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The Possibilities Become Practical

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redress for wrongs done to a minority. There are proper and lawful means of seeking redress of wrongs, including orderly picketing. The law of criminal conspiracy can and should be applied to unlawful mass demonstrations to insure that the proper and lawful means will be used in the future.

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THE POSSIBILITIES BECOME PRACTICAL—*Wong v. DiGrazia*

"To become so enamored with the paraphernalia of law as to lose sight of its noble objective is the great legal disease."

NIZER, MY LIFE IN COURT 523

In any contest to determine which rule of law best exemplifies the result of "the great legal disease," the rule against perpetuities might well take first place. Few rules of law have inspired such delight in detail and reverence for dogma by courts and scholars. "[F]ew, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman," stated the California Supreme Court in *Lucas v. Hamm*.¹ In that case, the court held that although an attorney is liable for malpractice if he fails to use reasonable skills when employed to render legal services, the rule against perpetuities did not lie within the area of "reasonable skills." It was not negligence for an attorney to fail to comprehend the intricacies of the California rule against perpetuities. Professor Leach of Harvard has described the rule as "a dangerous instrumentality in the hands of most members of the bar."²

When a rule of law has become so encrusted with tradition and formalism that its purpose and function has become forgotten, it must be reassessed. Does the rule still have a useful function to perform in present-day society? If so, what lies behind all of the confusion? If the rule is so complex as to be held beyond the comprehension of the ordinary member of the bar, something must be done to simplify its application.

The purpose and social policy underlying the rule against perpetuities is as valid today as it was when first evolved in the seventeenth century. The rule seeks to balance competing interests of society and the individual. The individual wishes to control the disposition of his property. His plan of disposition is frequently such that, if carried out, the property might be burdened with devolutionary controls for innumerable generations to come. Society wishes property kept free of burdens which would unduly hamper its flow through the channels of commerce and the economy. To that end, the law has devised various

¹ 56 Cal. 2d 583, 592, 364 P.2d 685, 690 (1961).

² Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954).

means of ridding property of controls which fetter its alienability. The rule against perpetuities is used to rid the property of the indirect fettering caused by contingent interests which might remain contingent too far into the future. The rule says to the individual, in effect: "We will allow you to burden your property with devolutionary controls *provided* you do not do so for too long a period of time." The period of time deemed permissible by the common law was one measured by lives in being plus twenty-one years.³

The "All Possibilities" Rule

The unwary or unimaginative draftsman has often fallen into the trap of the "all possibilities" rule. Under this rule, when one considers the application of the rule against perpetuities to a given limitation, one has to consider all possibilities which might occur under the terms of the limitation. The possibilities to be considered are those existing at the time the interest was created. One is to have no regard for reasonable probabilities that the interest would remain contingent for too long a period. The fact that between the time the interest was created and the litigation raising the question the event forming the "possibility" on which invalidity is predicated had ceased to be possible, is immaterial.⁴ In other words, by the words of the instrument itself, in light of facts existing when the instrument took effect, it must be certain the interest will not violate the rule. No possibility, however remote or ingenious, is to be overlooked. Once such a possibility is discovered, the rule is applied⁵ and the interest invalidated.

A brief survey of the cases discloses that the main problem in applying this rule lay in the definition of the word "possibility." While the attorney preparing the document tends to consider only possibilities within the realm of reality, the courts tend to measure by possibilities which could be said to lie only within the realm of abstract theory, in many instances having little or no relation to the realities of the situation. The courts have developed an unsettling ability to unearth contingencies the draftsman has failed to cover.⁶ In application, this can lead to rather astounding results.

