COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION

John A. Quigley Testamentary Trust
O.C. No. 374 ST of 1935
Control No. 194328

OPINION

This opinion is occasioned by the filing of a petition to terminate the John A. Quigley Testamentary Trust ("Trust") upon the consent of all the beneficiaries. For the reasons below, the petition is denied.

Background

On February 7, 1934, John A. Quigley ("Testator") executed a will. By a codicil dated April 6, 1934, the Testator amended the Tenth and Eleventh paragraphs of his will. The codicil created a series of life estates for the Testator's family where they would enjoy the income produced by his residuary estate held in trust.

To begin, all of the Trust income would be paid to the Testator's son, John, for life.[1] For twenty years after John's death, the income would be paid to John's children or their descendants. At the end of the twenty-year period, John's children or their descendants would receive one-half of the Trust principal, and the income of the other half of the principal would go to the Testator's two sisters, Mary and Lillian, for life.

If John died without children or descendants of children, Mary and Lillian would receive the income for life from all of the principal. The income enjoyed by each sister would then be paid to her children for life. Next, the share of income of each child of a sister would be paid to his or her children—i.e., the sisters' grandchildren—for life. Lastly, the share of income to each

[1] To minimize confusion, the Court refers to some parties by their given names rather than their surnames. This does not mean the Court views the parties informally.

grandchild of a sister would be paid to his or her children—i.e., the sisters' great-grandchildren—for life.

The remainder clause of the codicil reads:

> I direct my said trustees, upon the death of all those entitled to the income thereform, to pay the principal of the aforesaid trust estates not otherwise disposed of, to his Eminence, Dennis Cardinal Dougherty, or to whomever may be at the time, Archbishop of the Diocese of Philadelphia, or his successor as Archbishop of said Diocese, to be used for such charitable purpose as he shall deem proper, PROVIDED, however, in the event of my death within one calendar month, I direct my trustees, upon the death of all those entitled to the income therefrom, to pay the principal of the aforesaid trust estates not otherwise disposed of, to his eminence, Dennis Cardinal Dougherty, or to whomever may be at the time, Archbishop of the Diocese of Philadelphia, absolutely, and in fee.

The Testator died within one month of executing the codicil on April 24, 1934.

John died without issue. Thus, the income was to go to Mary and Lillian for life. Mary predeceased John and had no children. Lillian, however, survived John, but she disclaimed her interest in favor of her daughter, Madeline. As a result, Madeline enjoyed a life estate of all of the income generated by the Trust. After Madeline's death, her four sons—John, James, Charles, and William—received the income of the Trust. John, Lillian, Madeline, and Madeline's four sons were all lives in being when the Testator died and the will and codicil took effect. William, the last of these lives in being, died on June 30, 2015. William's death is significant for two reasons.

First, William's death closes the fourth and final class of life estates as there can be no more great-grandchildren of Lillian. There are 8 income beneficiaries in this class: Brendan Dooley, Jennifer Wendel, William Dooley III, Carolyn Connor Ferber, Marie Francis Kent, Ellen Ingraham, M. Anne Connell, and Laura Mazella (collectively, "Petitioners"). When the last of

these income beneficiaries dies, the principal should be paid to the remainder beneficiary, the Archdiocese of Philadelphia.[2]

Second, the parties disagree on whether the Archdiocese's remainder interest is vested or contingent. If the future interest is contingent then it is subject to the rule against perpetuities, and the perpetuities period began upon William's death since he was the last life in being to die. If the Archdiocese's interest is contingent and fails to vest by the end of the perpetuities period (June 29, 2036), the Archdiocese receives nothing. If the interest is vested, however, the rule does not apply.

Wanting to avoid the above scenario where the Archdiocese receives nothing, the Petitioners filed a petition to terminate the Trust. The Petitioners cite Section 7740.1 of the Uniform Trust Act which states a non-charitable irrevocable trust "may be terminated upon consent of all the beneficiaries only if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust." 20 Pa. C.S. § 7740.1(b). When a trust terminates pursuant to Section 7740.1, "the trustee shall distribute the trust property as agreed by the beneficiaries." *Id.* § 7740.1(c).

