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Real Property

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exceed $500. The probate court had not required the posting of a bond before issuing letters of guardianship. *Held:* RCW 11.88.100 provides that when the estate of a minor exceeds $500 posting of a bond is a condition precedent to issuing letters of guardianship. "It is the gross value of the minor's estate, not claimed net value, which determines whether a guardian's bond is necessary." The court below had no jurisdiction to enter an order directing the putative guardian to settle the minors' claims and to execute a valid release.

Probate—Filing of Creditor's Claims. In *Shumate v. Ashley,* 46 Wn.2d 156, 278 P.2d 787 (1955), *P* filed a conformed copy of a creditor's claim with the executor of the decedent's estate. The executor rejected it contending that the claim was not in accordance with RCW 11.40.010-.030. *Held:* that the original claim, with its disposition noted thereon, must be filed and become a part of the court record; that, while the Washington State Bar Association's probate form No. 28 provides for the use of two duplicate originals, it is not controlling, being drawn only in an excess of caution. Thus, the executor must be satisfied with a conformed copy served by regular mail.

REAL PROPERTY

Power of Revocation. In *Grove v. Payne*[1] a power of revocation was found to have been reserved in the grantor of an interest in real property. A deed conveying a fee simple was conditioned with the words ". . . subject to [grantor's] will made prior to this date, with such codicils as may be added. . . ."[2] The grantee had leased a life estate to the grantor subsequent to the grant. The lessor retained a right of entry conditioned upon, *inter alia,* an attempt to assign the leasehold interest without permission. The grantor-lessee thereafter attempted to assign the leasehold interest by quitclaim deed to a third party. This attempted assignment caused the grantee-lessor to seek an ejectment of the defendant and a quieting of title.[3] In sustaining the plaintiff's claim to a right of entry the court, after holding that the quitclaim deed failed to pass the leasehold interest, also held that it was not valid as a conveyance of the grantor's power of revocation by testamentary disposition. There was no elaboration to why the provision in the deed constituted a power of revocation by testamentary disposition. The court's silence raises a question concerning the distinguishing elements delineating a power of revocation from a power of appointment. The two concepts bear a close relationship but the authorities prefer to distinguish them.[4]

[1] 147 Wash. Dec. 411, 288 P.2d 242 (1955).
[2] *Id.* at 412, 288 P.2d at 243.
[3] The plaintiff relied on RCW 7.28.010.
[4] See, *e.g.,* RESTATEMENT, PROPERTY § 318, comment *i* (1940); Old Colony Trust Co. v. Gardner, 264 Mass. 68, 161 N.E. 801 (1928).

A power of revocation is the reservation of a power in the grantor to put an end to the estate granted.[5] It is often said that this power must operate to revest the interest granted in the grantor or that the power of revocation operates in favor of the grantor.[6] On the other hand, a power of appointment is a power enabling the donee to designate, within such limits as the donor may prescribe, the transferees or appointees of the interest.[7] The principal distinction then, is that an exercise of a power of revocation must revest or return the interest to the grantor whereas an exercise of a power of appointment can, and practically speaking almost always does, vest the interest in someone other than the donor. Applying these observations to the *Grove* case it appears that the deed conveyed to the plaintiff actually reserved a testamentary power of appointment. The lack of express language is of no moment as such is not necessary to the creation of either the power of revocation or appointment. If the intent of the donor can be shown it will govern.[8] In the instant case the grantor was empowered to devise the estate directly to any person, the plaintiff's deed being subject to the provisions and codicils of the grantor's will. Thus it appears the court relied on the fact that the power *remained* in the grantor as the basis of preference for a power of revocation. If so, then this jurisdiction is clearly at odds with the prevailing concept that a donor and donee of a power of appointment may be the same person.[9]

Powers of revocation are predominantly utilized in the trust device while only relatively occasionally reserved in conveyances of land.[10] This factor of customary usage lends additional support to the finding of a power of appointment. Furthermore a testamentary power of revocation is somewhat anomalous in concept. The testator revests the interest in himself (creating a conceptual difficulty in that it is impossible to vest an interest in a deceased person) only to have it simultaneously pass by devise or intestacy to others.

