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Perpetuities - The Rule Applies to Remainders Over to Charities

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PERPETUITIES – THE RULE APPLIES TO REMAINDERS OVER TO CHARITIES

Decedent devised the residue of her estate to the Colorado National Bank in trust for 25 years for four beneficiaries, each with a contingent cross remainder in the income of the others. At the end of this time the principal was to be divided among the beneficiaries, their survivors or their issue; if no beneficiaries or issue, then to certain charitable institutions. The court held the bequest to the beneficiaries valid. However, they declared the interests of the beneficiaries' issue and of the charities void for violation of the rule against perpetuities. *Colorado Nat'l Bank v. McCabe,* 143 Colo. 21, 353 P.2d 385 (1960).

McCabe restates an orthodox rule—that no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.[1] Prior to the instant case the court apparently had adopted a rule contrary to other jurisdictions.[2] It had implied that public charities were absolutely exempt from the rule. This comment will trace a brief history of the rule as applied to charities.

The leading case on gifts over from an individual to a charity was decided in 1923 in Massachusetts.[3] It involved a gift of a deed of trust, for certain property, to a bank for its use as long as it continued in existence. It was then to go to a named charity. The court held that a gift over to a charity on a remote contingency is void unless the gift in the first instance is also to a charity.[4] The court indicated that charities can form an exception to the rule, but only in one instance—when the interest is a gift over from another charity. As was stated in *McCabe,* this is the only exception.[5]

The facts in *Ledwith v. Hurst*[6] were very similar to those in the instant case. There the decedent's will provided that certain property was to go to his wife and daughter for life. At the death of the survivor it was to pass to the daughter's issue and descendants, and if no issue or descendants to a charity. There was no express provision that the issue be alive at the time of the testator's death. As there were no living issue at testator's death, the court held the bequest void, stating that although an interest may be created for a charity in perpetuity, the charitable interest cannot follow a disposition of the property which is invalid for remoteness.[7]

In a later Pennsylvania case,[8] the court reiterated this proposition concluding, "It follows as a matter of course that if the trunk of the tree falls, the branches fall with it."[9]

Several courts have been concerned with the problem of postponement of enjoyment, stating that if the interest is vested it is not subject to the rule, however remote the time when it may come

1 Gray, Rule Against Perpetuities 191 (4th ed. 1942).
2 King, *Future Interests in Colorado,* 21 Rocky Mt. L. Rev. 123 (1949).
3 Institution for Savings v. Roxbury Home for Aged Women, 244 Mass. 583, 139 N.E. 301 (1923).
4 *Ibid.*
5 143 Colo. 21, 33, 353 P.2d 385, 391 (1960).
6 284 Pa. 94, 130 Atl. 315 (1925); see Jee v. Audley, 1 Cox 324, 29 Eng. Rep. (1186).
7 *Id.* at 97, 130 Atl. 317.
8 *In re* Stephan's Estate, 129 Pa. Super. 396, 195 Atl. 653 (1937).
9 Id. at 408, 195 Atl. 659.

into possession.[10] This postponement of enjoyment withdraws any interest from the rule's operation. The rule against perpetuities applies only to interests which *vest* too remotely.[11]

The Colorado Supreme Court in the instant case has stated the rule correctly: "It is true that the court has said on a number of occasions that the rule against perpetuities does not apply to charities, but never in a case where the interest of individuals or non-charitable corporations have intervened."[12]

Previous statements of the rule were misleading because in all Colorado cases dealing with charities the interests would have been valid, even if given over to non-charitable organizations or individuals. *Clayton v. Hallett*,[13] the first Colorado case to mention this exception, involved a trust in perpetuity for the maintenance of a college for the education of orphan boys. The reference to the rule was dictum because it would not have applied even if the interest had not been given to a charity.[14] The trust might have violated other rules[15] but not the rule against remote vesting, for the interest was vested.

Haggin v. International Trust Co.[16] involved an estate which was to be converted into cash, and then used to erect an ornamental arch in Denver's Civic Center. All the money was to be paid out by the executor subject to the approval of certain persons. The court held that a bequest to a charity was to be given the most liberal construction so that the intent of the donor would be enforced. It was regarded as the "settled law" in Colorado that the rule against perpetuities does not include charities.[17] Again, the court need not have considered the rule because the case dealt with a vested gift subject to divestment. It is the "settled law" in every jurisdiction that a bequest such as this one is out of the scope of the rule, not because the gift was to a charity but because the gift was vested.