³ This note is concerned only with the application of the rule against perpetuities, and no attempt will be made to discuss the rule itself. For brief treatments of the rule against perpetuities, see Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); SIMES, *HANDBOOK OF FUTURE INTERESTS* §§ 108-15 (1951). For more extended treatment, see RESTATEMENT, PROPERTY §§ 370-403 (1944); 6 AMERICAN LAW OF PROPERTY §§ 24.1-.68 (1952); GRAY, *THE RULE AGAINST PERPETUITIES* (4th ed. 1942); MORRIS & LEACH, *THE RULE AGAINST PERPETUITIES* (2d ed. 1962); 5 POWELL, *REAL PROPERTY* §§ 759-90 (1962); SIMES & SMITH, *THE LAW OF FUTURE INTERESTS* §§ 1201-97 (2d ed. 1956). The rule against perpetuities in California has had four different periods, at times embodying two different concepts in the rule, and at times with different periods of time applicable to each concept. For coverage of the rule in California, see 5 POWELL, *REAL PROPERTY* ¶ 811 (1962).

⁴ Prior to this time, California had frequently used construction to keep interests valid, and had a rule that, between two possible constructions, the one which would render the provision valid under the rule against perpetuities should prevail. This rule was not, however, carried to the extent it could have been. For further discussion, see 5 POWELL, *REAL PROPERTY* ¶ 811[6] (1962).

⁵ GRAY, *THE RULE AGAINST PERPETUITIES* § 629 (4th ed. 1942).

⁶ See discussion and collection of cases in 5 POWELL, *REAL PROPERTY* ¶¶ 766, 777, 784, 789 (1962), for tendency of courts to construe in favor of validity.

An excellent example of this rule in action was *Haggerty v. City of Oakland*.⁷ The case dealt with a lease to commence on the date the building in question was completed. The builder was to pursue such completion with "due diligence." The court held that the lessee's interest was invalid; it violated the rule against perpetuities. The interest was conditioned upon the happening of an event—the completion of the building—and was, therefore, a contingent interest. There was no express guarantee in the instrument that the building was to be completed within the permissible period of twenty-one years, or that if the building was not completed within twenty-one years, the lessee's interest would fail. Therefore, the court reasoned, it was "possible" that the lessee's interest would remain outstanding and contingent for longer than the twenty-one year permissible period.

To hold this contingency a "possibility," the court, by implication, assumed the following to be within the realm of "possibility": (1) That the lessee would have no power to make the interest vest within a reasonable time, being necessarily less than the twenty-one year permissible period, by obtaining specific enforcement of the contract if the lessor were not diligent in completing construction. (2) That the lessee had no power to make his interest fail within the twenty-one year permissible period by pleading frustration of purpose if the building was not completed within a reasonable time, even if the lessor were not at fault. (3) That the lessee, with both of the above remedies available to him, would sit on his rights. Therefore, there was no certainty that the interest would vest or fail within the permissible period. (4) That there was lack of any remedy in the lessor, in the event the lessee did sit on his rights, to destroy the contingent lease interest. This last assumption could only be based on the "possibility" that, should the lessee decide to set up his interest to bar any alienation of the property in question by the lessor, a court would sustain him, without barring him by estoppel or laches.

The light of reason returned in *Wong v. DiGrazia*.⁸ The case was factually on all fours with the *Haggerty* case, and was also decided under pre-1963 law. The supreme court adopted what might be called the "rule of reasonable construction" in applying the rule against perpetuities to a limitation, and held the interest involved did not violate the rule.

The court did not choose to make a specific exemption from operation of the rule for commercial transactions.⁹ The court did not twist words to hold that the interest created was one which was presently vested, with only enjoyment and possession postponed, so that the rule was not applicable.¹⁰ The court held rightly that this interest was contingent, the contingency being the completion of the building,¹¹ and, therefore, subject to the rule against perpetuities. By use of this reasoning, it is hoped that the court was laying the foundation for extension of this doctrine into areas other than commercial transactions.

⁷ 161 Cal. App. 2d 407, 326 P.2d 957 (1958).

⁸ 60 Cal. 2d 525, 386 P.2d 817 (1963).

⁹ *Id.* at 532, 386 P.2d at 822.

¹⁰ *Id.* at 534, 386 P.2d at 823.

¹¹ *Id.* at 535, 386 P.2d at 824.

