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Destruction of Contingent Interests by Termination of a Trust

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DESTRUCTION OF CONTINGENT INTERESTS BY TERMINATION OF A TRUST

Future interests is one of the most vexacious and troublesome areas of the law. It is steeped in the historical development of English society and law. The bases of the conglomeration of laws making up this field often appear to have no relationship to or function in the modern world.

One such rule deals with the destruction of a property right—the future interest. Out of the constant battle between feudal kings and their independent landholders for the control of land came a series of moves and counter-moves by each side which attempted to restrict and free the rights of landowners to dispose of their property. From this struggle emerged the fee simple transfer of land and other devices such as life estates, estates for years, fee tails and so on. At this point the remainder came into being. After the ability to alienate land was achieved, the next step in total alienability of land was the power to dispose of it so that the right to possession was delayed until a time in the future. This interest in land, termed a future interest, included the remainder, the reversion, the possibility of reverter, and the right of re-entry.[1]

This article is concerned with the contingent remainder and the related executory interest. The main purpose is to survey the rules of law dealing with the destructibility of these particular interests when they are created by a trust. In particular, the discussion is concerned with the question of whether a trust can be terminated before the time set for termination by the settlor, thereby destroying a future interest which was created in the trust.

A remainder has been defined as an interest which takes effect only upon the termination of the estate which supports it. It cannot by supported by an estate which is subject to divestment.[2] There are two types of remainders, vested and contingent. A vested remainder is an interest which is created to take effect upon the termination of the supporting estate, and is not subject to any conditions upon which it will take effect, other than the termination of the prior estate. A contingent

[1]C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY at 93. The creation of a remainder is by words of purchase as opposed to words of limitation which pass property by descent, and would create a fee simple in the holder of the life estate upon which the attempted remainder depended.

[2]L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS at 10 (1951). An interest following an estate of that nature is called an executory interest.

remainder is one which will take effect if some expressed condition is met prior to the termination of the supporting estate.[3]

Under the feudal theory of seisin, conveyance of land was consummated by passing possession of the land from the grantor to the grantee in a formalized manner. From this formality developed the rule that there could be no conveyance of land to take effect in the future, if it was created by the same instrument which created a present interest. A vested remainder met the test of this rule, because it followed a present estate and created a present right of future possession. A contingent remainder, however, did not become an interest as of right until the condition to its vesting was met. It could be destroyed if it did not vest before the termination of the prior supporting estate, since the land could not be held without an owner pending the vesting of the remainder.[4] From these rules grew the common law rule of destructibility: a contingent remainder which did not vest at or before the termination of the preceding estate was destroyed. Destruction could occur by natural expiration of the estate, forfeiture of the estate, or merger of the estate with a successive estate.[5]

Prior to the Statute of Uses,[6] the remainder was the only future interest recognized without resort to an interest called the use, the forerunner of the modern trust. However, when the Statute of Uses turned equitable interests into corresponding legal interests, other future interests called executory interests came into being. An executory interest was not vested and did not take effect until the divestment of a prior

[3] *Id.* at 19-21. The difference between a contingent remainder and a vested remainder subject to divestment is in the type of condition which affects the interest. The former only takes effect on the occurrence of a condition precedent. The latter takes effect immediately, but can be destroyed by the occurrence of a condition subsequent. Vested remainders are classified as indefeasible, subject to complete divestment or subject to open. Subject to complete divestment means that the remainder is limited so that it may be destroyed by an event or an action occurring after it has vested. Subject to open refers to class remainders which are redivided when another member enters the class.

[4] Seisin could not be held suspended pending the outcome of the condition precedent requirement. Thus the remainder was considered void and the estate which depended upon the condition precedent was held to vest in the grantor as a reversion. Further, if the condition were met later, it did not cause the conditional estate to vest, because seisin was in the grantor and it took a new conveyance to place it in the owner of the contingent remainder.
INTRODUCTION TO THE LAW OF REAL PROPERTY, *supra* note 1 at 128-133.

