust property, chances are the equitable interest in that portion is vested.<sup>147</sup>

What the trustee may find difficult to grasp about the vesting aspect of the Rule is that an interest may vest in someone for purposes of the Rule; yet the person may not get the use of the interest before death.<sup>148</sup> It is the person’s probate estate that will ultimately get the use of the property,<sup>149</sup> unless an antilapse statute<sup>150</sup> is applicable or the interest that has vested is an equitable life estate.<sup>151</sup> (As to how the Rule applies to a direction to the trustee to accumulate income once vesting has occurred, see §8.15.8 of this handbook.) The trustee cannot begin to understand the Rule without having solved the vesting riddle.<sup>152</sup> A good first start is to appreciate that vesting is not about possession. “It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman, who is ascertained, lives until the determination [“determination” in this context being an archaic synonym for “termination”] of the preceding estate...The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders.”<sup>1</sup>

In our hypothetical trust, the words *then living* make the interests of conceived and unconceived great-

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<sup>145</sup>Sheldon F. Kurtz, *Moynihan’s Introduction to the Law of Real Property* 154–155 (5th ed. 2002).

<sup>146</sup>*See* J. C. Gray, *The Rule Against Perpetuities* §§101–103 (4th ed. 1942); *but see generally* §8.15.55 of this handbook (antilapse [the trust application]).

<sup>147</sup>*See, e.g., In re Wright Trust*, No. 319832, 2015 Mich. App. LEXIS 543 (Mar. 17, 2015) (unpublished) (Although the trustee has discretion as to the *manner and timing* of disbursement, the beneficiary’s equitable interest, in this particular case, at least, is nonetheless indefeasibly vested in the beneficiary as any balance of the dedicated trust corpus passes upon the beneficiary’s death to the beneficiary’s executor.). A word of caution: If it is up to the trustee whether or not the beneficiary, dead or alive, ever receives a disbursement, the condition precedent of the trustee exercising discretion renders the permissible beneficiary’s equitable interest contingent.

<sup>148</sup>J. C. Gray, *The Rule Against Perpetuities*. §102 (4th ed. 1942).

<sup>149</sup>Note, however, that if the person dies intestate without heirs at law and the trust is comprised of personal property, then the doctrine of *bona vacantia* may be applicable, in which case the equitable interest would pass to the Crown or the State. *See* §8.15.46 (*bona vacantia* doctrine).

<sup>150</sup>*See generally* §8.15.55 of this handbook (antilapse [the trust application]).

<sup>151</sup>*See Hochberg v. Proctor*, 441 Mass. 403, 414–415, 805 N.E.2d 979, 989 (2004) (noting that if the vested equitable remainder is a life estate, the remainderman will enjoy the possession only if he survives the termination of the preceding life estate). The death of the remainderman, however, is not a condition precedent that would make the interest contingent; rather it is merely a limitation on the character of the remainderman’s property interest. *Hochberg v. Proctor*, 441 Mass. 403, 414–415, 805 N.E.2d 979, 989 (2004).

<sup>152</sup>The trustee may wish to consult chapter 3 of Thomas F. Bergin and Paul G. Haskell’s *Preface to Estates in Land and Future Interests* (2d ed. 1984), which has a useful section on the “concept of vestedness.” *See also* Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 66–73 (2d ed. 1984); J. C. Gray, *The Rule Against Perpetuities* §§99–118 (4th ed. 1942). *See generally* §5.2 of this handbook (class designation: “children,” “issue,” “heirs,” and “relatives” (some rules of construction)) (discussing in part the law’s preference for when a survivorship condition is satisfied and its preference for when an interest vests) and §8.30 of this handbook (the difference between a vested equitable remainder subject to divestment and a vested (transmissible) contingent equitable remainder).

<sup>1</sup> *Hanley v. Craven*, 200 Neb. 81, 263 N.W.2d 79 (1978) (citing to 2 Alexander, *Commentaries on Wills*, sec. 1005).

grandchildren contingent in part on their being born before and not dying before the trust terminates. (For a discussion of the UPC's 120-hour survival requirement, see §8.15.56 of this handbook.) These contingencies—or conditions precedent—will remain outstanding during that phase of the trust's life after the death of the settlor when there exists a grandchild of the settlor who is both alive and under the age of 30 years.

The instrument provides that at the point in time after the settlor's death when no grandchild of the settlor is both alive and under the age of 30, someone is then either going to hold a vested remainder interest or a vested reversionary interest under a resulting trust. The remainder interests will then be vested for two reasons, of which either one is sufficient vesting for purposes of the Rule: (1) the subsequent death of the great-grandchild, if any, who met the implicit conditions of birth, survivorship, and age will not extinguish his or her interest, because in that event the trust property would merely find its way into the great-grandchild's probate estate; (2) the qualifying great-grandchild will be the holder of an inter vivos power of appointment which, for purposes of the Rule, is tantamount to the great-grandchild possessing a vested interest in the trust property which is the subject of the power. If there is no great-grandchild around to take when there is no grandchild both alive and under the age of 30, the property will pass to the settlor's probate estate upon a resulting trust, the reversionary interest having been vested in the settlor and the settlor's estate during the entire life of the trust.<sup>153</sup>

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<sup>153</sup>See John Chipman Gray, *The Rule Against Perpetuities* §327.1 (4th ed. 1942).