The Rule of Reasonable Construction

Justice Tobriner reasoned as follows: One must apply the all possibilities rule in any case involving the rule against perpetuities. Before one can apply the all possibilities rule, however, one must first construe the document in question. One construes a contract in a reasonable manner. One looks at the whole contract, the circumstances surrounding its execution, and the facts and practical realities of the transaction. One must also consider the remedies available to each of the parties, should the other fail to carry out his obligations. Then, as nearly as possible, one determines what the parties meant by their words. If one considered the words alone, taken out of the circumstances in which the contract was executed, the words creating this interest made it theoretically possible the interest would remain contingent for longer than the permissible period. To do so, however, was to ignore the plain realities of the transaction.

In light of the surrounding circumstances, the available remedies, and the nature of the transaction, it is so highly improbable that the building would not be completed within the permissible period, or that, if it were, the parties would not avail themselves of their remedies, one should not consider the possibility that this interest would remain contingent for longer than that period. To make the assumptions stated above in the discussion on the *Haggerty* case, as a basis for declaring this interest violative of the rule against perpetuities, said the court, is to deny reason.

The court also stated that if the surrounding circumstances of the transaction were such as to make it necessary, from a practical point of view, that the contingency occur within a reasonable time (or the interest would fail), the court would read this fact into the instrument by construction. This would be true whether there was a clause in the instrument to the effect the contingency must occur within a reasonable time, or one party was to proceed with due diligence, or words of like import.¹² One must view the *purpose* of the rule against perpetuities said the court:

Certainly our function is not to interpret the rule so as to create commercial anomalies. . . . Our task is not to block the business pathway but to clear it, defining it by guideposts that are *reasonably to be expected* [W]e shall seek to *interpret it reasonably*, in the light of its objectives and the economic conditions of modern society.¹³

As to the main issue, the application of the rule against perpetuities, we conclude that we could invoke it only by conceiving that the application of the rule arose from the *conjecture* that although the contract certainly called for performance within a time for [sic] less than 21 years, it would be broken and the aggrieved party would not enforce it within that time. We must assume that out of the ashes of nonperformance and nonenforcement of the contract there arises, like the phoenix, the new form of the rule against perpetuities. We do not believe obligations should be obliterated upon such conjecture.¹⁴

¹² *Id.* at 539, 386 P.2d at 827.

¹³ *Id.* at 533-34, 386 P.2d at 823. (Emphasis added.)

¹⁴ *Id.* at 543, 386 P.2d at 829-30. (Emphasis added.)

The "Possibilities" Become Practical

In other words the only possibilities which the court will consider will be those which, from a practical point of view, lie within the realm of factual occurrence. No more is an interest to be invalidated because of the "conjecture" of a contingency which could occur only in theory.

Prior Decisions for Comparison

This doctrine gives the courts the ability to take into consideration the circumstances and facts surrounding the creation of the contingent interest. It allows flexibility and discretion in the appraisal of these facts. The rule of reasonable construction and its measuring stick of practical possibilities does not permit the creation of perpetuities; it permits the court to allow reason to come into the application of the rule. If, after reasonable construction of the instrument in question, the court determines that a practical possibility does exist that the rule against perpetuities will be violated, the court is not prevented from invalidating the interest.

In *Lucas v. Hamm*,¹⁵ an attorney was sued for malpractice. He had drafted a will creating a trust wherein the interests of the beneficiaries were found to violate the rule against perpetuities. The provision in question provided that the trust was to terminate at 12:00 noon on the day fourteen years after the trust res was given to the trustee (closing of probate proceedings). The beneficiaries sued the attorney for the \$75,000 difference between what they would have received under a valid trust and the settlement the decision forced them to make with the heirs. The basis for invalidation was the failure of the attorney to put in a clause to the effect that in no event should the trust terminate later than twenty-one years after lives in being at the time of the testator's death. Since there was no such provision in the will, the court reasoned, and there was no *certainty* the probate of the estate would not last longer than seven years, the trust interests had to be destroyed.¹⁶

In *Estate of Campbell*,¹⁷ the testator devised money free from trust, but in hopes it would be used for charitable purposes, to the persons who were holding certain offices in a fraternal organization on the date when the testator's estate was distributed (termination of probate proceedings). Since these officers were elected annually, the persons who were to take could not be ascertained until such time as the estate was actually distributed.