[5] *Id.*

[6] It was vital to the landed class in England, which measured wealth by land, that they be assured that their property passed to their lineal descendents. The destructibility of contingent remainders prompted the gentry to develop the use. By this method the legal estate could be granted to a person trusted by the grantor for the use of others. The land was held in seisin by the trustee and contingent remainders could be protected against the termination of the prior estate upon which the contingent remainder depended. Eventually, because of abuses of this method of conveyancing, the State of Uses was passed. It was aimed at protecting the interest of the crown, but more importantly it did not prohibit the use, but rather attempted to control it. Uses were recognized and contingent remainders continued to be protected in the use or active trust. *Id.* at 181-183.

estate. Generally, an executory interest divested the prior estate upon the occurrence of the condition upon which that estate depended. However, the executory interest could also be designed to take effect after the termination of the prior estate, although there was a time lapse between the two estates.[7]

Executory interests were not affected by the destructibility rule. Equitable remainders were also protected from destruction. In the desire to allow the grantor to dispose of land as he wished, courts began to construe remainders as vested, if at all possible, in order to prevent them from being destroyed.[8] By means of the use, contingent interests and executory interests were protected from destruction. By this method a life estate could be created with the remainder to Y in trust for the children of X for the life of X to preserve the contingent remainders, remainder to such of X's children as survive him. By this device, Y takes a vested remainder of the legal title with the equitable remainder of the title in the children who will take the legal title if they are living at the death of their father. The modern trust has the same effect in that the trustee is conveyed the legal title, while the beneficiary is conveyed the equitable title. The separation of the legal and equitable estate serves to protect the equitable interests in the contingent remaindermen.[9]

There is little case law in Montana dealing with the termination of trusts. *Bradbury v. Nagelhus*[10] dealt with the problem of termination in relation to a constructive trust. The Court stated that "[T]rusts are extinguished only by illegality, impossibility or fulfillment."[11]

In the Matter of the Testamentary Trust of Child[12] is the only Montana decision which deals with the problem of termination of a testamentary trust prior to the time set for termination by the testator-settlor.[13]

[7]HANDBOOK OF THE LAW OF FUTURE INTERESTS, *supra* note 2 at 25-27. In the former case it is hard to distinguish an executory interest from a contingent remainder. The prime distinction is that the remainder follows the prior estate upon its termination, while the executory interest follows the divestment of the prior estate.

[8]*Id.* at 189 and n. 3.

[9]*Id.* at 38-46. In 1877 the destructibility of legal contingent remainders was made impossible in England by statute. The destructibility is limited in varying degrees in the United States with or without statutes.

[10]Bradbury v. Nagelhus 132 Mont. 417, 319 P.2d 503. (1957).

[11]*Id.* 319 P.2d at 510. There was no elaboration of this statement and it does not bear directly on the point in question. The case involved a constructive trust which has no time set for completion of the purpose of the trust.

[12]*In Re* Child 26 St. Rep. 454. (1969).

[13]Montana does not recognize the executory interest. Revised Codes of Montana (R.C.M.) § 67-319 (1947), states that future interests are either vested or contingent. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate or precedent interest. R.C.M. § 7-320 (1947). A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain. R.C.M. § 67-321 (1947). The definition of a vested interest appears to include certain contingent interests, such as estate in a living person which depends upon the occurrence of a condition precedent.

This case arose from the desire of several beneficiaries to terminate the trust. Some of these objecting beneficiaries had vested remainders subject to divestment, and their children had shifting executory interests which would take effect on the divestment of the estates of their parents.

The trust was created by Harry W. Child in his will which was probated in 1931. The balance of his property was to be distributed through the trust. His wife, son-in-law, and a personal friend were appointed trustees and were given the residue of the estate. The trust was to exist during the life of the testator's mother, sister, son, Huntley Child Sr., and until the youngest survivor among the children of Huntley Child Sr., and until the youngest survivor among the children of Huntley Child Sr. reached age 40 or died. In this manner the testator described specifically the period for which he intended the trust to last, and in accordance with Montana law designated the events which would defeat the future interests created in the trust.[14]

In paragraph 12 of his will, Child set forth the manner in which the income of the trust was to be distributed. He created a life income for his mother and his sister. He created a monthly income for his son, Huntley Child Sr., to last until he reached 50 years of age or died. The trustees were also to pay a monthly income to the three children of Huntley Child Sr. as long as the testator's wife was alive. The balance of the income was to go to the wife of the testator for life. At her death, the income of the trust, which remained after the specific amounts were paid was to be distributed between Huntley Child Sr. and his three children, Huntley Child Jr., Marion Child, and Elizabeth Child, and the testator's daughter, Ellen Dean Child Nichols, and her heirs.[15] If any of the children of Huntley Child Sr. were not living at the death of the testator's wife, then their issue took the share of the parent per stirpes. These bequests were specified to last as long as the trust was in existence.[16]

[14]R.C.M. § 67-418 (1947). A future interest may be defeated in any manner or by any act or means which the party creating such interest provided for or authorized in the creation thereof; nor is the future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

[15]The specific distribution of the income of the testator's wife on her death was 1/16 to Huntley Child Sr., 1/16 each to Huntley Child Sr.'s three children, Huntley Child Jr., Marion Child and Elizabeth Child, and ¾ to Ellen Dean Child Nichols, the testator's daughter. *In Re* Child, *supra* note 12 at 456.

