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Class Gifts: Increase in Class Membership and the Rule of Convenience

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CLASS GIFTS: INCREASE IN CLASS MEMBERSHIP AND THE RULE OF CONVENIENCE

When an individual disposes of his property, it is not always possible to identify the recipients by their individual names. Often the most convenient means of identification is by reference to a number of persons having a common characteristic and thought of as a group. If a disposition is made to such a group, and it is not on its face a transfer of title to any particular or designated member or members of the group, it is referred to as a "class gift".

Perhaps the most familiar definition of a class gift is that "it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount on the ultimate number of persons[1]." A gift of property, real or personal, ". . . to the children of A" would be a simple illustration of a class gift.

As in any area of the law, there are many interesting aspects to a study of class gifts. First, of course, it must be determined if the disposition has created a valid class gift or if it has created a gift to individuals. Really, this amounts to a determination of whether the transferor was group-minded or individual-minded. Although this determination is a very interesting aspect of class gift problems, it is not within the scope of this paper, and for the purposes of this paper it will be assumed that a valid class gift has been created. This will enable us to examine the problem of the determination of the membership of the class.

The determination of the membership of a class has two important phases—the determination of the minimum membership and the determination of the maximum membership.

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[1] JARMAN ON WILLS (6th Ed.) p. 262. Also quoted in: Bethard v. Iverson, 35 Wash. 2d 344, p.2d 783 (1949); Lawes v. Lynch, 6 N.J. 1, 76 At 1.2d 885 (1950); Lawrence v. Westfield Trust Co., N.J. Super. 423, 61 At 1.2d 899 (1948).

Generally, the minimum membership of a class is a problem of determining when the class vests. For example, where a class gift is created by will and is a present vested right of future enjoyment, in the absence of any applicable lapse statute, the membership of the class will decrease from the time of the execution of the will until the death of the testator[2]. However, the class will not decrease after the death of the testator unless there is an express or implied condition in the will that the members must survive the time of distribution or some other time subsequent to the death of the testator. Thus, the general rule is that the class membership will not decrease after the vesting of the gift, and the minimum membership of the class is, therefore, determined at the time of the vesting. Of course, there are many refinements to this problem of determination of minimum membership, but here I have attempted only to point to the general rule.

When must a person who initially meets the class description be born in order to be entitled to share in the gift? The answer to this question involves an examination of the determination of the maximum membership of the class, or, to express it another way, the selection of a date at which the class will close to additional members. If a valid class gift has been created by the language of a will reading "to X for life, then to the children of Y," what date will be used to determine the maximum number of Y's children who will share in the distribution? There are four possible dates which could be used for this determination: the date of the execution of the will, the date of the testator's death, the date of the distribution of the gift, and finally, the date at which it would be impossible for Y to have any additional children.

In making a choice among these four possible dates, it is apparent that the courts should attempt to reach the result which would be most in harmony with the intent of the testator had he foreseen the problem. As in all areas of class gift problems, it is presumed that the testator would, generally

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2 In Re Watson's Estate, 109 N.Y. S.2d 381, 201 Misc. 193; Affirmed, 110 N.Y.S.2d. 461, 279 App. Div. 480; Appeal Denied, 112 N.Y.S.2d 318, 279 App. Div. 975 (1951); In Re Doolings Will, 285 N.Y.S. 603, 158 Misc. 333 (1936); Lawrence v. Westfield Trust Co., *supra,* note 1.

(1) want to include as many children as possible, (2) desire as early a distribution as possible, and (3) not want to have any part of the gift fail by lapse or otherwise. In view of these presumptions, what date for the closing of the class would be most likely to carry out the testator's presumed wishes?

It can be argued that the date of the execution of the will or the date of the testator's death should control, since it is very likely that the testator desired to give his property to persons he knew. However, the use of either of these dates would probably not enable the gift to include as many children as possible and would defeat many of the advantages of the use of a class designation.

There remain, then, the date of distribution or the date at which it would be impossible for Y to have any additional children. These would seem to be the two dates which, if used for the determination of the maximum membership of the class, would benefit the largest number of Y's children by allowing maximum class membership. In choosing between these two dates, the English[3] and American[4] courts have been in general accord in using the date of distribution as the time at which the class should close. This selection has been based on the inconvenience of using the latter date, and, conversely, the convenience of using the date of distribution.