"[W]hile this event would, in the ordinary and usual course of events, probably occur within a few months, or at most a few years, after the death of the testatrix, yet it cannot be said that it is a condition that must inevitably happen within 21 years"¹⁸

¹⁵ 56 Cal. 2d 583, 364 P.2d 685 (1961).

¹⁶ Under *In re Walkerly*, 108 Cal. 627, 41 Pac. 722 (1895), in effect at that time, the trust had to terminate within 21 years from the date on which the interests of the beneficiaries were created in order for those interests to be valid. This doctrine was abolished in 1959 with the repeal of § 715.1 and the old § 771 and subsequent enactment of the new § 771 of the California Civil Code.

¹⁷ 28 Cal. App. 2d 102, 82 P.2d 22 (1938).

¹⁸ *Id.* at 104, 82 P.2d at 23 (Quoting from *Johnson v. Preston*, 226 Ill. 447, 457, 80 N.E. 1001, 1004 (1907).)

One possibility, which cannot be overlooked, is that the probate proceedings might not have been started for many years While it can be said that the reasonable probabilities were in favor of a distribution of this estate well within the time required, to hold that such a result, with the consequent vesting of interest, was certain to occur and would inevitably take place would be to disregard the statute [Section 716 of the Civil Code, at that time containing the all possibilities rule] by accepting a high degree of probability as a certainty.¹⁹

Compare the court's reasoning in the Connecticut case of *Belfield v. Booth*,²⁰ where the devise was a gift to vest fourteen years after the settlement of the testator's estate. The court held the interest valid on the basis that the holder of the will was duty bound to produce it promptly, and the executor had a fiduciary obligation to settle the estate promptly. The testator expected both of these things to be done. Therefore, as a *matter of construction*, the fourteen-year period would commence at the time when the accounts of the executor or administrator of the estate were or should be settled in due course of administration. The court further held that this time *could not be delayed as long as seven years from the testator's death*.²¹

In *Estate of Gump*,²² the settlor had conveyed property to the trustee, Wells Fargo Bank, in return for a loan of \$75,000. The trustee was to manage the property during a twenty year period, paying the settlor a certain monthly amount out of the proceeds. The trustee was to use whatever part of the proceeds was necessary to make improvements and repairs. In the making of improvements and repairs, the trustee was to have absolute discretion. The remainder of the proceeds was to be used to repay the loan. If the loan was repaid prior to the expiration of the twenty years, the trustee was to convey to the settlor's children, reserving a life estate for the settlor. If the settlor died within the twenty year period, the trustee was to convey the property to the children if they would execute a promissory note secured by a deed of trust on the property for the balance remaining to be paid. There was a provision that, in the event the loan was not paid off within the twenty year period set for the trust, the trust was to continue until such time as the loan was paid in full. The settlor died eight years after execution of the trust instrument. The trustee conveyed to the children and took their promissory note secured by a deed of trust on the property. The provision regarding the possible duration of the trust beyond the twenty-year period was held invalid, however, on the following grounds:²³

The provision of the trust against which the attack is launched and which it is claimed invalidates the entire trust, is that one which contemplates a possible continuance of the trust for an indefinite period beyond the twenty-year term because of a failure to clear the property of debt. *Theoretically*, the trustee might under its plenary power of management continue to encumber the property—perhaps to such an extent that the children of the trustor, or their issue, would never be willing to meet the condition of executing a promissory note and trust deed to secure payment of any remaining balance of the debt upon

¹⁹ *Id.* at 105-06, 82 P.2d at 23-24.

²⁰ 63 Conn. 299, 27 Atl. 585 (1893).

²¹ *Id.* at 306-07, 27 Atl. at 587.

²² 16 Cal. 2d 535, 107 P.2d 17 (1940).