[16]*Id.* All of the income interests were included in section (a) through (e) of paragraph 12, section 1. Section 2 of that paragraph described the manner of the distribution of the corpus of the estate upon the occurrence of all the events which measured the life of the trust. One-fourth of the trust was given to the children of Huntley Child Sr. or their issue per stirpes. The other three-fourths was given to the daughter of the testator, Ellen Nichols and to her heirs.

At the time the suit was brought, all of Huntley Sr.'s children had reached age 40, and the testator's mother, sister, and daughter were dead. Huntley Child Sr. was still living. Thus all but one of the events which would terminate the trust had occurred. Huntley Sr. had been divested of his interest in the income from the portion originally given to the testator's wife.[17] Huntley Jr. had been divorced and as part of the divorce settlement had given his ex-wife one-half of his interest in the corpus of the trust. The divorce decree specifically reserved his interest in the income to him and stated that he gave his ex-wife one-half interest in his interest in the corpus, subject to loss if he died before the trust was terminated.[18]

The trial court found as a fact that the object of the trust was to create a life income for the mother, sister, and son of the testator. The Montana Supreme Court upheld this finding and added that the testator's purpose was fulfilled when the income payments could no longer be made to one of those persons.[19] The court also upheld the finding that, since the testator's purpose had been fulfilled, the trust was extinguished.[20]

To determine whether a trust can be extinguished before the time set for termination by the settlor, it is necessary to consider the conditions under which the testator wanted the trust to end, the purposes of the testator in creating the trust, and whether those purposes were in fact completed. In the Child will it appears that the plain meaning of the

[17]Creditors had been granted the income interest which was to last until Huntley Sr. reached age 50. Creditors had also been granted the income which he was to receive after his mother died. This interest had been recovered by his three children, who shared it equally. *In Re* Child, *supra* note 12 at 457 and 541. In this respect see R.C.M. § 86-112 (1947). The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits cannot transfer or in any manner dispose of his interest in such trust. The attachment of Huntley Sr.'s interest by his creditors seems to be void at least to any real property in the corpus of the trust which would mean that he should have retained some income interest in the trust. This would defeat the decision of the court in the Child case. It is also possible that the statute could be construed to apply to income interest in trusts of personal property as well.

[18]*In Re* Child, *supra* note 12 at 456 and 458. Huntley Jr.'s ex-wife received a one-half undivided interest in the one-twelfth interest of Huntley Jr. in the corpus of the estate. This interest of course was not guaranteed, since if Huntley Jr. predeceased Huntley Sr. the interest would be taken by his children per stirpes.

[19]*Id.* at 462. As authority for its interpretation of the trust, the court cited the following statutes: R.C.M. § 91-201 (1947). A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible. R.C.M. § 91-202 (1947). In cases of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations. R.C.M. § 9-205 (1947). All the parts of a will are to be construed in relation to each other, so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

[20]As authority for terminating the trust on the basis of the objects being completed the court cited R.C.M. § 86-601 (1947). A trust is extinguished by the entire fulfillment of its object or by such object becoming impossible or unlawful.

words used to describe the time for termination of the trust was that it should end on the occurrence of all the conditions stated. If the testator had desired that the trust terminate on those conditions *or the forfeiture of the right to receive income by the beneficiaries whose lives measured the trust,* then he should have specifically provided for that condition.

It also appears from the will that the testator's purpose went beyond the creation of a life income for his wife, mother, sister and son. In the same section in which he created a life income for his son, the testator also created an income in the children of Huntley Sr. or their issue, if any were deceased, which was to last for the period of the trust. It appears clear that all of the purposes of the trust had not been completed, but could still be completed. Thus the Montana statute which authorizes termination of a trust when the objects are completed, impossible or illegal does not apply to this case.[21]

In view of R.C.M. 1947 § 91-201,[22] even though the life income could not be paid to Huntley Sr., the intent of the testator should have been carried out as far as possible. In other words, the testator's intent to pay income to the children of the children of Huntley Sr. should have been given effect, though the life income provisions for Huntley Sr. could not be given full effect. It is apparent that the decision of the Montana Supreme Court hinges on the interpretation of the purposes of the trust.

