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## Public Policy and the Dead Hand - A Special Book Review

George G. Bogert

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## PUBLIC POLICY AND THE DEAD HAND A SPECIAL BOOK REVIEW

GEORGE G. BOGERT

PROFESSOR LEWIS M. SIMES delivered a series of five lectures under the Thomas M. Cooley lectureship in February, 1955, at the University of Michigan. These lectures comprise a volume of considerable interest which is the subject of this review.\* The basic problems discussed are the extent to which existing legal rules limit the power of a property owner to control by conveyance during his life or at his death the ownership and use of the property which he has at his disposal; what are the objectives of these rules; and to what extent should they be modified or abolished in the light of their present-day operation and of sound public policy.

The qualifications of Professor Simes in this field are so impressive and well known as to need no elaboration, consisting as they do of his introductory training in property law under the guidance of a master, the late Harry A. Bigelow; his thirty-seven years of experience in teaching the law of property and fiduciary administration; and the publication of several standard works covering these topics, including his authoritative treatise on Future Interests. When he summarizes views and observations which are the fruit of this extensive and intensive study the profession may well listen attentively.

Before proceeding to discuss briefly the content of these lectures the reviewer desires to pay tribute to the manner and method in which they are presented. The language is clear and direct. The sentences are short and the terminology simple and easily understood. Involved structure and abstruse phrases are avoided. Common sense and moderation are everywhere evident. In short Professor Simes has given us a readable and interesting discussion of a subject which is often treated with mystery and confusion.

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\* Public Policy and the Dead Hand. By Lewis M. Simes. Ann Arbor, Michigan: The University of Michigan, 1955. Pp. xxii, 163.

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MR. BOGERT is Professor of Law at Hastings College of Law, San Francisco. A former Dean of the Cornell University Law School and Professor of Law Emeritus at the University of Chicago, he drafted several uniform acts for the Conference of Commissioners on Uniform State Laws, including the Uniform Common Trust Fund Act. He is author of several treatises on the law of Trusts.

## I

The author's first lecture, "Should the Dead Hand Distribute: Free Will vs. Family," considers the extent to which a testator should be allowed to exclude members of his family from the enjoyment of his property after his death. Here are considered dower and curtesy, the family allowance and homestead rights, the power of a spouse to elect to take a statutory share in lieu of a provision made by will, the rights of spouses under community property laws, and illusory inter vivos trusts which are in substance wills and are intended to evade the statutes giving a surviving spouse a certain share of the estate. These all involve, of course, considerable restrictions on the power of a property owner to distribute his property at death and hence are cases where the legislatures have decided that in some ways the dead hand shall not control.

Professor Simes asserts as a fundamental proposition that, "complete freedom of testation should be permitted except to the extent that there is some public policy against it." He feels that the ethical claim of a surviving spouse justifies restriction on the power of the deceased spouse to give away his property at his death and validates the claim of the survivor to a fixed share; but with reference to the children of the testator Simes contends that American testators usually treat children with fairness and do not disinherit them without reason, and hence that a child should be permitted to take against the will "only to the extent that the child is unable to provide for his own maintenance and education, and only in the amount necessary for this purpose." As to inter vivos dispositions and the exclusion of the surviving spouse Simes would follow the model of the Federal Estate Tax Law and by statute select certain described inter vivos transactions as equivalent to wills for family restriction purposes.

The rights of members of the family to take against a gift to charity are treated in a later lecture.

If one were to venture a suggestion with regard to this lecture, it would be that consideration be given to requiring by statute that at least in some instances surviving dependent parents should be entitled to a share of their child's estate.

## II

In his second lecture, "The Rule against Perpetuities: Dead Hand vs. Alienability," the author examines the claim that the rule is neces-

sary in order to make property interests alienable, to keep the channels of exchange open, to promote sales and investments, and to keep capital productive.

Admitting that the common law has a strong bias in favor of alienability, that it strikes down attempts to restrain it, and that in the case of legal interests the Rule may have some effect in insuring marketability, Simes considers whether it has much bearing on the types of future interests now customarily created.