²³ The trust was upheld, however, on the ground this provision was severable.

conveyance to them of the real property by the trustee. *Practically, such a situation is most improbable.*²⁴

The court then discusses the various code provisions the trustee would violate if it were to encumber the estate unreasonably, and the construction of the statutes to the effect that a provision granting such plenary powers to the trustee would be void. The beneficiaries would, of course, have a remedy against the trustee if it were to encumber the property in an unreasonable manner. The court also discussed the fact that it was obvious the trust was set up primarily as security for the loan, and the financial factors clearly showed that the loan would be repaid well within the twenty-year period. The court continued:

However, we have in mind the fact that in testing a trust agreement for violation of the rule against perpetuities or restraints on alienation, its validity is to be judged from the date of its inception [I]t is not permitted to wait to see what happens in order to determine the validity or invalidity of the trust. *We shall, therefore, concede the possibility of the situation suggested by appellant arising . . . and shall proceed, upon the premise that this particular provision would be repugnant to the constitutional and statutory prohibitions against perpetuities and restraints on alienation*²⁵

In other words, the provision was found invalid because it was *theoretically possible* the trustee would violate its trust and the beneficiaries would refuse to enforce their remedies against it. The court, at the same time, recognized the absence of any *real* possibility of this occurring.

Logic demands that the rule of reasonable construction and its measuring stick of practical possibilities, adopted in *Wong v. DiGrazia*, be extended beyond its immediate application to a contract to lease in a commercial transaction. The more modern method of construing *any* instrument is that adopted in contract law:²⁶ Look at the instrument as a whole, and try to determine from it and the surrounding circumstances what the parties intended, construing the instrument reasonably in light of those factors. The court is also correct in its statement that one of the factors which must be considered is any remedy which would be available to each of the parties.

The rule of reasonable construction can easily be adopted to make good the invalidations occurring due to administrative contingencies,²⁷ such as termination of probate proceedings, etc. There is no reason why the court could not extend this to other situations where proof of the practical realities will show there can be no violation of the rule. For example, the courts have felt required to apply a conclusive presumption of continued ability to have issue until the person in question dies.²⁸ As a result of applying this presumption, the interest is invalidated. Professor Leach gives the classic example:

²⁴ 16 Cal. 2d at 546, 107 P.2d at 23. (Emphasis added.)

²⁵ *Id.* at 547, 107 P.2d at 23. (Emphasis added.)

²⁶ See 53 CAL. JUR. 2D *Wills* §§ 370-430 (1960) and cases collected therein; 15 CAL. JUR. 2D *Deeds* §§ 119-54 (1954) and cases collected therein; 12 CAL. JUR. 2D *Contracts* §§ 117-50, 154-55 (1953) and cases collected therein.

²⁷ Some courts hold that the time consumed for administrative matters is not to be considered at all for purposes of construing whether the rule against perpetuities has been violated. See 5 POWELL, REAL PROPERTY ¶ 764[5] (1962) and collection of notes. Also see 4 RESTATEMENT, PROPERTY § 374, Comment f (1944).

²⁸ *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 Pac. 425 (1920).

T has a widowed sister, A, aged eighty. He leaves property in trust to pay the income to A, then to pay the income to the children of A for their lives, then to pay the principal to the children of such children. The gift to the children of A's children will be held void because of the possibility that A, aged eighty when the testator dies, will have another child. Since that child will not be alive when the testator dies, there is no certainty that the gift to such child's children will vest within lives in being and twenty-one years. This is absurd. T probably never intended to include any children which might be born to A after he died, and, even if he did, at the age of eighty, she could not have any more.²⁹

As Professor Leach stated, in over twenty million births between 1923 and 1932, not one was to a woman over fifty-five, and .001 percent were to women over the age of fifty.³⁰

It is recognized that the legislature's failure to enact a statute changing this conclusive presumption of continued ability to have issue to a rebuttable one presents a barrier to judicial trail-blazing in this field.³¹ However, since it would be extremely difficult to phrase a statute which would allow the proper flexibility required in this sort of a fact situation, could it not be argued that the legislature believed the matter might better be left to the court's construction of documents?