The crucial issue in the *Child* case is apparent. If the purpose of the trust was to preserve the corpus for the full period of time set by the testator so as to allow the future interest created therein the opportunity of taking effect, then the court should not have terminated the trust. The testator had created unvested future interests[23] in the issue of the children of Huntley Jr., Marion, and Elizabeth.[24] These were equitable interests which according to the common law are indestructible.[25] Therefore, unless the Supreme Court was correct in its construc-

[21] *Id.*

[22] R.C.M. § 91-201 (1947), *supra* note 19.

[23] Historically, contingent remainders and executory interests were distinguished. By R.C.M. § 67-319 (1947) there remain only two types of future interests, vested and contingent. To avoid confusion and yet preserve the separation of the types of future interests, the term unvested future interest has been used throughout this article to refer to both contingent remainders and executory interests.

[24] The interests created in the children of Huntley Child Sr. and their issue can be viewed either as vested remainders in the children of Huntley Sr. and shifting executory interests in their issue, or as alternative contingent remainders. For purposes of this discussion, however, the distinction poses no problem, since both are protected as equitable interests. *See* Festing v. Allen, 67 Rev. Rep. 339 (Ex. 1843), and Edwards v. Hammond, 3 Lev. 132 (Common Pleas 1683).

[25] Even if the equitable unvested future interests were not protected under the common law theory, these interests seem to be protected under Montana law. R.C.M. § 67-419 (1947). No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger or otherwise, except as provided by the next section, or where a forfeiture is impressed by statute as a penalty for the violation thereof.

tion of the trust that the sole object was the creation of a life interest for the wife, mother, sister, and son, it was incorrect to terminate the trust before the end of the measuring life because unvested future interests were thereby destroyed.

Many state jurisdictions have dealt with the problem of the termination of a trust before the time set by the testator. From these decisions general rules have developed. It appears that in order for the court to terminate a trust, the purposes must practically be completed, and all persons with an interest in the trust must consent to its termination.[26] In addition, a number of jurisdictions require that all persons with an interest in the trust must be present in their own behalf, or that all interests have vested before the court can terminate the trust prior to the time set by the testator.[27]

The effect of the requirement of all persons with interests being represented in their own behalf is that a future interest existing in a trust prevents termination without acquiescence by the holder of that interest. Several jurisdictions have not stated the rule in this fashion, but merely have relied on the existence of an unvested future interest as sufficient reason to prevent termination of the trust prior to the time set for termination of the trust by the settlor.[28] Relying on the intent of the testator, these cases either state or imply that creation of an unvested future interest in a trust is expressive of an intent of the settlor to protect the corpus of the trust until the time set for termination in order to allow these interests a full opportunity to take effect.[29]

If these rules are applied to the Child case, it appears that the Supreme Court did not give sufficient weight to the intent of the testator in creating the trust, and that they should have refused to terminate it because the purposes of the trust were not all completed or impossible of completion. A good example of the solution to the issue presented in

[26] *In Re* Gallimore's Estate, 99 Cal. App. 2d 664, 222 P.2d 257 (1950); Byers v. Beddow, 106 Fla. 166, 142 So. 894 (1932); Hill v. Traveler's Bank and Trust Co., 125 Conn. 640, 7 A.2d 652, 123 A.L.R. 1419 (1939).

[27] Hubbard v. Buddemeier, 328 Ill. 76, 159 N.E. 228 (1937); Miller's Executors v. Miller's Heirs and Creditors, 172 Ky. 519, 189 S.W. 417 (1916); Brandenburg v. Thorndike, 139 Mass. 192, 28 N.E. 575 (1885); Gwin v. Hutton, 100 Miss. 320, 56 So. 446 (1911).

[28] *In Re* McKenney's Will, 169 Md. 640, 182 A. 425 (1936); Kimball v. Blanchard, 101 Me. 383, 64 A. 645 (1906); *In Re* Kamerly's Estate, 384 Pa. 225, 35 A.2d 258 (1944); Bettis v. Harrison, 186 S.C. 352, 195 S.E. 385 (1938).

