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CLASS GIFTS — THE VIRGINIA RULE OF EARLY VESTING

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The devise or bequest to grandchildren has always represented dangerous ground to be surveyed carefully before treading. Many grandparents have dutifully planned their estates with the interests of grandchildren in mind, only to have it illustrated that they have, perhaps, planned too extensively and the purpose has not only been thwarted but also that the objects of their giving have lost the intended blessing.

Gifts to grandchildren are particularly susceptible to the operation of the Rule Against Perpetuities. A gift "to my grandchildren when they become twenty-five" is void if there are no grandchildren who fit that description at the testator's death. If the testator has children at his death they are the only lives in being which can be used as a class to measure the period since the grandchildren in being at the testator's death may die and the children can have further issue which would not be lives in being. Therefore under a situation similar to the one stated, the period of years would be measured from the death of the last surviving child.[1]

This is not a field of possibilities. Professor Gray's statement of the Rule provides:

> No interest is good unless it must vest . . .[2]

This common situation of a testamentary gift to grandchildren arose in a recent Virginia case.[3] The testator provided in Clause Six of his holographic will that certain assets "be placed in a fund from which my grandchildren are to receive an education as high as their abilities may acquire." He further provided in Clause Seven, after describing other assets, ". . . and the proceeds from the other stocks are to go

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1 2 SIMES, THE LAW OF FUTURE INTERESTS, § 496 (1936).

2 GRAY, RULE AGAINST PERPETUITIES, § 268 (3rd ed. 1915).

3 Burrus v. Baldwin, 199 Va. 883, 103 S.E.2d 249 (1958).

in the fund created for my grandchildren. Each of whom are to share alike."[4]

The Virginia Supreme Court of Appeals held that the provisions of the above clause were violative of the Rule:

> When construed together these two items of the will described first, the type of education each grandchild is to receive, and second, the manner of ultimate distribution of the fund. Thus the class of beneficiaries, the testator's grandchildren, would open up to admit others who might not qualify for educational benefits and would close at the time of the ultimate distribution.[5]

Very simply, the Court reasons that the provision under Clause Six is violative of the Rule since the educational needs may arise or terminate more than twenty-one years and ten months after the last life in being dies. Therefore the Court also holds Clause Seven void since the fund would be distributed only upon the termination of all the educational needs and thus, according to the Court's reasoning, may vest in parties which may not be lives in being or be takers within the period of the Rule.

It is readily seen that the Court's decision contemplates postponed vesting, that is, the grandchildren have no transmissible interest or right until time for distribution.

It appears both appropriate and necessary to distinguish the problem of closing the class to determine maximum membership, and vesting, which determines the minimum membership. These two are not dependent upon each other.[6] For example, it is possible for a single member of a class to have the gift vest as to him, thereby creating the minimum membership while the class remains open, allowing in new members until the class closes. To further illustrate: A gift (not per capita) to my grandchildren who reach twenty-one years of age. At

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[4] *Id.* at 887.

[5] *Id.* at 888.

[6] SIMES, HORNBOOK ON FUTURE INTERESTS, § 91 (1951).

the death of the testator no such grandchildren are twenty-one years old. Now the class can increase and there has been no vesting and there has been no closing. But upon one grandchild reaching the age of twenty-one, the class is closed as to maximum membership (afterborns are closed out) and the qualifying grandchild is entitled to his share. If there be five grandchildren alive he has the right of possession in one-fifth. However the class is not vested as to minimum membership since the contingency of survivorship still remains. This result involves the Rule of Convenience.[7]

Thus in a situation where the gift is "to my grandchildren who reach twenty-five" and a grandchild is twenty-five at the testator's death, the gift will be valid under the Rule of Convenience since, although it is possible for other grandchildren, not *in esse*, to reach twenty-five more than twenty-one years and ten months after the last life in being, these persons are precluded from becoming members of the class which must be confined to those in being at the death of the testator.[8]

In the instant case the Court, recognizing the Virginia rule of early vesting[9] counters the argument thusly:

> But of course the early vesting rule does not prevail over the expression of contrary intent by the testator.

While this rule gives way to contrary intent such intent must be clear:

> When words imply futurity of time, courts are accustomed to construe the expressions as meaning the time possession shall accrue rather than conditions upon which the right shall vest.[10]

The decision turns on the Court's insistence that the provision for education attaches a futurity which prevents immediate vesting. However in Clause Seven there is provided that each of the grandchildren "are to share alike." This clause does

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[7] *Ibid.*

[8] 2 SIMES, *supra* note 1, § 528, p. 402.

[9] Rennolds v. Branch, 182 Va. 678, 689, 33 S.E.2d 200 (1944).

[10] *Id.* at 691.

not seem to call for postponement of the right. It is well settled that there is no presumption against early vesting and postponed distribution.[11]

The Court's refusal of early vesting is supported by *Harris* v. *Harris*,[12] which dealt with a conveyance as follows:

> . . . after their death (the life tenants) to be equally divided in fee simple, among the children . . . when the youngest shall have attained the age of (21) years.