He asserts, and it would seem with reason, that most contingent interests are now equitable, that is, the interests of trust beneficiaries, and furthermore that in most well-drawn trust instruments the trustee is given a power of sale of the trust property. A string of *legal* interests in real or personal property, some of which are contingent, is probably very rare. Problems of management and the protection of the successive owners make the trust form imperative.

Thus, Simes argues, if a trust is created to last for a period longer than that of the Rule, as far as ownership and use of the things which are the subject of the trust is concerned, there is freedom of transfer by means of the use of the power of sale, and the trustee has power to extinguish the equitable interests of the cestuis in these things and to give a perfect title. The fact that the right of the cestuis to have the trust enforced, and the consequent equitable title to the trust res from time to time, may be inalienable by the cestuis, either because of the contingent nature of the cestuis' interests or because those interests are affected by a spendthrift clause, is not of any moment from the public point of view. The stocks, bonds, mortgages, land, and other things pass freely into the flow of commerce.

As buttressing this argument as to the relative unimportance of the Rule nowadays Simes cites the English Property Act of 1925 which puts property under a trust with a power of sale in the trustee, the power of American courts to order a sale of future interests in land and a reinvestment of the proceeds which would cut off contingent interests, and the recent English statutory tendency to allow the condemnation of land (including contingent interests) where the property is unproductive as it stands but can through condemnation be put to some good use.

Thus, from the point of view of promoting alienability of property, this seems to leave need for the rule only in the relatively small percentage of deeds and wills where legal contingent interests are

created or where there are contingent interests under a trust which gives the trustee no power of sale. Even in this latter case, however, the need for the Rule may be said to be reduced by the power of equity to order a sale of the trust property where it is desirable.

### III

In his third lecture Professor Simes considers the justifications for the Rule which can be advanced, aside from obstruction of alienation.

As to the argument that the Rule prevents the undue concentration of wealth in the hands of a few, he agrees with Professor Leach that income and estate taxes effectively prevent this evil, and so the Rule is not needed for that purpose.

Simes rejects the suggestion that the Rule is useful in bringing into play the doctrine that the fittest should survive and that socially undesirable weaklings should not be protected. The Rule permits one generation of weaklings to be protected, and the policy of present-day society is to care for the weak and let the fit look out for their own welfare.

The lecturer finds grounds for the continuance of the Rule in that it strikes a fair balance between unrestricted testamentary disposition by the present generation and unrestrained control by future generations. He apparently considers it a compromise of the contesting claims of these two interests.

Mr. Simes also asserts that the Rule is needed to insure that the living shall from time to time be able to decide how existing property shall be enjoyed, a result he deems in accord with public policy. Where there are contingent interests in the cestuis of a trust, the power of sale of the trustee does not, he argues, give complete freedom of use of the trust res, since risk investments of trust funds would not normally be legal and since trust property can be used for capital investment only and not for the purchase of consumer goods. Hence, unless the Rule puts some control on the length of the contingency of equitable interests, the social usefulness of the trust property will be restricted.

Simes also comments that future interests under trusts may be handicapped by conditions which control the conduct of the donee, and gifts over in cases of breach of these conditions. The Rule is needed to abbreviate the time during which these conditions may endure, even though the trustee has a power of sale.

He then discusses several criticisms of various features of the Rule, as it has been construed by the courts, on the assumption that if the Rule is to be retained, some of its provisions should be amended. First, the Rule deals with possibilities, however remote. The gift must stand up under all conceivable conditions. Secondly, the validity of a contingent interest is determined under the Rule as of the date of its creation and not by events which have transpired later. It is immaterial that at the time of litigation all chance of a remote vesting of a contingent interest has been removed. Thirdly, remoteness of vesting results in the total invalidity of the interest, rather than in its partial destruction or acceleration of vesting. (It might have been added that the invalid interest often drags down with it preceding interests which are perfectly good.) Fourth, it is said that the Rule should apply to interests which will take effect in *possession* (although not in interest) at remote dates, since from a practical point of view they obstruct alienation. Fifth, there is criticism of the period—lives in being and twenty-one years. Sixth, it is sometimes urged that the Rule should be applied to possibilities of reverter and rights of entry, but is not.