The inconvenience of using the date at which it would be impossible for any additional members of the class to come into being is rather evident. For example, if Y is still living and married at the time of X's death, it may be very possible for additional members of the class (i.e. Y's children) to come into existence after the death of X (i.e. after the date of dis-

[3] Andrews v. Partington, 2 Cox 223, 3 Bro. C. C. 401 (1791); Barrington v. Tristam, 6 Ves. 345 (1801); Farman v. Barrett, 1 Ch. 466 (1927); Clarke v. Clarke, 8 Sim. 59 (1836); Robley v. Ridings, 11 Jur. 813 (1847); In Re Emmet's Estate, 13 Ch. Div. 484 (1880).

[4] Simpson v. Spense, 58 N.C. 208 (1859); In Re Billings' Estate, 268 Pa. 67, 110 Atl. 767 (1920); In Re Orr's Will, 144 N.Y.S.2d 876 (1955); Williams v. Harrison, 72 Ind. App. 245, 123 N.E. 245 (1919); Austin's Estate, 315 Pa. 449, 173 At 1. 278 (1934); Thomas v. Thomas, 149 Mo. 426, 51 S.W. 111 (1899); Brownell v. Edmunds, 209 F.2d 349 (Va. 1952).

tribution). How, then, is distribution to be made at the termination of the life estate? It would be possible to give to each class member a portion of the gift, the size of the portion being determined by the number of class members already born. But what will happen when another child is born to Y after the date of distribution? If this subsequently born child is to share in the gift, each share that has already been distributed will have to be reduced. Thus, at the time of distribution each share would be received subject to partial divestment, and no member of the class could obtain an indefeasible interest until the possibility of children being born to Y had been completely eliminated. Therefore, the interest which the class members would receive at the time of distribution would be of little real value or use until it was no longer possible for additional class members to be born.

In order to protect the interests of unborn class members, a further inconvenience is caused by the necessity of some form of guarantee against the dissipation of the estate by the distributees. If realty is involved, the recording acts would probably give sufficient notice to third parties, but the possibility of a cloud on the title could prove to be very annoying. If personalty is involved, the problem becomes more accute. It would probably necessitate the giving of security by the present distributees or the establishment of a trust. Either of these alternatives would involve additional expense, delay and work. In addition to all of these factors, it seems quite clear that a quick settlement of the estate is in the interest of public policy.

In view of these inconveniences, it is not too difficult to understand why the general rule in the English and American decisions has been to select the date of distribution as the date at which the maximum membership of the class will be determined. A suggested reason for the court's selection of this date is the belief that if the transferor had been aware of the problems involved, he would have intended that a class member be permitted to take his indefeasible share of the gift in possession at the time when all conditions precedent to the interest of the class member had been performed and when all prior interests had ended. This is possible only if persons

who fit the class description, but are born after the date of distribution, are excluded. Because the considerations which have created the rule are matters of convenience, the rule has been labeled the *rule of convenience.*

The rule of convenience, then, is simply the general[5] rule that the maximum membership of a class will be determined at the time of the first principal distribution. The rule is well stated by Jessel, M. R. in an old English case:

> "There has, however, been established a rule of convenience . . . that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased[6]."

The date of distribution, then, becomes the important date in the determination of the maximum membership of a class, and this date can generally be defined as that time at which a member of the class described is entitled to demand in possession a share of the subject matter of the gift. The date at which a class member can make this demand will be determined by any manifestations of intention by the transferor. If this intention is not clear, the court will have to decide what the transferor would have intended had he been aware of the matter.

If the gift, bequest, or devise is immediate, the date of distribution will be at the date the gift is made or at the date

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[5] The rule in Kentucky is different. When the gift is to near relatives of the transferor, the Kentucky courts have held that the class should remain open until all possibility of increase is extinguished. Azarch v. Smith, 222 Ky. 566, 1 S.W.2d 968 (1928); Patterson's Executor v. Dean, 241 Ky. 671, 44 S.W.2d 565 (1931); it seems, however, that when the members of the class are not closely related to the transferor, the class will not remain open until all possibility of increase is extinguished; See, Barker v. Barker, 143 Ky. 66, 135 S.W. 396 (1911).