Here, the Petitioners claim continuance of the Trust actually thwarts the Testator's intent: to provide lifetime income to successive generations of his family and then "pass a meaningful amount of preserved principal to the Archdiocese at the expiration of the life interests." The Petitioners propose terminating the Trust now, giving the Archdiocese $25,000.00 of Trust principal, and distributing the remainder to the Petitioners.

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[2] The codicil names the remainder beneficiary as "his Eminence, Dennis Cardinal Dougherty, or to whomever may be at the time, Archbishop of the Diocese of Philadelphia, or his successor as Archbishop of said Diocese." The Archdiocese of Philadelphia, however, views bequests to the Archbishop individually as bequests to the Archdiocese, and the Archdiocese has been involved in this litigation on the Archbishop's behalf. Thus, the Court will refer to the "Archdiocese" as the remainder beneficiary.

The Petitioners and the Archdiocese consent to the termination. The Attorney General has issued a no-objection letter. Of all the parties in interest, only the corporate trustee, PNC Bank, N.A. ("PNC"), opposes the petition.

PNC objects to the Petitioners' proposed termination as it will "violate the Testator's express intent in establishing the Trust and cause a complete failure of the intended gift to the Archdiocese." PNC reasons the Testator only intended to provide income to his family while all the principal was to be paid to the Archdiocese, not a mere $25,000.00. As a result, the proposed termination "in no way resembles the plan intended by [the Testator]." PNC does not find the $25,000.00 a "meaningful" or "substantial" amount given how much money the Archdiocese is leaving on the table—approximately $2.2 million. Rather than terminate the Trust now, PNC argues the Court should "give full meaning" to the wait-and-see rule and allow the "statutory period to close and determine the rights of interested parties at that time." PNC believes this approach best honors the Testator's intent.

The Petitioners maintain they "are before this Court availing themselves of their statutory rights to modify and terminate the Trust by consent." While the Petitioners claim they are not asking the Court to invalidate the Trust as a whole or a specific interest as violating the rule against perpetuities, the rule forms the crux of the proposed termination. The Petitioners insist there is only "an infinitesimal chance" the Archdiocese's remainder interest will vest within the perpetuities period. The Petitioners also believe waiting until the perpetuities period closes only benefits those income beneficiaries still alive whereas termination now benefits all eight income beneficiaries. Moreover, waiting "only increases the fees the trustee will collect," and this disproportionately impacts "those income beneficiaries who do not survive" beyond the perpetuities period.

The parties were ordered to submit briefs addressing "whether continuance of the Trust is necessary to achieve any material purpose of the Trust and whether it is proper for the Court to terminate the Trust now and in the manner proposed by the beneficiaries."

Discussion

The parties do not seek a determination of the validity of the Archdiocese's remainder interest *per se*, but the uncertainty of whether this future interest is vested or not triggered this litigation.

The Petitioners argue the language "upon the death of all those entitled to the income" creates a contingent interest, one that will vest conditioned on the death of all the income beneficiaries. The Petitioners anticipate the interest most likely will not vest within twenty-one years of William's death. In order for the interest to vest, all 8 income beneficiaries must die by June 29, 2036. It is highly unlikely all eight income beneficiaries will die in the next sixteen years. If even one of those eight income beneficiaries survives, the Archdiocese's contingent remainder interest will fail to vest within the perpetuities period, the interest will be void, and the Archdiocese receives nothing. By the same token, the surviving income beneficiaries will continue to enjoy their life estates. Once the last of the income beneficiaries dies, the Trust principal will revert to the Testator's residuary estate then descend to the eight income beneficiaries' heirs as they would be the Testator's only living heirs. Hence, the petition to terminate the Trust now and in a way that ensures the Archdiocese receives something.