Under the terms of section 715.5 of the California Civil Code, the legislature has authorized the courts to construe or reform the instrument in question so as to make the interest valid, if at all possible. This process could easily have been resorted to in *Estate of Sahlender*,³² and the interest in question held valid. This case involved a trust set up to pay income to the testator's daughter for life, then to her issue for life, with a gift over to children of such issue or to other relatives upon the daughter's death or the death of the issue. At the time of the testator's death, his daughter was a childless widow of fifty-five. The limitation to the issue for life and the limitations of the corpus to the issue or to the relatives was declared invalid on the ground that there was a "possibility" there might be children born to the testator's daughter after his death.

Under the rule of reasonable construction, would it not be reasonable to admit evidence of statistics such as those noted above? Or, facts surrounding the execution of the will could be shown. If, for example, the will had been executed when the daughter was thirty and happily married, the provision for the possibility of her having issue would be reasonable. The instrument did not become operative until the testator's death, and circumstances might have changed radically. Under the rule of reasonable construction, and its measuring stick of practical possibilities, would it not be reasonable to admit evidence to show these facts? Would it not be reasonable to allow the court to determine whether, in light of these facts, the testator actually intended to include the possibility of his daughter having issue? Or, in the alternative, if he did so intend, would he have continued to do so had he known such inclusion would have invalidated the other interests provided for in his will? The court is given the authority to look into these matters by the terms of section 715.5.

²⁹ Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643 (1938).

³⁰ *Id.* at 643 n.12.

³¹ See ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, PERPETUITY LEGISLATION HANDBOOK, Recommendation (2), at 8 (2d ed. 1962).

³² 89 Cal. App. 2d 329, 201 P.2d 69 (1948).

The rule of reasonable construction could be used to admit medical testimony on facts relating to the possibility of having issue. If a person can be proven to be medically incapable of having children, there is no reason to exclude such proof for purposes of construing the instrument in question.

The court recognized in *Wong v. DiGrazia* that the social and economic conditions giving rise to many of the presumptions indulged in for purposes of applying the rule against perpetuities have changed drastically since the time of their development. One must bear in mind that many of these presumptions, and particularly the conclusive presumption of continued ability to have issue until death, developed in seventeenth century England. The scientific conditions were vastly different from those of the twentieth century. At the time this rule was developed, the state of medical knowledge was such that *one could not prove with certainty* that a person was incapable of having issue until his death. Under such circumstances, a conclusive presumption of continued ability to have issue until death had a valid function to perform. This function does not exist at present.

Conclusion

At all times, one must bear in mind the purpose of the rule against perpetuities. The purpose is to destroy interests which would interfere with alienability or control of property, provided there is *no other way* to rid the property of such interference. For example, it is no longer necessary to apply the concept of suspension of the power of alienation to regulate the duration of trusts because, by Civil Code section 771, we now have a statutory means of destroying the restraint imposed by the trust without destroying the interests of the beneficiaries. If it can be proven, with certainty, that no interference will in fact occur, why invalidate the interest and contravene the transferor's intent?

The court is given the power, under California Civil Code section 715.5, to construe or reform the instrument in question so as to give effect to the transferor's intent and not violate the rule against perpetuities. It is easy to understand a court's reluctance to use the reformatory power, and actually change the wording of the instrument, unless it is absolutely necessary. Therefore, it is submitted that the rule of reasonable construction should be used to try to construe a document, as it stands, so as not to violate the rule against perpetuities. Only when the document is not susceptible, by any means, to such construction, should the reformatory power granted the courts in section 715.5 be used. The rule of reasonable construction should be utilized to aid in the resolution of ambiguities in the event the transferor's intent is not clear on the face of the instrument. When the transferor's general dispositive plan is clear, and there are no ambiguities, and such general plan can be given effect without violation of the rule against perpetuities, then the reformatory power of the courts should be used. If the plan of the transferor is clear, but such general plan cannot be given effect without violating the rule, then the limitation should be struck down.

It is submitted that the only limitation which should be struck down as violative of the rule against perpetuities is one which cannot be construed, reformed, or effected so as not to tie up property for too long a period of time, and still give effect to the transferor's generally intended plan of disposition. It is hoped that the path broken by the legislature and the supreme court will be followed. The guideposts which have been set are clear and reasonable. It is