[6] In Re Emmet's Estate, 13 Chi. Div. 484 (1880).

of the testator's death as the case may be. It should be noted that in the case of immediate gifts the date for the determination of maximum and minimum membership of the class is the same. There are additional considerations, however, when the bequest or devise is to take effect at some future date, and in the case of these postponed gifts, the selection of the date for determination of the maximum membership of the class is separate and distinct from the selection of a date for the determination of minimum membership. Of course, the date of distribution could not occur prior to the termination of any interests which precede the class gift, and no class member is entitled to distribution so long as any condition precedent to his interest remains unperformed. However, in line with the rule of convenience (and, in fact, really just another way of stating the rule), it is generally agreed that the transferor, if he knew all of the circumstances, would not intend to delay the distribution until it would be impossible to have the class membership increase. "Thus, it is not a condition precedent to the right of a class member to demand the possession of his share that it be no longer possible for additional members of the group described to be born. If the condition attached to the share of a class member is not precedent, his right to demand possession of his share will not be postponed any further than it would be in the absence of such a condition. Generally, then, it can be said that if there are no outstanding unsatisfied interests which precede the gift to the class and if all conditions which are precedent to the interest of any member of the class have been performed, the period of distribution has arrived[7]."

It should be noted that the operation of the rule of convenience has two aspects—an inclusionary aspect and an exclusionary aspect. It seems that little criticism can or has been directed at the inclusionary aspect of the rule, since it appears to be in complete harmony with the presumption that the transferor would desire to benefit as many members of the class as possible. For example, in the case of a bequest or devise, the operation of the rule makes it possible for the class

[7] A James Casner, *Class Gifts* (AMERICAN LAW OF PROPERTY, Little-Brown and Co., 1952, Vol. V. Sec. 22.40, p. 346).

membership to increase even after the execution of the will and in the case of an immediate bequest or devise, until the date of the testator's death, or in the case of a postponed bequest or devise, until the date of distribution. The principle benefit to be obtained from the inclusionary aspect of the rule of convenience is that the operation of the rule often has the effect of keeping the class open to increase until all possible class members have been born. This is true in the common disposition by a testator to his children. *All* of his children living at the date of his death will be included in the gift, since it would be impossible for the period of distribution to arrive until after the testator's death. This would also be true in the case of a disposition of property to the children of a life tenant. Since the period of distribution of this postponed gift to the children of a life tenant could not arrive until the death of the life tenant, all possible members of the class (i.e. the life tenant's children) would share in the gift. As is often the case, the class gift may be given to the children of a deceased person. Here again the operation of the rule would include all possible members of the class.

Since dispositions of the above types frequently occur, it can be seen that often the exclusionary aspect of the rule of convenience is of no importance. When the exclusionary aspect of the rule does operate, its operation must be justified on the basis of eliminating the inconveniences which would occur in the absence of an application of the rule and on the basis of carrying out what is presumed would have been the transferor's intention if he had been aware of the problem.

Briefly, let us examine the application of this rule—first to a gift with postponed distribution and then to an immediate gift. If a bequest is made ". . . to the children of A attaining the age of twenty-one," the distribution of the gift will be postponed until a child of A attains the age of twenty-one. Since the date of the first distribution will occur when the oldest child of A reaches the age of twenty-one, that is the date at which the maximum membership of the class will be determined, and if any children are born to A after that date

(except, of course, for children *en ventre sa mere*)[8] they will be excluded. The convenience of closing the membership to increase at that date seems apparent, since then a distribution can be made and the shares can be determined. However, it has been pointed out that the rule of convenience "must be very inconvenient to those children who may be born after the period of distribution[9]."

In the case of a present absolute bequest ". . . to the children of A" the date of distribution would be immediate (i.e. the date of the testator's death) if A had children living at that date. If A is still living, there would be a possibility that additional children may be born to A; however, these subsequently born children would be excluded. While some writers[10] say that this is justified on the basis that the testator would probably have intended to include only those of A's children whom he knew, this does not appear to be a convincing argument for the operation of this exclusionary aspect of the rule of convenience. If this were so true as to justify the exclusionary aspect of the rule in the situation where there is an immediate gift, would it not be more appropriate, in order to be consistent, to say that in the case of a postponed gift the class should close at the date of the testator's death (rather than at the date of distribution) so as to eliminate the possibility of any portion of the gift going to any of A's children who were unknown to the testator? This would, of course, run contra to the presumption that a transferor would desire to benefit as many class members as possible. Therefore, it seems that the strongest justification for the exclusionary aspect of the rule of convenience is that it avoids the inconvenience of delaying the final distribution of the gift.