The lecturer next examines proposed changes with reference to the Rule. He is opposed to complete abolition and the substitution of another rule, on the ground that attempts of this type in New York and elsewhere have been unsuccessful and have caused much litigation. He does not favor the "wait and see" doctrine by which the validity of contingent interests is to await the outcome of events and decision be reserved until it can be learned whether contingent interests actually do become vested at a remote date, since this often involves undesirable uncertainty in property ownership for a protracted period.

Simes would give the courts power to construe the disposition in such a way as to avoid violation of the Rule and to accomplish the result intended by the donor as nearly as possible. In addition he would allow the application by the courts of the *cy pres* principle so that where vesting was to occur at the end of a period of years greater than twenty-one, it would be accelerated to occur at the end of twenty-one years. He would also adopt a rule of construction that gifts to occur on the happening of some event like the probate of a will should be deemed to be subject to the condition that the probate be within twenty-one years, and in the case of vesting at the death of the widow of a named person there should be an implied condition that such widow be a person in being at the time of the conveyance.

Simes would not give blanket *cy pres* powers to courts administering the Rule. He would in substance bring possibilities of reverter and rights of entry under it by limiting their duration. He is also inclined to believe that the Rule should require interests to vest in *possession* as well as in interest within the period of the Rule, which would be a considerable extension of it.

The reviewer offers the following comments on the second and third lectures and the Rule:

A large percentage of the bar is ignorant or poorly informed about the Rule. The course in Future Interests is generally regarded by law students as extremely difficult, is usually elective, and a great many students do not take it.

This inadequacy of understanding of the Rule is reflected in the draftsmanship of wills and deeds. The pitfalls and traps are not foreseen. There is no intent by draftsmen or testators to violate the Rule.

There is a large amount of wastage of estates in litigation over perpetuity problems arising out of construction of instruments or application of the law.

Many gifts are stricken down and the property given to relatives who were never intended to benefit, when the donor actually never intended to violate the Rule, or if his attention had been called to the problem would have reworded his gift so as to avoid violation.

The amount of public benefit from the application of the Rule is small, and is more than offset by the disadvantages named above.

The situation can be greatly improved by the adoption of relatively simple legislation, some of which has been suggested by Mr. Simes in his lectures and by Mr. Leach as a basis for the statutes recently adopted in New England and Pennsylvania. The three principal ideas which appeal to the reviewer as desirable amendments to the Rule are (1) a statutory rule of construction creating a presumption of lack of intent to violate the Rule; (2) the *cy pres* doctrine; and (3) the "wait and see" rule.

Under the rule of construction it would be provided that if a donor did not expressly state that the vesting was to occur after the lives of unborn persons or after a period exceeding twenty-one years, it should be presumed that he intended the period to be limited to lives in being in the one case or to twenty-one years in the other instance. It is believed that such a presumption would be realistic, that is, would conform to the donor's actual state of mind or to the results he would

have intended if he had appreciated the situation. Instead of taking the most pessimistic view of the construction problems, as the courts do at the present time, the most optimistic attitude would be taken. Instead of searching for remote possibilities which would give ground for invalidating the gift, the courts would be bound to assume that the transferor intended his gift to take effect and to comply with the law.

The *cy pres* doctrine (already applied in the analogous field of accumulations) would require the courts to lop off excessive portions of a period of contingency, where they were expressly provided for, instead of invalidating the whole gift. Thus, a contingency of thirty years would be reduced to twenty-one; and a delay in vesting for lives in being and others not in being would be permitted to operate during the period of the lives in being only.

Finally, the "wait and see" rule, recently adopted in Pennsylvania and three New England states, seems to the reviewer very sensible and not to be attended with great inconveniences. True during the period of waiting there will be uncertainty whether the future interest will be good and so whether one person or another will be the owner, but nearly all of these cases involve trusts where the trustee's power of sale nullifies any social disadvantage as to inalienability, and the trustee's uncertainty concerning the person to whom he is to pay or deliver will be resolved when it comes time for the trustee to act.