It would appear that this case presents quite a different problem than the instant case. Here the futurity may be said to be annexed to the giving. In jurisdictions having the so-called Divide and Payover Rule, a gift which employs a direction to divide or pay at a future time creates a future gift and contingency rather than immediate and vested.[13]

The *Harris* gift by its very terms is placed in the future. Also in *Driskell* v. *Carwile*,[14] which the Court cites as supporting the *Harris* result of postponed vesting, the words employed are, "to be sold and equally divided . . . " Nowhere in the *Burrus* case does such a direction appear. These cases may be explained and justified as proper results of application of this Divide and Payover Rule.[15]

Another distinguishing feature of these two cases is that the gifts are not direct but are gifts over after a precedent life estate. The gift here is direct and entirely to the grandchildren.

The problem may well be the one which Professor Alford suggests:

> The construction by the Court may rest upon a confusion of postponement of enjoyment with postponement of vesting.[16]

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[11] SIMES, *supra* note 6 at p. 268.

[12] Harris v. Harris, 166 Va. 351, 358, 186 S.E. 29, 32 (1936).

[13] SIMES and SMITH, THE LAW OF FUTURE INTERESTS, § 657 (2nd ed. 1956).

[14] 145 Va. 116, 133 S.E. 773 (1926).

[15] While the *Driskell* case presents a statement of the Divide and Pay Over Rule, there is conflict as to whether the Rule is law in Virginia. (LAMB, VIRGINIA PROBATE PRACTICE, § 133 (1957).

[16] *Annual Survey of Va. Law*, VA. L. REV. 1409, (1958).

The Court's rejection of early vesting is supported by this reasoning:

> In the present case there are no words indicative of a gift to the grandchildren with the immediate *right of possession.* (emphasis added)[17]

But as the Court in its discussion notes:

> . . . a contingent gift . . . must vest . . . [18]

Of course, the Rule contemplates the concept of vesting in interest. The term "vest" as used in the Rule refers to a vesting in interest and not in possession.[19]

In view of the Virginia rule of early vesting, what in the will indicates that vesting be postponed? If Clause Six, the educational provision, is cited as requiring such a result this would also require that little or no notice be given to the provision of Clause Seven, "to share alike."

Even if Virginia did not have the rule of early vesting, which creates a presumption necessitating a clear intention otherwise[21] to overcome it, the general rule of construction would seem sufficient to prevent an invalid interpretation of the will:

> Where one construction of the will will be void because of perpetuity and another construction of the will is valid, the court sustains the construction which maintains the validity of the will.[22]

The presence of the provision "to share alike" not only allows immediate vesting but demands it. What adverse rule of construction, applicable, could operate to postpone vesting when the general rule calls for immediate vesting?

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17 199 Va. 889, 103 S.E.2d 254 (1958).

18 *Id.*

19 McComb v. McComb, 96 Va. 779, 32 S.E. 453 (1899); American National Bank and Trust Co. of Danville v. Herndon, 181 Va. 17, 23 S.E. 768 (1943).

21 Boyd v. Fanelli, 199 Va. 357, 99 S.E.2d 619 (1958).

22 Jewett v. Harvie 183 Va. 734, 33 S.E. 2d 213 (1945) as cited in 20 MICHIE'S JURISPRUDENCE, WILLS § 75; 5 PAGE ON WILLS § 30.13 (3rd ed. 1961).

The Court in the *Driskell* case[23] cites authority as follows:

> *Time of Distribution as Determining Membership*
>
> Although as has been seen, the general rule favors the death of the testator as the time for *fixing the membership* in a class, there are numerous decisions to the effect that where distribution is to be made among a class upon some contingency or at some time subsequent to the testator's decease, then those, and those only, who belong to the class when such time or contingency arrives are entitled to share in the distribution. (emphasis added)[24]

The *Harris* case cites this with approval:

> We think this was a gift to a class the *members of which were to be fixed after the termination of the life estate* of the grantors. (emphasis added)[25]

As has been discussed, there is a dangerous distinction, often ignored, between vesting and closing the class. Vesting affords the class the right to the gift, closing determines the membership. The cases and the authority cited are correct—as to the time when the class closes and the membership determined.[26]

The above treatise, cited by both cases is inconsistent. Its title is concerned with determination of membership but in the text the rules of closing the class are applied to the concept of vesting. This is erroneous. To do so would result in applying a rule analagous to that of immediate gifts, where both minimum and maximum memberships are determined simultaneously, to gifts which are not immediate and by their terms require the class to stay open while not requiring postponed vesting.

Under situations of distribution subsequent to the death of the testator it is not uncommon for courts to fail to make this distinction:

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23 145 Va. 116, 121, 133 S.E. 773, 774 (1926).

24 28 R. C. L. p. 264, § 238.

25 166 Va. 351, 354, 33 S.E.2d 29, 31 (1936).