It should be noted that the exclusionary element of the rule of convenience (as well as the inclusionary element) can easily

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[8] This is in accord with the generally recognized doctrine in property law to the effect that, when it is beneficial to the child, a child begotten but not born is, for most purposes, treated as in being. 2 Simes, FUTURE INTERESTS, Sec. 388 (1936).

[9] The remark is that of Justice Chitty in In Re Wenmoth's Estate, 37 Ch. Div. 266, 57 L.J.Ch. 649, 57 L.T. 709, 36 Wkly. Rep. 409 (1887);

[10] 2 Simes, FUTURE INTERESTS, Sec. 374 (1936).

be avoided by careful and precise drafting of the dispositive instrument. For indeed, the rule of convenience is a presumption and is rebuttable by a clear indication of contrary intent, either by express words or by the circumstances surrounding the disposition.

If, in the case of an immediate class gift, there are no members of the class in existence at the date of distribution, the rule of convenience is not applied, and *all* persons who are thereafter born and fit the class description are admitted to the class[11]. For example, if a bequest is made ". . . to the children of A," and A is still alive and has no children (in *esse* or *en ventre sa mere*) at the time of the testator's death (the date of distribution), then any and all children thereafter born to A will be included in the membership of the class, and the class will not be closed at the testator's death. The reasons for this exception to the application of the rule of convenience are easy to understand. If the class would close at the date of the testator's death, the gift would fail and the disposition would be a nullity. This is obviously contra to the presumption that the testator would not want any part of the gift to fail, and if there were no children in existence at the time of making the bequest, the testator must have intended to benefit all class members whenever born. Thus, if we let in *any* child of A after the date of distribution, there is no conceivable reason why we should not admit *all* of the children of A. Therefore, the first child to be born to A after the testator's death would receive the property subject to partial divestment by the birth of other class members[12]. It is very true that this causes all of the inconveniences mentioned above which have caused the creation of the rule of convenience, but it would seem that the desire to prevent any gift from failing and becoming a nullity overrides the inconveniences involved.

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11 Weld v. Bradbury, 2 Vern. 705, 23 Eng. Rep. 1058 (1715); Bailey v. Brown, 19 R.I. 669, 36 Atl. 581 (1897); Male v. Williams, 48 N.J. Eq. 33, 21 At 1. 854 (1891); Shepherd v. Ingram, Ambler, 448; 27 Eng. Rep. 296 (1764).

12 Gest v. Way, 2 Whart. 445 (Pa. 1837); Weld v. Bradbury, *supra,* note 11.

Does the rule of convenience apply to gifts of income? An examination of the materials on this question indicates that the rule does not apply to gifts of income[13]. This appears to be in harmony with the reasons for the rule of convenience, since there really are no inconveniences involved in admitting new class members to gifts of income. Since there is no distribution of corpus, the income can be distributed at established intervals to those class members in existence at that time. This means that if such a construction will not cause the gift to be invalid because of the rule against perpetuities each income payment is treated by the court as a separate and distinct gift, and a class member is excluded only from those distributions made prior to his birth[14]. This construction is supported by the presumption that the transferor would wish to benefit as many class members as possible.

This raises the additional question as to whether or not the rule of convenience (or any other rule of construction) should ever be varied in its application so as to avoid the rule against perpetuities. While no attempt will be made in this paper to decide this complex issue of interpretation of the rule against perpetuities, it should be noted that some authorities[15] seem to indicate that the application of the rule of convenience might be varied so as to avoid the making of a gift bad under the rule against perpetuities. This theory is well stated by A. James Casner:

> "The theory which is advanced to justify a different result when the rule against perpetuities is involved is that the disposition is capable of two constructions, one of which makes the instrument entirely valid and the other of which makes the instrument entirely in-

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13 In Re Wenmoth's Estate, *supra,* note 9; Prichard v. Prichard, 83 W.Va. 652, 98 S.E. 877 (1919).