Of course, the court may not have wished to infringe upon the concept of the power of appointment in this jurisdiction intentionally. The

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[5] Clifford v. Helvering, 105 F.2d 586 (8th Cir. 1939) (dicta citing TIFFANY, REAL PROPERTY, (2nd ed. 1049) reversed on other grounds Helvering v. Clifford, 309 U.S. 331 (1940).

[6] See 3 TIFFANY, REAL PROPERTY § 681 (3d ed. 1939); RESTATEMENT, PROPERTY § 318, comment *i* (1940).

[7] See, *e.g.*, RESTATEMENT, PROPERTY § 318 (1) (1940).

[8] See *In re* Lidston's Estate, 32 Wn.2d 408, 202 P.2d 259 (1949); RESTATEMENT, PROPERTY § 323 (1940); RESTATEMENT TRUSTS § 330, comment *a* (1935).

[9] See RESTATEMENT, PROPERTY § 319 (1) (2), comment *b* (1940); Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 75 N.E.2d 3 (1947).

[10] *Id.*, § 24, comment *c* (1936).

recent case of *In re Lidston's Estate*,[11] the definitive case on powers of appointment in Washington, is conventional in its treatment of such powers and may be interpreted to imply that powers of appointment remaining in a grantor-donor are possible.[12]

The court stated that a power of revocation is not an interest in land which can be transferred to another. As an adjunct to this it said that an attempt to transfer or alienate the personal power does not cancel or destroy it. This is clearly in line with the weight of authority.[13] But it is the law in many jurisdictions that a power, the execution of which involves no discretion or element of trust, may be delegated to others.[14] Had it been advocated that this was an attempt to delegate a general power the result would probably have been the same, for it would seem that if an attempted inter vivos *exercise* of a testamentary power is ineffective,[15] so also would be a delegation under the same circumstances. But the matter of delegability of powers in this jurisdiction might have been clarified. Taken in context, the general import of the court's language in the *Grove* case appears to be that the exercise of a power must be effected personally by the donee or grantor.

Rule Against Perpetuities—Factors Favoring a Vested Interest—The Status of the Rule Against Undue Postponement of Enjoyment in Washington. *In re Lemon's Estate*[16] involved an alleged infraction of the rule against perpetuities and a closely related trust concept termed the rule against undue postponement of direct enjoyment. The action was brought to determine the validity of a trust to be derived from the $150,000 residuary estate of Ella C. Lemon, devised to the National Bank of Commerce of Seattle. The beneficiary was the Yakima Valley Memorial Hospital Association. The testatrix provided

[11] 32 Wn.2d 408, 202 P.2d 259 (1949).

[12] The case involved the question as to whether the residuary clause in a will had created an effective general power of appointment in the executor. In holding that such a power had been created, the court defined a power as "... a power or authority given to a person to dispose of property, or an interest therein, *which is vested in a person other than the donee* of the power." (emphasis supplied) It would seem implicit that a grantor of lands who retains no further interest therein could qualify as a donee under this definition.

[13] Jones v. Clifton, 101 U.S. 225 (1879); Farmers' Loan and Trust Co. v. Bowers, 29 F.2d 14 (2d Cir. 1928); 72 C.J.S., *Powers* § 19 n.38 (1951).

[14] See 13 A.L.R. 1055, 104 A.L.R. 1459.

[15] See PERRY, TRUSTS AND TRUSTEES, § 511 *b* (7th ed. 1929); *cf.* RESTATEMENT, PROPERTY § 340 (1940). The donee of a power not presently exerciseable cannot contract to make an appointment; See also 72 C.J.S., *Powers* § 39 n.93 (1951). The rationale principally relied on is that the donee has no right to exercise the power in a manner contrary to the wishes manifested by the donor in the creation of the power. *See* Vinton v. Pratt, 228 Mass., 468, 117 N.E. 919 (1917); Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 75 N.E.2d 3 (1947).

[16] 147 Wash. Dec. 21, 286 P.2d 691 (1955).

for distribution to the beneficiary as follows:

> My said trustee shall pay annually the net income of said trust estate to the Yakima Valley Memorial Hospital Association, together with $2,500 annually from the principal of said trust. In the event that it shall be impossible for my said trustee to make payments [to the beneficiary] ... trustee shall make said payments to some other suitable charitable organization at its full discretion.[17]

From the terms of the will and the amount of the gift it is apparent that it would require approximately sixty years to distribute the corpus of the trust.