In *Town of Clarion v. Central Savings Bank & Trust Co.*,[18] a provision that the city agree to perpetually maintain a gift of a memorial library was held to be a condition subsequent. The opinion implied, however, that even without an immediate vesting the gift would be valid because charitable bequests are not subject to the rule[19]—again, an inaccurate statement.

A gift of the residue of testator's estate to the Colorado State Bureau of Child and Animal Protection for its use in perpetuity was declared valid on the assumption that the court has "many times held" that the rule does not apply to charities.[20] This gift

10 Harrison v. Kamp, 395 Ill. 11, 69 N.E.2d 261 (1946); *In re* Swingle's Estate, 178 Kan. 529, 289 P.2d 778 (1955); Appeal of Appleton, 136 Pa. 354, 20 Atl. 521 (1890); First Huntington Nat'l Bank v. Gideon-Broh Realty Co., 139 W.V. 130, 79 S.E.2d 675 (1953).

11 *In re* Gageby's Estate, 293 Pa. 109, 141 Atl. 842 (1928). See also Gray, *op. cit. supra* note 2 at 191.

12 Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 33, 353 P.2d 385, 391 (1960).

13 30 Colo. 231, 70 Pac. 429 (1902).

14 Grant, *Powers and Perpetuities in Colorado*, 10 Rocky Mt. L. Rev. 249, 252 (1938).

15 Simes & Smith, Law of Future Interests, § 1281 (2d ed. 1956) states: "It may be said that this [rule against indestructibility of trusts] is but a branch of the rule against perpetuities. But the present tendency is to treat it as a separate, but closely related doctrine."

16 69 Colo. 135, 169 Pac. 138 (1917).

17 *Id.* at 141, 169 Pac. 138, 141 (1917).

18 71 Colo. 482, 208 Pac. 251 (1922).

19 *Ibid.*

20 Johnson v. Colorado State Bureau, 86 Colo. 221, 279 Pac. 721 (1929).

was already vested; the only problem involved the duration of the interest, consideration of the rule by the court was unnecessary.

The first Colorado case to restrict this alleged exception was *Gregory v. Colorado Nat'l Bank.*[21] There a will directed the trustees, after making certain investments which could possibly last longer than 21 years, to pay one-half of the residue to charities and one-half for the benefit of the city. The problem was resolved on the theory that although the enjoyment was postponed, the interest itself was vested.[22] The court cited the *Clayton* case,[23] *Haggin v. International Trust Co.*[24] and *Johnson v. Colorado State Bureau of Child & Animal Protection*[25] in support of it declaration that the rule has no application to public charities. As pointed out above, all of these cases were decided on specific issues not actually involving the rule against perpetuities. However, the court did cite Gray[26] to the effect that the rule may apply, even to charities, if the interest is based on a condition precedent.

In *Smith v. United States Nat'l Bank,*[27] the court was again thrown into a trap by an advocate postulating the theory that charities are not within the scope of the rule against perpetuities. There the problem was merely one of a vested interest with enjoyment postponed. The rule should have been discussed only to clarify its correct application.

Since the Colorado Supreme Court's interpretation of the rule in these cases is not clear, some confusion has existed concerning the exact effect of the rule upon charities. As pointed out, the purpose of the rule is not to invalidate present interests, but to prevent the remote vesting of future interests.[28] The fact that the future interest is in favor of a charity in no way eliminates the social inconvenience.[29] The *only* exception is in the instance of a gift over from one charity to another.

The rule against perpetuities has been a source of legal confoundment since its inception. As in all rules, we must have exceptions to add to the perplexity of the law. Before the decision in the instant case, few have realized how very narrow the exception is.

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21 91 Colo. 172, 13 P.2d 273 (1932).
22 *Ibid.*
23 *Supra* note 16.
24 *Supra* note 18.
25 *Supra* note 16.
26 *Supra* note 18 at 177-78, 13 P.2d at 275.
27 120 Colo. 167, 207 P.2d 1194 (1949).
28 Gray, op. cit. *supra* note 2 at 428.
29 4 Restatement, Property § 396 (1944).