14 Crawford v. Carlisle, 206 Ala. 379, 89 So. 565 (1921); Bank of New York v. Kaufman, 26 N.Y.S.2d 474 (Sup. Ct. 1941); affirmed mem. 261 App. Div. 819, 25 N.Y.S.2d 408 (1st Dept. 1941); Matter of Pulitzer, 148 Misc. 116, 265 N.Y. Supp. 401 (1933).

15 A. L. I. RESTATEMENT, PROPERTY, Sec. 242 (1940); W. Barton Leach, CASES AND MATERIALS ON FUTURE INTERESTS, 2d Ed., 1940, p. 394; Elliott v. Elliott, 12 Sim. 276, 59 Eng. Rep. 1137 (Ch. 1841).

valid. It is natural to presume that the transferor would intend the construction which will make the instrument valid. In the case in which the court seemed to be influenced by a desire to avoid violation of the rule against perpetuities, it is interesting to notice that in two of them the possibility of increase in the class was quite remote because of the age of the parents designated, and in the other the court stressed the fact that the will was drafted by a prominent attorney who certainly would not make gifts which would violate the rule against perpetuities[16]."

This same view was also very strongly stated by Ernst Freund:

"Wherever reasonable construction can save a gift which, under purely technical rules of construction, violates the rule against perpetuities, the gift ought to be saved. If the law is now otherwise, it ought to be changed; if the English law is otherwise and is nineteenth-century law, it should not be followed[17]."

However, Casner also suggested that it appears that a majority of courts follow the opposite view, which he refers to as the more orthodox view[18]. A concise statement of this view has been given by Gray:

"The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist,

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16 A. J. Casner, *Class Gifts, op. cit. supra,* note 7, Sec. 22.46 at p. 390.

17 Freund, *Suggestions Concerning Future Interests,* 33 Harv. L.Rev. 526 at 535 (1920).

18 A. J. Casner, *Class Gifts, op. cit. supra,* note 7, Sec. 22.46 at p. 390.

and then to the provision so construed the Rule is to be remorselessly applied[19]."

The rule of convenience applies both to realty and personalty. It is not limited to gifts to children, but applies equally to gifts to a class of other relatives such as nephews, nieces, grandchildren, brothers, sisters, etc., or even to a class of persons not related to the transferor, such as ". . . to the members of the X Fire Company[20]."

In conclusion, it can be said that the rule of convenience is a rather clearly defined rule of construction which is in common application in our courts today. It would seem that little criticism can be directed at the inclusionary aspects of the rule. And, while there may be some criticism of its exclusionary aspects, to this writer, the alternatives to the rule are more objectionable. The draftsman of any instrument can, of course, solve all of these problems by careful and precise drafting and, in this way the draftsman can reduce the necessity for court interpretations.

In spite of the fact that many of these instruments are drafted by laymen and many of the instruments that are drafted by lawyers are very adequate and complete and therefore do not involve litigation, many of the instruments which are drafted by lawyers are woefully inadequate and do involve litigation. In fact, the poor draftsmanship in this area has caused A. James Casner to remark that "this branch of the law, however, is a shameful memorial to the ineptness of the profession in drafting instruments[21]."

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19 Gray, RULE AGAINST PERPETUITIES, 3rd Ed., 1915, Sec. 626. For some cases following this view, see: Dime Savings & Trust Co. v. Watson, 254 Ill. 419, 98 N.E. 777 (1912); Crawford v. Carlisle, *supra,* note 14; Lockhart's Estate, 306 Pa. 394, 159 At 1. 874 (1932); In Re Newlin's Estate, 367 p. 527, 80 At 1.2d 819 (1932).

20 Millikin National Bank of Decatur v. Wilson, 343 Ill. 55, 174 N.E. 857, 75 A.L.R. 117 (1931); Johnson v. Cook Benevolent Institute, 33 Ky. Law Rep., 722 Ill. S.W. 294 (1908).

21 A. J. Casner, *Class Gifts to Other Than to "Heirs" or "Next of Kin" Increase in the Class Membership,* 51 Harv. L.Rev. 254 at 308.