The question primarily presented was whether equitable title was to vest at some future date possibly beyond the period allowed by the rule against perpetuities,[18] as asserted by the appellant, the testatrix' adopted son, or whether it had vested immediately. The court held there was a present vesting.

The reasons given for the finding are somewhat obscure. Among the more fruitful passages in the opinion are the following:

> Quoting *In re Quick's Estate*[19] the court repeated, "It is a well settled and just rule that the law favors the early vesting of estates."[20]

> "The direction to the trustee to pay *annually the net income* of the trust together with a part of the corpus, leaves no doubt that the testatrix intended a present vested gift of the equitable estate."[21]

> "... the beneficiary is ascertained and in existence; the trustee has no discretion, but must pay the entire income to the beneficiary, and the duration of the trust is easily ascertainable ...."[22]

From these remarks the court appears to rely on (1) the constructional preference for vested interests,[23] (2) the mandatory requirement that distribution of all income (and also a portion of the corpus) be made to the beneficiary by the trustee,[24] and (3) the fact that the beneficiary is presently ascertained and in existence.[25]

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[17] *Id.* at 22, 286 P.2d at 692.

[18] The rule against perpetuities is usually stated as prohibiting the creation of future interests or estates which by possibility may not become *vested* within a life or lives in being and twenty-one years. See, *e.g.*, Denny v. Hyland, 162 Wash. 68, 297 Pac. 1083 (1931); GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942); SIMES, FUTURE INTERESTS §§ 490, 498 (1936).

[19] 33 Wn.2d 568, 206 P.2d 489 (1949).

[20] 147 Wash. Dec. at 23, 286 P.2d at 693.

[21] *Id.* at 24, 286 P.2d at 693.

[22] *Id.* at 24, 286 P.2d at 693.

[23] See 57 AM. JUR., *Wills* § 1218 (1948); Shufeldt v. Shufeldt, 130 Wash. 253, 227 Pac. 6 (1924).

[24] See SIMES, FUTURE INTERESES § 356 (1936) *cf.* Annot., 172 A.L.R. 455 (1948).

[25] *Id.* § 95.

There are other factors in the *Lemon* case which are often utilized to settle the perplexing question of "vested or contingent?" and which might have been relied upon to reinforce the court's decision.[26] There is a presumption against partial intestacy in the interpretation of a will when two constructions are possible, one of which will pass the gift by devise.[27] With regard to the gift over to another organization in the event that payment to the Yakima Hospital was impossible, the court said, "It is well settled that a contingent gift over does not affect the vested character of an estate."[28] From this it appears the court felt that the dissolution of the hospital association was a condition subsequent to the vested character of the trust. The presence of a contingent gift over to another taker often raises a query as to whether some factor such as survivorship is a condition precedent to the vesting of an interest.[29] The contention that continued existence of the hospital association is a condition precedent to the vesting of the interest is perhaps the strongest argument available to the appellant. But it should not be permitted to prevail where, as here, the wording is susceptible to a finding of condition subsequent, for the previously mentioned reasons that the vested interest and a valid devise are preferred.[30] Most simplified definitions of the word "contingent" say it refers to an interest so limited that the right to possession or enjoyment is subject to a condition precedent other than termination of prior interests.[31] Other than the presence of the gift over, there appears to be a significant lack of other factors in this case which could arguably be viewed as conditions precedent. There is no question as to the beneficiary's present identity nor is its legal capacity presently to take the interest in doubt.

Where the trustees hold the gift solely for the benefit of the person ultimately entitled to it, a present vesting of equitable title is favored.[32] This concept is adaptable to the instant case where the gift over is considered a condition subsequent. A mere postponement of possession or enjoyment per se does not tend to make a gift contingent.[33]

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[26] For suggested tests and rules used to distinguish vested and contingent remainders see *Id.* §§ 68, 95. For rules of construction often used in construing wills with regard to whether the interest devised is vested or contingent see *Id.* § 351.

[27] *Id.* § 351.

[28] 147 Wash. Dec. at 24, 286 P.2d at 693.

[29] SIMES, FUTURE INTERESTS § 358 (1936).

[30] *Id.* § 95. For a comment on the distinction between contingent estates and estates vested, subject to defeasance see Annot., 131 A.L.R. 712 (gift over discussed at 718) (1941).

[31] *Id.* § 347.

[32] *Id.* § 351.

[33] See, *e.g.*, Annot., 110 A.L.R. 1450 (1937).