[29] *In Re* Adoption of a Minor, 214 F.2d 844 (1954); Ramage v. First Farmers' and Merchants' Bank of Troy, 249 Ala. 240, 30 So.2d 706 (1947); *In Re* Washburn's Estate, 11 Cal. App. 735, 106 P. 415 (1910); Byers v. Beddow, *supra* note 26; Mohler v. Wesner, 382 Ill. 225, 47 N.E.2d 64 (1943); Brandenburg v. Thorndike, *supra* note 27; Hill v. Hill, 49 Okla. 646, 152 P. 1122 (1915); *In Re* Stack's Will, 217 Wis. 94, 258 N.W. 324, 97 A.L.R. 316 (1935).
The authors of treatises also are in agreement with the rules regarding the termination of a trust prior to the time set by the settlor. *See* J. PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES § 920 at 1561-1568 (7th ed. 1929), and G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS at 591-593 & n. 49 (3rd ed. 1952).

the *Child* case is the case of *Ramage v. First Farmers' and Merchants' Bank of Troy,*[30] in which the court found that termination of a testamentary trust would be contrary to the testator's intent. That intent was found from the creation of an unvested future interest which preserved the corpus for the benefit of a group whose members were subject to change, and who could not be ascertained until the time set for termination of the trust by the testator. The court expressed its opinion regarding termination, saying:

> . . . Certainly in this case the court must decline to terminate the trust where termination will not only defeat the object of the testator, but where in doing so the contingent interest will be cut off.[31]

California, whose statutes in regard to the termination of trusts are similar to Montana's,[32] has dealt frequently with the question presented in the *Child* case. A review of the California cases on the question in point supports the conclusion that the Montana Supreme Court should have refused to terminate the Child trust.

In the case of *In Re Washburn's Estate,*[33] the testator created a trust which gave a life income to his daughter and wife. On the death of either, the income of the deceased went to the other beneficiary for her life. On the death of the surviving beneficiary, the corpus was to be paid to the two living children of the daughter, and to any children born to her thereafter, or to their issue per stirpes. The daughter acting as guardian for her children relinquished her right to income in their favor. She argued that the sole purpose of the trust had been to collect and pay her the income after the other life beneficiary died; that when she gave up this right to income, the estate became merged with the remainders of her children; and that, since she had no further interest in the trust, the purposes were complete. However, the court found that the interests of her children were contingent[34] since it was not known if more would be born.

The court decided, therefore, that there could be no merger of a life estate and a contingent interest so as to create a fee simple. In other words, the legal title to the corpus stayed in the trustees until the occurrence of the contingency upon which the termination depended, which in this case, was the death of the life income beneficiary. On this basis, the court refused to terminate the trust. Therefore, the California Court finds that the creation of a future interest, which is to vest only upon

[30]Ramage v. First Farmers and Merchants' Bank of Troy, *supra* note 29.

[31]*Id.* 30 So.2d at 714.

[32]West, Annotated California Civil Code, §§ 694, 695, 740, 742 and 2279 (West 1954), and West, California Probate Code §§ 102, 103 and 105 (West 1957).

[33]*In Re* Washburn's Estate, *supra* note 29

[34]The court described future interests as vested or contingent which agrees with their law on the subject and shows the abrogation of the distinction between contingent remainders and executory interests.

the occurrence of a particular contingency, demonstrates the expression of an intent of the testator to delay the distribution of the corpus until that specified time, and that this intent must be honored.[35]

The case of *In Re Gallimore's Estate*[36] dealt with the problem of termination of a trust where the purposes were alleged to have been completed. The court found some authority for the proposition that a trust could be terminated over the objections of a beneficiary if the purposes of the trust were accomplished, but then added: "That rule will never be applied, however, where the rights of a beneficiary will be adversely affected by the termination."[37] The court then discussed the intent of the testator and purposes of the trust by stating:

> The argument of appellants is that this case is one where no purpose can be served by the continuing of the trust. But this contention disregards Clause "(c)" of the trust. This is not a case where the interests of the beneficial life interests have merged with the vested interests. Robert Gallimore Jr. has a contingent survivorship interest in the income of the trust under Clause "(c)". This being so, the trial court properly refused to terminate the trust over his objection.[38]

These statements appear to be an equation of the creation of an unvested future interest with the purposes of the trust. Therefore, in California, the purposes of a trust are not impossible of completion if the corpus or income can be distributed to a remainderman, or if a divesting interest is created which will vest upon the termination of the prior estate. This case is directly in point with the *Child* case since the issue of Huntley Child Sr.'s children have a similar interest which will vest on the termination of the estate of their parents, or take efect with respect to the corpus if their parents die before the termination of the trust.[39]