While lawyers and judges apparently have a respect for the Rule amounting almost to veneration, recent experience would seem to show that an organized movement for the modification of the Rule along the lines suggested would have a good chance of success, especially if backed by title companies and corporate trustees. Indiana, California and Michigan have recently overhauled their future interest law, and Pennsylvania, Massachusetts, Maine and Connecticut have adopted the "wait and see" principle.

#### IV

Professor Simes' fourth lecture, "Should the Dead Hand Increase Its Grasp: The Policy against Accumulations," gives the history of the rules regarding accumulations in England and the United States, beginning with *Thellusson's Case* and *Thellusson's Act*, outlines the common law and statutory development of the subject in this country, and expresses the view that accumulations are limited to the period



of the Rule against Perpetuities in the case of private trusts, and to a reasonable period to be approved by the courts in charitable trusts.

The lecturer next considers the public policy relating to accumulations, mentioning three possible arguments in favor of some limitations, namely, (1) accumulations take property out of commerce (render it inalienable); (2) they encourage undesirable concentrations of wealth in one family or group; (3) they postpone the enjoyment of income from the present to future generations.

Simes denies that the income is kept out of commerce, since it will not be set aside as money but will be invested by the trustee in things which will be usually freely transferable through the trustee's power of sale. He discounts the dangers of concentration, alleging that the growth of funds through accumulations is smaller and slower than generally supposed, because much of the gain is drained off by income taxation, mismanagement or misfortune, or business depressions. He believes that the policy against permitting the former owner to control the use of the income of property by the future owners thereof is a valid argument for control. He feels that the rules are framed to strike a balance between some control in the donor who made the fortune and some power in the donee to decide how current income is to be used.

As a result of this consideration Simes favors neither lengthening the period of permitted accumulations beyond lives in being and twenty-one years, nor shortening the period, as, for example, to a two-life period or to the minority of a beneficiary. The New York legislation, followed in some other states, limiting accumulations to minorities only is said to have been productive of much litigation and to be too short to enable donors to accomplish legitimate objectives. As examples of litigation provoked by this type of statute Simes cites the cases concerned with the question whether an accumulation is involved in the case of stock dividends, paying off encumbrances, paying insurance premiums, or providing for apportionment between successive tenants. Parenthetically it may be suggested by the reviewer that these problems may arise under any system of accumulation law and do not constitute an argument for one plan or the other, but rather are grounds for legislation giving a clearer meaning to the word "accumulation."

Simes expresses the opinion that the common law rule against accumulations is rarely needed, because a provision for a very long accu-

mulation is likely to involve remote gifts of the accumulations which will be void under the Rule against Perpetuities, and also because many trusts to accumulate will be terminable at the will of the cestui where the doctrine of *Clafin v. Clafin* is not applied. All in all the lecturer favors the continuance of the common law rule, and would tie accumulations and perpetuities as closely together as possible.

With respect to accumulation questions the reviewer makes two suggestions. While there is some authority to the effect that accumulations are limited in the case of private trusts by a common law rule to lives in being and twenty-one years, the slightness of the basis for this rule might well be justification for the enactment of a statute making it clear what the limits are, as has recently been done in an amendment of the California Civil Code; and in such an act it could be made clear that only mandatory accumulations are controlled and exactly what is meant by an accumulation.

Secondly, would it not be desirable to permit a settlor to direct accumulations for charity for a fixed period, say, fifty years, and for such other period beyond the fifty-year term as the court might approve as reasonable? As the law stands now in most states trustees for charity must go to court to secure court approval of every accumulation before they can safely act. Fifty years would generally be held a reasonable period by the courts under the present system. Under the proposed change if the Attorney General was convinced that the fifty-year accumulation provision of the settlor was undesirable, it would seem clear that on his application the court would exercise its overriding power to eliminate undesirable administrative provisions, but the trustee would be protected in acting under the accumulation clause until the decree of the court modified it.