The second significant question in the *Lemon* case arose from the appellant's alternative contention that there was an undue postponement of enjoyment of the corpus of the trust with the result that the trust must fail.[34] There is a conflict of authority as to whether a rule embodying such a concept should be recognized.[35] Washington is now apparently in the camp of those jurisdictions which ignore whatever development the rule may have attained. The court said, "The trust ... is to continue for a definite period, which, in view of her intended purpose, is reasonable."[36] This period is greater than that allowed by the rule.

It should be noted that the rule against undue postponement of enjoyment does not apply to charitable trusts.[37] The *Lemon* case was up on demurrer and apparently no issue was raised as to whether the Yakima Valley Memorial Hospital Association is a charitable institution. Assuming that it is charitable it is probable that the court would not take judicial notice of this in light of *Susmann v. Y.M.C.A.*[38] In any event the decision favoring the respondents made the charitable question inconsequential.[39]

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[34] The rule against undue postponement of enjoyment is generally stated to be that a private trust must be limited in duration to a period not longer than lives in being when the trust begins and twenty-one years thereafter. See, *e.g.*, BOGERT, TRUSTS AND TRUSTEES § 218 (1951). Thus the time limitation is the same as that in the rule against perpetuities.

[35] See GRAY, RULE AGAINST PERPETUITIES § 412 n.1 (4th ed. 1942); SIMES, FUTURE INTERESTS § 553 (1936); RESTATEMENT, PROPERTY § 378 (1944).

[36] 147 Wash. Dec. at 25, 286 P.2d at 694. In Denny v. Hyland, 162 Wash. 68, 297 Pac. 1083 (1931), the court stated that the rule against *perpetuities* has nothing to do with the postponement of enjoyment of vested estates. A private trust was held bad because there was no vesting of equitable title, primarily due to a condition precedent of survivorship with regard to the individual members of a class of beneficiaries. The clear implication was that if the interests had vested, the trust would have been sustained, despite the fact that equitable and legal title could have been separated for a period longer than a life or lives in being and twenty-one years.

[37] SIMES, FUTURE INTERESTS § 554 (1936); BOGERT, TRUSTS AND TRUSTEES § 352 (1951); THOMPSON ON WILLS § 436 (3rd ed. 1947).

[38] 101 Wash. 487, 172 Pac. 554 (1918). The court held the charter of the particular association involved in the case would necessarily have to be consulted to determine if it was of a legally charitable status. For a note on charitable corporations in this jurisdiction see 12 WASH. L. REV. 146 (1937).

[39] There is an exception to the rule against perpetuities applied in favor of a remote charitable gift following a valid, non-remote charitable gift. If the gift to the hospital is charitable the gift over to another charity, though obviously remote, would be good under this exception. It must be noted that this does not resolve the question of whether the interest is vested with regard to the initial gift. Therefore this exception would not aid the hospital in the instant case unless the court felt that each annual payment was a separate gift. In such a case it is apparent that twenty-one non-remote gifts would vest in the hospital. The subsequent payments could be construed as gifts over from charity to (the same) charity and so within the exception discussed herein.

Real Property—Easements by Prescription. In *Gray v. McDonald*, 46 Wn.2d 574. 283 P.2d 135 (1955), plaintiffs sued to enjoin interference with an alleged easement by prescription. Defendant filed a cross-complaint for damages sustained by a temporary injunction. The dispute was over a fifty foot strip of land, located between the parties' properties in the city of Tacoma, which had been used by plaintiffs and the public as a roadway since 1910. In remanding the case for a new trial the court held that plaintiffs had established a prima facie case of an easement by prescription. Citing authority, the court recited the general principles of the law of prescriptive rights, as evolved in Washington, as follows: "(1) Easements may be acquired by prescription. (2) The period necessary to establish a prescriptive right is ten years. (3) It is not necessary to the establishment of a prescriptive right that the claimant make declarations of adverse intent. (4) The burden of proving a prescriptive right rests upon the one to be benefited. (5) A use, at its inception, is presumed to be permissive. (6) If the user is initiated by permission, it does not ripen into a prescriptive right *unless* there has been a distinct and positive assertion by the dominant owner of a right hostile to the servient estate. (7) The question of adverse user is a question of fact. (8) Such adverse use must be open, notorious, continuous, and uninterrupted over a uniform route, and with knowledge of such use by the owner at the time when he was able in law to assert and enforce his right. (9) When all the essential elements listed in (8) have been established, there is a presumption that the use is adverse. The burden is then upon the servient owner to rebut the presumption by showing that the use was permissive." (at p. 578).