Creation of an unvested future interest can be construed to be the expression of an intent not to have the trust terminated until the occurrence of the event, or expiration of the time upon which termination is to occur. In other words, the purpose of the trust is to protect the corpus

[35] In *Fletcher v. Los Angeles Trust and Savings Bank*, 182 Cal. 177, 187 P. 425 (1920), the court decided that there was a conclusive presumption that a woman could have a child as long as she was alive, regardless of other circumstances. This presumption was applied to trusts to prevent their termination where the possibility of issue existed and those issue would have an unvested future interest. The important point with reference to the issue in Child is that termination was not allowed where unvested future interests could exist in unascertained persons.

[36] *In Re* Gallimore's Estate, *supra* note 26.

[37] *Id.* 222 P.2d at 261.

[38] *Id.* Clause "(c)" of the trust created an unvested future interest in each remainderman by providing that on the death of another remainderman before the termination of the trust, the survivors would share his one-fourth interest.

[39] *Supra*, note 24.

for the unvested future interests until the time set for termination of the trust.[40]

In *Byers v. Beddow*,[41] the Florida Supreme Court met the issue of the determination of the purposes of a trust in which unvested future interests had been created, and equated the purposes of a trust to the creation of those interests in this manner:

> Whenever courts are called upon to dissolve or terminate a trust, they will be careful not to defeat any object of the trustor apparent from his declaration of the purpose of the trust: to this end, courts must decline to act when there are, or may be, persons interested in the trust who are not before the court.[42]

Illinois has also been specific in its equation of the creation of an unvested future interest with the purposes of the trust. In *Mohler v. Wesner*[43] the Illinois Court faced a factual situation similar to that in the *Child case*.[44] There were unvested future interests extant in the trust. However, all of the income beneficiaries joined in the suit to terminate the trust after the beneficiary whose life measured the length of the trust waived his rights to the income.

The future interests which were created were dependent upon the occurrence of certain specified events. Each of the children had a remainder in the corpus which was subject to divestment by his death. Each of the remaindermen had a shifting executory interest in each other's estate, since each beneficiary was an heir at law of the other, and would share the interest of a beneficiary-remainderman who died before the end of the trust. The court found that the trust could not be terminated because the purposes of the testator in creating the unvested future interests had not yet been accomplished:

> The contention that Edward Mohler's waiver of the right to receive forty percent of the income from the trust estate is tantamount to his death, and therefore equally as effective as his death to extinguish the life of the trust is untenable. . . . **The purposes of the trust have not been substantially satisfied: there are contingent interests in the trust fund and a present determination of the ultimate beneficiaries would be sheer speculation.**[45] (emphasis supplied)

It is important to note that in this case, as in the *Child* case, the testator had created interests which could only be determined at the death of the last measuring life of the trust. The fact that he no longer

[40]This view is supported by subsequent California cases such as *Wogman v. Wells Fargo Bank and Union Trust Co.*, 123 Cal. App.2d 657 267 P.2d 423 (1954). In *Hunt v. Lawton*, 76 Cal. App. 655, 245 P. 803 (1926), the California Court decided that the resignation of the sole income beneficiary did not mean that the purpose of the trust was ended as the plaintiff had argued.

[41]Byers v. Beddow, *supra* note 26.

[42]*Id.* 142 So. at 896.

[43]Mohler v. Wesner, *supra* note 29.

[44]*Id.* 47 N.E.2d at 65 and 66.

[45]*Id.* 47 N.E.2d at 67.

had any interest in the income of the trust did not affect the use of his life as a measuring device. The reason for this is clear. One of the purposes of the trust was to preserve the corpus of the trust until the time set for the termination by the testator so that the unvested future interest had a full opportunity to take effect. Applying this reasoning to the Child case, it is clear that the purposes of the trust were not complete or impossible of completion.[46]

The Massachusetts Court also decided the question in this manner. In *Brandenburg v. Thorndike*,[47] a trust was created from which the widow of the testator was to receive a life income. Three years after her death the corpus was to be distributed to the testator's nieces and nephew, who were still living or to the issue of any of the beneficiaries who were deceased, per stirpes. The widow waived her rights under the will and elected to take her statutory share of the estate. The beneficiaries then sued for termination of the trust. The court, after examining the facts of the case, stated that the court had the power to terminate a trust when the purposes were accomplished, and the interests under it had vested in those seeking termination. The waiver by the widow of her rights only affected that provision of the will in which she had a personal interest. It could reduce the corpus of the trust, but did not revoke or affect the bequests to the other beneficiaries under the trust. The court stated:

> We must construe the bequest in favor of the nieces and nephews in the same manner as if the widow had accepted the provision of the will.[48]

Once again, the intent of the testator and his purpose in creating unvested future interests is respected. If the testator had desired that the trust be terminated before the date which he had prescribed, he could have created indefeasible remainders to the nieces and nephew, the remaindermen, instead of making them subject to divestment and creating shifting executory interests for their issue. Therefore, the testator must have had a purpose in the creation of those interests, and it must be given effect.