## V

In his fifth and last lecture Professor Simes considers the law regarding the freedom of a donor to frame a charitable trust to suit his own desires and views as to social interest.

First, there are rather important controls in some states preventing testators from giving to charity by wills executed shortly before death and from giving more than a certain fraction of the estate to charity when close relatives survive, and in some states charitable corporations are limited as to the amount of property they may take.

Next, Simes discusses the special privileges accorded by the law to

the creator of a charitable trust in that he is not required to name definite beneficiaries, may make his trust perpetual or of indefinite duration, may provide for a gift over from one charity to another at a remote date, and is less limited as to accumulations than in the case of private trusts.

In considering whether the rule permitting perpetual charitable trusts is defensible Simes argues that there is little objection to such trusts on the ground of removal of property from commerce, since complete ownership of the trust property is usually freely transferable by the trustee, although this power does not extend to using the capital for risk ventures.

Perpetual charitable trusts do prevent the current generation from deciding what shall be done with trust capital and income. That has been decided by the settlor, subject to the use of the *cy pres* power in cases of impossibility or illegality. The problem is in essence whether the disadvantages of dead hand control outweigh the social gains coming from the administration of the trust.

Simes considers whether it is possible to define charity more clearly, or to classify charities into those of major and minor importance, and inclines toward negative answers. While perpetual charitable trusts possess a defect in that they may become obsolete, due to social and economic changes, this objection is to some extent removed by the power of the court to use *cy pres* and to remould the trust to meet the changed conditions. However, the doctrine has been applied with varying degrees of liberality, ranging from a requirement of strict impossibility to lesser degrees of difficulty. By a description of the history of the Mullanphy trust in St. Louis and the Benjamin Franklin trusts in Boston and Philadelphia Simes illustrates the delay, expense, and unsatisfactory results of the use of *cy pres*.

Professor Simes is opposed to narrowing the definition of charity or to making a flat limitation on the life of all charitable trusts. He cites the Sailors' Snug Harbor trust, set up in 1801, as an ancient trust which is still operating satisfactorily and doing much good. He favors some relief from the disadvantages of perpetual charitable trusts by enlargement of the *cy pres* power, making it usable by the courts, with the consent of the trustees and the donor (if living) after a period of thirty years, not only in cases of impossibility or impracticality but also inexpediency; and he would give charitable trustees

power to use trust capital after the lapse of a fixed period since the trust began (say thirty years).

The reviewer agrees that the *cy pres* rule should be to some degree relaxed. It is believed that a proper balance between respect for the wishes of the deceased donor and the anxiety of his successors to see his desires carried out on the one hand, and the interests of the public for whom all charitable trusts are created on the other hand, could be maintained if "impracticality" and "inexpediency" were added to the list of emergencies justifying a change in the trust. The latter types of application might be granted only after a sufficient period had elapsed so that the feelings of members of the donor's immediate family would not be disturbed by the change. Possibly one generation, or thirty years, would be sufficient. After that it seems unjustified to require the trustees to make a wasteful and unwise use of the funds. The actual expansion of the *cy pres* power in Scotland and the proposed enlargement of it advocated in the recent Nathan report in England seem to represent desirable trends.

To avoid the waste and delay which Simes shows so clearly have occurred in certain famous American cases of obsolescent charities it would be well for settlors to consider granting the *cy pres* power to their trustees, as has been done with such good effect in the case of community trusts.

Lastly, it is urged by the reviewer that other states follow the lead of Pennsylvania in abolishing the distinction between a broad and narrow charitable intent in the law of *cy pres*. The cases apply the rule only where it is found that the donor had a general or broad charitable intent, as distinguished from a purpose to benefit a limited and particular charitable object. It is submitted that the *cy pres* doctrine should be applied in all cases of the failure of the charity, unless the settlor clearly directs otherwise. Drawing the line between a broad intent and a narrow intent is extremely difficult, frequently there is very little reason for deciding which was in the testator's mind a good deal of fiction and artificiality is displayed in the opinions, and the decisions are often conflicting and of dubious soundness.

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