Public Easements by Prescription—Implied Dedication. In *Van Sant v. City of Seattle*, 147 Wash. Dec. 178, 287 P.2d 130 (1955), the plaintiff brought action to quiet title in land abutting a city street. The city of Seattle, relying on previous decisions in this jurisdiction, contended that a public easement by prescription is not confined to width actually traveled but includes the width reasonably necessary for public use. In the instant case this would involve taking twelve feet of the plaintiff's property in order to complete a planned sidewalk. The plaintiff's predecessor had placed fences, cultivated a yard, and placed part of the house itself on the disputed land during the statutory period. The court held that, as public easements by prescription are based upon an implied dedication by the owner of the land, no presumption of dedication could arise in the instant case in light of the use and occupation of the disputed land by plaintiff and his predecessor. The requisite of an implied dedication is new to the case law of this jurisdiction.

Risk of Loss in Eminent Domain Proceedings—Real Estate Covered by Executory Contract. Transfer of title by virtue of right of eminent domain is not necessarily equivalent to a "sale". In *Pierce County v. King*, 147 Wash. Dec. 292, 287 P.2d 316 (1955), the vendors of land taken by eminent domain proceedings contended the condemnation award was presently payable to themselves on the ground that condemnation is equivalent to sale. The contract provided that upon sale by vendee, the vendor would be entitled to the principal sum plus interest to the end of the contract. No provision was made for taking by eminent domain. The court, noting that there is a conflict of authority on who should bear risk of loss with regard to condemnation proceedings, adopted the "definite and easily applied" rule, found in 9A U.L.A. § 1 (b), which provides that where title or possession has been transferred, the vendee is not entitled to rescind the contract nor to obtain a restitution of the payments made. The court also held that condemnation was not a "sale" within the meaning of the non-assignability clause in the instant contract. The court distinguished *American Creameries Co. v. Armour and Co.*, 149 Wash. 690, 271 Pac. 896 (1928), by suggesting

that collateral circumstances of each case must be considered, *e.g.*, intents and purposes of the parties; the construction of the instrument as a whole.

SALES

Liability of a Manufacturer to Persons Other than His Immediate Vendee. The recent case of *Freeman v. Navaree*[1] illustrates the liberality of the supreme court in finding an agency relationship in order to meet the privity requirement in an action for breach of warranty under the Uniform Sales Act.[2] The court also dealt another blow towards the dying concept that privity plays a part in a negligence action against a manufacturer of personal property.[3]

In this case, the appellant (plaintiff below) employed a general architect for the development of the Bellevue Shopping Square. The architect, with appellant's approval, hired a heating consultant to aid him in the design of the project. The respondent manufacturer represented to the heating consultant that it manufactured pipe units for a completely engineered underground heating system of long life and high thermal efficiency. On the basis of these representations,[4] respondent's pipe units were included in the contract specifications for the "Square's" underground heating system. The contract was let to a contractor who purchased and installed the pipe units according to the contract specifications. In 1949, two years after construction, the pipes began to leak. The respondent, the heating consultant, and the contractor, attempted to repair the pipes until 1951, when the efforts were abandoned. The appellant sued these three parties in the lower court. At the close of the appellant's evidence, the court dismissed the suit against the respondent because of lack of privity. The jury later returned a verdict in favor of the heating consultant and the contractor. No appeal was taken from the jury verdict. The supreme court reversed the lower court's dismissal for the following reasons:

1. Implied and Express Warranty[5]

The court began its decision by a general discussion of the privity requirement in warranty actions. The discussion pointed out that the privity requirement was born in an age where the consumer dealt directly with the manufacturer on a personal basis. The opinion went on to emphasize the significant change in modern day business methods

[1] 147 Wash. Dec. 686, 289 P.2d 1015 (1955).
[2] RCW 63.04.
[3] PROSSOR, TORTS § 84. (2d ed. 1955).
[4] The minority opinion felt the heating consultant did not rely on the respondent's representations.
[5] Implied Warranty: RCW 63.04.160; and Express Warranty: RCW 63.04.130.