The Petitioners' reasoning appears sound, but it contains two fatal errors: (1) the Petitioners assume the Archdiocese's interest is contingent; and (2) even if the Archdiocese's interest is contingent, the proposed termination of the Trust is rooted in speculation about, rather

than the actualities of, the vesting of the Archdiocese's interest in violation of the wait-and-see approach to the rule against perpetuities.

A. Contingent or vested interest

Generally, a future interest is vested if "it is *certain* to take effect in possession or enjoyment" while a future interest is contingent if "it *might not* take effect in possession or enjoyment." RESTATEMENT (THIRD) OF PROPERTY § 25.3 (emphasis added). For example, a clause that only postpones possession and not the vesting of the actual interest does not create a contingent future interest. *In re Estate of Gageby*, 141 A. 842, 843 (Pa. 1928).

A testator's intent determines whether a future interest is vested or contingent. *In re Estate of Zucker*, 761 A.2d 148, 150 (Pa. Super. Ct. 2000); *see also In re Estate of Hirsh*, 5 A.2d 160, 163 (Pa. 1939) ("The 'polestar' long fixed for the guidance of courts in interpreting deeds of trust, as in interpreting wills, is the intention of the maker."). Initially, a testator's intent must be ascertained from the plain meaning of the words within the four corners of the will. *In re Estate of Zerbey*, 459 A.2d 1237, 1241 (Pa. Super. Ct. 1983). Individual clauses are not to be read in isolation but placed in their larger context. *Id.* Of course, where the will is ambiguous or contradictory, a court may determine the testator's intent by looking to the distribution scheme as well as the facts and circumstances surrounding the will's execution. *In re Estate of Jessup*, 276 A.2d 499, 502 (Pa. 1970).

Courts may resort to canons of construction in order to resolve ambiguities regarding the classification of future interests. *Zucker*, 761 A.2d at 151. For instance, the law presumes a testamentary estate or interest is vested "unless the language plainly, manifestly, and indisputably indicates the testator's intention to create a contingent estate or interest." *Id.*

By and large, precedents in will cases are of "little value" because "few wills have a twin brother," *In re Estate of Newlin*, 80 A.2d 819, 825 (Pa. 1951), yet the Court finds two cases discussed in PNC's brief most illuminating.

In *Zucker*, the testator left a will which held his residuary estate in trust and gave his daughter a life estate. 761 A.2d at 150. After the daughter's life estate, the will provided two remainder interests. The will reads:

> Upon the death of my daughter, PAULINE RIDDLE, this trust shall terminate and the balance of the principal and accumulated income, if any, shall be paid as follows:
>
> > 1. One half (½) thereof to the LUTHERAN HOME FOR ORPHANS AND AGED AT GERMANTOWN, Philadelphia, Pa.
> >
> > 2. One half (½) thereof to GEORGE T. FOREMAN and ETHEL C. FOREMAN, his wife, in equal shares, or to the survivor of them.

Id. The Foremans predeceased the testator's daughter but were survived by a son, George. *Id.*

After the daughter's death, the trustee filed an account, and the auditing judge issued an adjudication granting leave to distribute the entire residuary estate to the Lutheran Home. *Id.* George appealed, claiming the auditing judge improperly construed the intent of the testator in a way that was inconsistent with the overall testamentary plan and scheme of distribution. *Id.*

On appeal, the Superior Court of Pennsylvania framed the issue as "whether at the time of the testator's death the Foremans received a vested interest in the residuary estate, such that their share would pass to their estates upon their death, even if they predeceased the life tenant." *Id.* at 151. Holding the Foremans' interest had vested upon the testator's death and was not conditioned on surviving the life tenant, the court found the auditing judge had erroneously awarded the entire residuary estate to the Lutheran Home. *Id.* at 150.