The decision of the widow to take her statutory share, in renunciation of the will and trust income, can be equated with the divestment of the life income of Huntley Sr. in the *Child* case. There appears to be no sound reason for treating the loss of income by Huntley Sr. differently from the widow's renunciation. Since the testator in both cases created unvested future interests, his purpose in doing so should be respected and the trust allowed to continue for the full term specified.[49]

[46]See Gutman v. Schiller, 37 Ill. App.2d 58, 187 N.E.2d 315 (1963).
[47]Brandenburg v. Thorndike, *supra* note 27.
[48]*Id.* 28 N.E. at 576.
[49]*See* Hoffman v. New England Trust Co., 187 Mass. 205, 72 N.E. 952 (1905).

In *Smith v. National Saving and Trust Co.*,[50] the court reached what appears to be an opposite result in dealing with this problem. An inter vivos trust was created to give the settlor a life income. At the settlor's death the corpus was to be divided between her children or their issue per stirpes. The specifically stated purpose of the trust was to prevent her husband from dissipating her estate. She subsequently divorced her husband, and sought to terminate the trust. The court found that the purpose of the trust was completed, and no further purpose could be served by continuing the trust.

The result appears to be in conflict with the established rules concerning termination since the children had a vested remainder subject to divestment, and their issue had a shifting executory interest in the remainder. However, when the purpose of the trust is considered this apparent conflict can be resolved. The creation of interests of sufficient duration was required to assure that the estate could be controlled by the descendents of the settlor after her death so as to prevent it from falling into the hands of the husband. Therefore, the contingencies of the death of the settlor's children had to be accounted for to assure that protection. The terms of the trust disclose that this was the sole purpose of the trust, and that it was accomplished by the divorce. Consequently an exception to the rule of termination of a trust when unvested future interests have been created exists in this jurisdiction. This exception is limited to situations where the express purpose of the trust requires future interests, vested and unvested, to complete that purpose.[51]

Wisconsin's Supreme Court also equated the purpose of the trust with the creation of an unvested future interest in the case of *In Re Stack's Will*:[52]

> We find no authority for the position that, where a trust becomes impossible of completion for any reason suggested or a situation arises not in the contemplation of the settlor which threatens the loss of the trust res, the court will terminate the trust in the sense that it will defeat he rights of the remaindermen for the benefit of the life tenants where the parties are not sui juris and not before the court. . . . While no doubt the court has the power, in case it is found upon further investigation that a continuation of the present situation threatens the total loss of the trust res, to order a sale and cut off the interest of contingent remaindermen in the real estate, which constitutes the corpus of the trust, and to cause the proceeds to be impressed with the trust and reinvested, it is under a duty not to destroy the trust.[53]

[50]Smith v. National Savings and Trust Co., 245 Fed. Supp. 532 (1965).

[51]This is supported by the fact that previous Washington D.C. cases, *In Re Adoption of a Minor, supra* note 29. *Hart v. Gilmer*, 40 F.2d 794 (1930), held that a trust could not be terminated prior to the time specified by the testator when an unvested future interest would be thereby destroyed.

[52]*In Re* Stack's Will, *supra* note 29.

[53]*Id.* 258 N.W. at 326 and 328.