26 SIMES and SMITH, *supra* note 13, §§ 631-637, 640, 642-647. See especially § 643.

> Many of the decisions involve only a question of the closing of the class. Since the question of the vesting of the class is not actually involved, the courts fail to differentiate the two problems, and lay down a rule broad enough to include both.[27]

The authors continue to discuss and illustrate this result which they term "error."

The problem of closing the class is, of course, infinitely more complex than the cursory discussion here which has been for the purpose of distinguishing vesting and closing the class.[28]

Up to this point the discussion has been confined to substantiating the argument of early vesting under the facts presented by the *Burrus* case. If early vesting was allowed there would be many possible results.

As has been noted, if Clause Seven was the only gift there would be no problem. Reading it, "to my grandchildren who shall share alike," would constitute an immediate gift. The class would vest and close at the testator's death and those grandchildren *in esse* would represent the class and close out the afterborns.[29]

But the problem here does not contemplate immediacy but by its very terms calls for postponed distribution. Disregarding the Rule Against Perpetuities for a moment, the devise and bequest is for education of the grandchildren and then the excess to be shared alike among the beneficiaries. The lay testator generally is unaware of the Rule and probably intends to include all his grandchildren, regardless of when distribution takes place.[30] The same can be said about his ignorance of the various rules of construction.

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[27] *Id.* § 654.

[28] *Id.* § 632. The discussion here clearly illustrates the distinction and offers excellent examples of possibilities which might arise as a result of applying some of the theories pronounced by various courts.

[29] *Id.* § 636.

[30] This the authorities have agreed upon in setting out the general principles from which the problem is approached. See note 6.

A potential difficulty which we cannot ignore is that we do not know when distribution is to take place. We can only say that the time is indefinite. There is authority which holds:

> The general rule upon this subject is, that where there is an indefinite period for distribution, the legacy vests at the death of the testator, and that none can take except those in esse at that time.[31]

If the above be applied there would be no difficulty with the Rule. Only the grandchildren in being would be entitled under Clause Six or Clause Seven. This result is certainly simple and would give remedy to the problem but at the same time work an unjustified hardship on afterborn class members. A case where an intervening life estate, an indefinite period, represents the postponement is enough to illustrate the inherent unfairness and fallacy in such a sweeping rule.[32]

The better rule would be that a gift to a class to vest in possession on a future event should be construed to include members of the class born after the death of the testator and prior to the event. There is no inconvenience in doing so since distribution is postponed until the occurrence of the event.

However if Clause Six be declared void as a perpetuity the grandchildren would take the entire fund under Clause Seven since the distribution is for the excess,[33] and under the reasoning that the gifts are separable, Clause Seven is not void merely because Clause Six may be. The difficulty is that distribution would be immediately possible since there is no postponing feature and following the Rule of Convenience the gift is immediately vested in the grandchildren *in esse* and the class closed as to afterborns. We therefore arrive at the same result, as to the beneficiaries, found in the *Meyer* case but our arrival is by different means.

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[31] Meyer v. Meyer, 2 McCORD'S CH. 214, 16 A. D. 648 (1827).

[32] However there is authority which distinguishes the situation of a life estate representing the postponing event as being not considered an indefinite period contemplated in the rule set forth in the *Meyer* case. (96 C. J. S. § 695 (4) p. 44).

[33] SIMES, *supra* note 6, at p. 267.

There should be no problem as to Clause Six if the interests are declared vested immediately upon each grandchild coming into being. In *Bayly* v. *Curlette*[34] a gift to grandchildren was postponed until the youngest reached twenty-one. The gift was held vested immediately, subject to open. The Court distinguishes this case on the ground that the gift included a provision for maintenance as well as education, affording the heirs an immediate right of enjoyment in the fund.

The distinction is unjustified. Vesting merely gives the heir the right to the gift. Under a gift "to the children of X, but if any child does not live to be twenty-five his share to terminate," this gift is vested subject to defeasance.[35]

Again we must distinguish right and enjoyment. Certainly the children of X have no right of immediate enjoyment, but they have the right to demand when possession is to commence.

In *Burrus* if a grandchild lacks the ability or dies before school age his share is divested. What occurs after the point of vesting does not interfere with the gift as a valid interest. While it may be true that gifts over may be bad, in the example of X's children a gift over to their children, such is not the case here. While the divesting event may take place beyond the period of the Rule its effect would not create a perpetuity since it is represented in the already vested gift of Clause Seven.

Therefore all gifts to the grandchildren whenever born should be considered vested immediately subject to open. Distribution under Clause Seven takes effect upon the termination of the education by the class and the takers should properly be the entire class and the heirs of any deceased members per stirpes.

The result of the Court's decision, which shall be noted but not discussed, may be important as a practical matter. By declaring the provisions of Clauses Six and Seven void the gifts did not pass to strangers but went to the testator's children thereby endowing the parents of the intended beneficiaries.

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[34] 117 Va. 253, 84 S.E. 642, (1915).

[35] SIMES, *supra* note 6, at p. 267.