In reaching that conclusion, the court held the language of the bequest did not "plainly, manifestly, and indisputably" reveal the testator's intent to create a contingent interest for the

Foremans. *Id.* Rather, the court held "the Foremans took a vested interest upon the testator's death, contingent only upon continued existence of a 'balance of principal and accumulated income, if any,' remaining at the life tenant's death." *Id.*

Similarly, in *Gageby*, the testator left a will which held her residuary estate in trust and gave her daughter and any grandchildren a life estate with the remainder going to charity. 141 A. at 843. The testator's daughter challenged the gift to charity on the grounds it was a contingent future interest and violated the rule against perpetuities. *Id.* The will reads:

> [A]t the death of my said daughter, Emma F. G. Cocheu, without issue, or at the death of her surviving child or children, if any, I direct that the personal property herein bequeathed in trust to the Johnstown Trust Company aforesaid, be given to the trustees of the Jacob Fend Home, the purposes and objects of which are fully and specifically set forth in the last joint will and testament of Ettie Fend and Matilda Fend Gageby [decedent], dated April 1, 1918, to be taken and considered by the trustees of the said Jacob Fend Home as a part of the assets of said Home.'

Id.

The Supreme Court of Pennsylvania held the charity's interest did not violate the rule against perpetuities as the interest was vested, not contingent. *Id.* The court stated the trust was "limited to the life of [the testator's daughter] and her children, if any, all of whom must die at some time or times"; therefore, the remainder gift to charity "depended on a certainty and not a contingency." *Id.* Moreover, the court cautioned a "too literal" reading of the will might lead one to conclude the charity only received the gift once the preceding life estates ended. *Id.* Instead, a "careful examination" of the will showed the remainder clause "only postpone[d] the delivery of possession" by the charity and not the actual gift by the testator. *Id.*

Here, the Court finds the language in the codicil unambiguous. Similar to the "at the death of my said daughter" language in *Gageby*, the phrase "upon the death of all those entitled to the income" employed by the Testator refers to a certainty, not a contingency. This

certainty—the death of all eight income beneficiaries—is a condition insofar as it postpones delivery of the Trust principal to the Archdiocese, not the vesting of the interest. Like in *Zucker* where the remainder beneficiaries would receive "the balance of the principal and accumulated income, if any," the only meaningful condition on the Archdiocese's interest is the Trust not having "otherwise disposed" of all the principal. So long as there is principal left once all the income beneficiaries die, the remainder goes to the Archdiocese.

Thus, as in *Gageby* and *Zucker*, the Archdiocese's interest *vested* upon the Testator's death, but the Archdiocese receives *possession* of that interest only when the preceding life estates end. This delay between vesting and possession accords with the overall testamentary scheme outlined in the codicil as it allows the Testator's great-grandnieces and nephews to enjoy the same life estates as the income beneficiaries before them.

Assuming the codicil was ambiguous, the result would be the same. *Zucker* states the law presumes the vesting of testamentary interests. This presumption can be overcome only if the testator's language "plainly, manifestly, and indisputably" suggests the testator intended a contingent interest. The Court is unconvinced the Testator plainly, manifestly, and indisputably intended to create a contingent remainder interest for the Archdiocese. If anything, the Testator's language plainly, manifestly, and indisputably proves his intent to create a vested interest. While the Testator's general scheme is more elaborate than in either *Zucker* or *Gageby*, his intent harmonizes with the testators' intentions in those cases. The Testator intended to provide financial support to multiple generations of his extended family from the income generated by his residuary estate held in trust. Upon the death of the fourth and final generation of income beneficiaries, the Testator directed the remainder of his residuary estate to the

Archdiocese. Nothing suggests the Testator conditioned the vesting of the interest on the death of the last income beneficiary.

Therefore, contrary to the Petitioners' claims, the Archdiocese's remainder interest is vested, not contingent.

B. Wait-and-see & the rule against perpetuities

Unlike vested future interests, contingent future interests are subject to the rule against perpetuities. *Gageby*, 141 A. at 843. The rule states: "'No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.'" *In re Estate of Pearson*, 275 A.2d 336, 342 (Pa. 1971) (quoting JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942)).