The cases which have terminated trusts before the time set for termination because the purposes were impossible of completion generally involved situations in which the trust corpus was destroyed or seriously impaired.[54] Also, the rule has been applied where the purpose of the testator was specifically stated, and the creation of unvested future interests were obviously an attempt to further that purpose.[55] Several of the cases examined dealt with attempts to terminate a trust on the alleged grounds that the purposes were complete or impossible of completion because the life beneficiary disclaimed his right to the trust income. The courts have not allowed this type of termination unless all the parties agreed to the termination, and termination would not defeat the testator's intent or purpose.[56]

Relating these rules to the *Child* case, all of the purposes of the trust had not been accomplished nor were they impossible of accomplishment. First, the testator did not specifically state the purpose for the creation of the trust, except that the bequest to his mother was for her care and support. The other bequests were life incomes with the exception of the original bequests to Huntley Sr. and his children, which were replaced by life incomes after the testator's wife died. Second, the terms of the trust were written in such a manner that the testator included all the income interests in one section of paragraph twelve. He did not create the life beneficiary interests, and as an afterthought, add the income interests of the children of his son, Huntley Sr. If the desire of the testator had not been to distribute the corpus of the estate upon the occurrence of certain events, he could have avoided that possibility by not creating future interests in the issue of Huntley Sr.. The testator could have accomplished the same result by making the remainder absolute in the children of Huntley Sr., and allowing the interest to pass to the heirs of those remaindermen by descent rather than through the trust if the remaindermen died. Because the testator decided to create the trust with unvested future interests he must have had a reason, and his intent should be given effect to the fullest extent possible in accordance with Montana law.[57]

[54]Fish v. National Bank of Phoenix, 64 Ariz. 164, 167 P.2d 107 (1946); Hughes v. Neely, 332 S.W.2d 1 (Mo. 1960); Cuthbert v. Cuthbert, 136 N.Y. 326, 32 N.E. 1088 (1893); Townsend v. Schalkenbach Home for Boys, Inc., 33 Wash.2d 255, 205 P.2d 345 (1949); *In Re* Stack's Will, *supra* note 29. *See also* 92 A.L.R. 158, and 97 A.L.R. 325. In *Stack, Townsend* and *Hughes,* there were unvested future interests. The courts found that the corpus could be sold and the trust terminated as to that particular property. However, the proceeds from the sale were impressed with the trust and had to be held for the benefit of the beneficiaries of the original trust.

[55]Smith v. National Savings and Trust Co., *supra* note 50.

[56]Brandenburg v. Thorndike, *supra* note 27 and Mohler v. Wesner, *supra* note 29.

[57]R.C.M. § 91-201 (1947), *supra* note 19.

CONCLUSION

The cases studied which have dealt with the question of termination of a trust containing unvested future interests reveal that only in unusual circumstances will the court allow the termination of a trust before the times designated for termination by the settlor. Early termination has been allowed where the trust *res* is destroyed or where all purposes are completed. It must be shown in the latter case that the creation of an unvested future interest was designed to support an express purpose and was not a purpose in itself.[58] Generally, however, courts have either stated or implied that the creation of an unvested future interest is evidence of a purpose to continue the trust for the full term prescribed in order to give the interest the full opportunity to take effect.[59]

The desired rule is that the creation by the settlor of an unvested future interest in the trust gives rise to a presumption that one of the purposes of the trust is to preserve the corpus for the full term prescribed by the settlor in order that the unvested future interest can have the full opportunity to take effect. Those persons who seek an early termination of the trust have the burden of proof to show that this was not a purpose of the trust, and that the testator did not intend to preserve the trust corpus for the full term prescribed for the trust.

On the basis of the cases examined, the Montana Supreme Court in the *Child* case has ignored the general rule concerning the termination of a trust before the time prescribed by the settlor. They brought the case under the realm of a statute, R.C.M. 1947 § 86-601,[60] and *Restatement* § 340,[61] which apply only in very specific circumstances. These circumstances, that the purposes of the trust be accomplished or impossible of accomplishment, do not exist in the facts of the *Child* case. On the basis of the Montana law and the general rule of law regarding early termination of a trust, a more appropriate result would have been the continuation of the trust until the death of Huntley Child Sr., the last measuring life of the trust.

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[58]Smith v. National Savings and Trust Co., *supra* note 50; *In Re* Frank's Will, 57 Misc. 2d 446, 293 N.Y.S.2d 16 (1968); Holden v. Morgan, 115 N.J.Eq. 59, 169 A. 546 (1933).

[59]*Supra* note 29.

[60]*Supra* note 20.

[61]RESTATEMENT (SECOND) OF TRUSTS, §§ 335, 337 and 340 (1959). The Restatement does not speak of the problem under consideration. Its illustrations of termination of trusts because of completion or impossibility of completion of purposes do not include examples in which unvested future interests exist. The discussion of impossibility of completion of the purposes of the trust centers around trusts in which the trust corpus has been destroyed or greatly injured. This indicates that the question of unvested future interests has not been considered in those sections.