Title

Centuries ago the absence of full donative intent inherent in a gift to a "use" sparked the evolution of resulting-trust doctrine, an indispensable component of modern-day trust jurisprudence

Text

The history of the resulting trust concept. The resulting trust is not a new concept. Not long after the chancellor began enforcing *uses* in fifteenth-century England, he was confronted with the issue of what was to happen to land that was enfeoffed by *A* (think proto-settlor) to *B* (think proto-trustee) and his heirs for the *use* of *C* (think proto-beneficiary) for life when there was no mention of what was to be done with the beneficial interest once *C* died. As there was no evidence that *B* should have the use in himself, the inference was that *A* was entitled to it. It was said that *B* held the property upon a resulting *use* for *A*, the transferor. In other words, the use "sprang back" or "resulted" to *A*. Gratuitous land transfers also raised the presumption that the transferee held the property upon a resulting *use* for the transferor. Even the purchase money resulting trust can be traced back to what was essentially the purchase money resulting *use*.

The practical present-day applications of resulting trust doctrine. Resulting trust doctrine is a creature of equity. At law, a completed gift entails a transfer of legal title to the donee. Even when a legal reversion is reserved, the title is shared with the owners of the various legal interests. Take, however, an irrevocable inter vivos trust, which is a creature of equity. A donative transfer to the trustee entails a transfer of legal title to the trustee, who, *qua* trustee, does not also take beneficial ownership. Should the trust fail *ab initio* or in mid-course, what then is to be done with the subject property, the settlor never having intended to make an outright gift to the trustee? It is said that the settlor from the outset possessed by operation of law an equitable vested reversionary property interest, subject to divestment upon the trust terminating in favor of persons or institutions designated in the trust's terms. That being the case, the equity court developed over time a procedural equitable mechanism for getting legal title from the express trustee back to the settlor, or over to the settlor's successors in interest, in vindication of the vested equitable reversion should the trust fail *ab initio* or in mid-course. *Again, the process kicks in only in the absence of express direction in the terms of the trust as to what is to be done with the legal title in the event of such a failure*. The process is simple: The equity court declares the express trustee now to be a resulting trustee and issues an equitable specific-performance order to the resulting trustee personally, formerly the express trustee, to transfer the legal title to the settlor, or over to the settlor's successors in interest.

Some things to keep in mind: First, a reversion, whether legal or equitable, arises by operation of law. A remainder, on the other hand, "can never be limited, unless either by deed or devise." See Blackstone's Commentaries, Book II, 175. Second, reversionary interests are always vested and assignable, and thus exempt from application of the rule against perpetuities, at least on this side of the Atlantic. Third, the resulting trust is generally exempt from application of the statute of frauds.

For a discussion of what an equitable vested *remainder* incident to a trust relationship looks like, see §8.2.1.3 of *Loring and Rounds: A Trustee's Handbook*, which section is reproduced in its entirety in the appendix below. The Handbook is available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP.

Appendix

§8.2.1.3 The Vesting of Interests Under Trusts [from *Loring and Rounds: A Trustee's Handbook* (2022), available for purchase at https://law-

store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP].

> *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.*[144]

A reversion, whether legal or equitable, and a vested remainder, whether legal or equitable, are not subject to the Rule [against Perpetuities]...[145] Other types of future interests are not vested and therefore generally are subject to the Rule.[146] "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 subject to a condition precedent."[147] 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.[148] 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.[149]

What the trustee may find difficult to grasp about the vesting aspect of the Rule is that an

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[144]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).

[145]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").

[146]John Chipman Gray, The Rule Against Perpetuities §205 (4th ed. 1942).

[147]Sheldon F. Kurtz, Moynihan's Introduction to the Law of Real Property 154–155 (5th ed. 2002).

[148]*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]).

[149]*See, e.g.*, *In re* Wright Trust, No. 319832, 2015 Mich. App. LEXIS 543 (Mich. Ct. App. 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.

interest may vest in someone for purposes of the Rule; yet the person may not get the use of the interest before death.[150] It is the person's probate estate that will ultimately get the use of the property,[151] unless an antilapse statute[152] is applicable or the interest that has vested is an equitable life estate.[153] (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.[154] 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."[155]

Thus, an income-only irrevocable trust for C, a specific individual in existence *ab initio*, for 1,000 years, remainder in corpus outright and free of trust to D, also an individual who is in existence *ab initio*, though destined for a long duration, would not violate the classic Rule, absent a statute to the contrary. This is because both C and D took vested interests *ab initio*, the income interest to flow into C's probate estate from when C dies to when the trust eventually terminates. In other words, there are no contingent interests in the fact pattern. Prof. John Chipman Gray was not overly concerned by this "inconvenient" quirk of vesting jurisprudence, although he did

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[150]J. C. Gray, The Rule Against Perpetuities. §102 (4th ed. 1942).

[151]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).

[152]*See generally* §8.15.55 of this handbook (antilapse [the trust application]).

[153]*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).

[154]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).

[155]Hanley v. Craven, 200 Neb. 81, 263 N.W.2d 79 (1978) (citing to John Edmundson Alexander, 2 Commentaries on the Law of Wills §1005 (1918)).

suggest that some "judicious" statutory intervention might be appropriate.[156] Generally, though, he was not a fan of messing with the Rule legislatively.[157]

In our hypothetical trust, the words *then living* make the interests of conceived and unconceived great-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.[158]

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[156] *See* John Chipman Gray, The Rule Against Perpetuities §210 (4th ed. 1942).

[157] *See* John Chipman Gray, The Rule Against Perpetuities, Appendix G, §871 (4th ed. 1942).

[158] *See* John Chipman Gray, The Rule Against Perpetuities §327.1 (4th ed. 1942).