Even to lawyers and judges, this formulation of the rule reads like English translated into Sanskrit back into English, but the rule's purpose was simple: promote the alienability of property. Property encumbered by remote future interests decreases the value and productive use of the property so encumbered. As one court stated:

> The object of the rule . . . is to leave the alienation or circulation of property free from all entanglements and other obstructions, so that it will freely pass and circulate in the channels of commerce; and the kind of the estates to which the rule applies are contingent remainders, conditional limitations, executory devises, and springing and shifting uses. These interests or estates at common law were inalienable, because of their contingent nature. . . . Such estates withdrew the landed property from the ordinary channels of commerce, its disposal and acquisition was rendered difficult, its improvement was greatly retarded, the development of the country was stayed, and the capital of the country was gradually withdrawn from trade and circulation. In order to escape from that condition of things, the courts . . . developed . . . the rule against perpetuities. It . . . stands inexorably against all efforts tending to impede or clog the devolution and free circulation of property in the channels of commerce.

Shepperd v. Fisher, 103 S.W. 989, 998 (Mo. 1907) (citation omitted). While the court in *Shepperd* discussed the rule as applied to land, there is no distinction between real and personal property under the rule. *In re Estate of Packer*, 92 A. 70, 74 (Pa. 1914).

The common law rule held if there was a *possibility* an interest would violate the rule against perpetuities then the interest was void *ab initio*. *E.g.*, *Ledwith v. Hurst*, 130 A. 315, 317 (Pa. 1924). Under the guise of "possibility," courts invented farfetched scenarios like the "fertile octogenarian," the "precocious toddler," and the "unborn widow." These scenarios violated the rule but were highly unlikely; nevertheless, likelihood was all the rule required.

Pennsylvania courts ultimately rejected the common law formula and adopted a wait-and-see approach to the rule against perpetuities. *E.g.*, *In re Estate of Quigley*, 198 A. 85, 91 (Pa. 1938) (declining to rule on the validity of future interests as "[p]ersons may be born hereafter who will be concerned in the problems here involved, which is a cogent reason for postponing an adjudication of their rights; moreover, it may, and probably will, be many years until the questioned remainders can in any event ripen into possession").

The General Assembly later codified the wait-and-see approach, and it can now be found in Section 6104 of the Probate, Estates, and Fiduciaries Code ("PEF Code"). *See* 20 Pa. C.S. § 6104(b). The wait-and-see approach requires courts to analyze whether an interest violates the rule "as measured by *actual* rather than possible events." *Id.* (emphasis added). "By regarding actualities at the end of the period, the unrealistic results based on purely theoretical possibilities are avoided." *Id.* § 6104, J. St. Gov't Comm'n cmt. 1947. Furthermore, the wait-and-see approach only applies to those interests created before January 1, 2007. *Id.* § 6104(d).

Assuming the Archdiocese's remainder interest is contingent, not vested, the Petitioners request termination of the Trust now based on a belief the Archdiocese's interest will not vest.

The Petitioners ask the Court to ground its ruling on a possibility, not an actuality. On its face, this argument flouts the requirements of Section 6104 of the PEF Code, effectively neutering the wait-and-see approach. The Court will not, and cannot, terminate the Trust solely on conjecture.

Conclusion

The Testator intended all the Trust principal to go to the Archdiocese at the end of the last life estate. This is a material purpose of the Trust. To terminate the Trust now and redirect the lion's share of the principal to the Petitioners frustrates that material purpose. Moreover, the violence to the Testator's intent would be that much worse since the Archdiocese's interest has already vested. Even if the Petitioners were correct and the Archdiocese's interest is contingent, termination of the Trust now based on Petitioners' prophecy of what will happen in sixteen years' time violates the wait-and-see approach to the rule against perpetuities. Also, the argument in favor of preemptive termination does not diminish either the Testator's intent or the materiality of the Trust's unfulfilled purposes.

Therefore, based on the foregoing discussion, the Court finds the continuance of the Trust is necessary to achieve a material purpose of the Trust, and the Petitioners' request to terminate the Trust is denied.

BY THE COURT:

JOHN W. HERRON, J.

Dated this 18th day of February 2020

Caitlin Akins, Esquire
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