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Legislation - Future Interests - Extinguishment of Contingent Remainder Interests in the Unborn

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RECENT LEGISLATION

LEGISLATION—FUTURE INTERESTS—EXTINGUISHMENT OF CONTINGENT REMAINDER INTERESTS IN THE UNBORN—Under the somewhat misleading title of "An Act To Permit the Dissolution of Estates Tail and To Permit the Conveyance of Contingent Remainder Interest and To Provide Procedure Therefor," Arkansas has enacted legislation which partially revitalizes an ancient common law rule that other legislatures and courts have been trying to eliminate for some hundred and fifty years—the doctrine of the destructibility of contingent remainders.[1] Arkansas' Act 163[2] is thus unique among the modern statutes designed to increase the alienability of estates fettered with outstanding future interests.[3] The particular problem of alienability which prompted the act arises from this typical situation: an owner of land, *O*, makes a conveyance "To *B* and the heirs of his body." At common law, this would have created a fee tail estate in *B*. An Arkansas statute[4] enacted in 1837, however, precludes the creation of fee tail estates and decrees that any grant or devise of this nature shall be converted into a life estate in the first taker, with a remainder in fee simple to the issue of the life tenant. Thus, *B* would receive a life estate, and his children, *C* and *D*, a remainder in fee. But this remainder has long been interpreted by the Arkansas courts as contingent upon

1 See SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §209 (1956) for historical analysis.

2 Ark. Acts 1957, No. 163.

3 For a comprehensive citation of authority relating to each, see 2 POWELL, REAL PROPERTY §292 (1950). See also SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 169-173 (1953).

4 Ark. Stat. Ann. (1947) §50-405.

survivorship,[5] rather than vested, and since Arkansas is one of the few states in which contingent remainders are not alienable,[6] this estate has become unmarketable by ordinary conveyance. Even if *C* and *D* join with *B* in conveying title by warranty deed and thereby estop themselves from asserting ownership when the remainder subsequently vests,[7] a grantee still has valid grounds for rejecting the title as unmarketable.[8] But under Act 163 this fettered estate will now be substantially emancipated. Applicable retroactively,[9] the act provides that if the grantor, *O*, the life tenant, *B*, and all *living* persons who may possibly take as remaindermen, *C* and *D*, join in a conveyance, their grantee receives title in fee simple.[10] The title of the act is thus misleading in that it says nothing about the destruction of contingent remainders; yet under the above procedure the interests of all unborn remaindermen are clearly destroyed. Indeed, it is this aspect of the act which seems to constitute its basic purpose. If the doctrine of the destructibility of contingent remainders were in effect in Arkansas,[11] then *B*, the life tenant, could have conveyed to *O*, the holder of the reversion, and thus merged their two estates. This would have caused the destruction of the remainder interests in *B*'s issue. A similar merger would result if *B* and *O* joined in a conveyance to any third party. In a limited way, this is precisely what the statute appears to authorize. However, the fact that all living remaindermen are required to join might be a good indication that the destructibility rule as such did not exist in Arkansas. Also, because of ambiguities in construction,[12] the act need not be limited to the typical situation presented above.

As a model solution to the problem of alienability, the merit of Act 163 is doubtful. This is so, first, because of the act's restricted area of

[5] Horsley v. Hilburn, 44 Ark. 458 (1884); Hutchison v. Sheppard, 225 Ark. 14, 279 S.W. (2d) 33 (1955).

[6] Hurst v. Hilderbrandt, 178 Ark. 337, 10 S.W. (2d) 491 (1928). See generally 2 ARK. L. REV. 87 (1948).

[7] Ark. Stat. Ann. (1947) §50-404; Bradley Lumber Co. v. Burbridge, 213 Ark. 165, 210 S.W. (2d) 284 (1948).

[8] There may be issue born to *B* after the conveyance (in Arkansas a person is deemed capable of procreation until death) who would have a right to participate in the remainder. Or, the children, *C* and *D*, might predecease *B*, causing the remainder to vest in *B*'s grandchildren at *B*'s death. See Peebles v. Garland, 221 Ark. 185, 252 S.W. (2d) 396 (1952).

[9] Ark. Acts 1957, No. 163, §2.

[10] See id., §1.

[11] There is apparently no authority in the state on this point except Le Sieur v. Spikes, 117 Ark. 366, 175 S.W. 413 (1915), which avoided application of the doctrine by construction, and in effect made the doctrine inoperative in Arkansas.

[12] Does "conveyance" include devise, or is the act applicable only to inter vivos conveyances? Does "grantor" include devisor or successors of a deceased grantor who now hold the reversion, or is the act applicable only so long as the grantor therein is living? Does "or to other contingent remaindermen" refer to all contingent remainders, or only those created simultaneously with a limitation to heirs of the body?

effective applicability. Should the word "grantor," as used in the statute, be narrowly construed to mean only *O*, the original grantor, and not his heirs who would hold the reversion, then at *O*'s death the statute is no longer operative.[13] Also, there can be no conveyance without the assent of all the parties. Indeed, whenever a remainder, either contingent or vested, is created after a life estate, practical alienability is somewhat abridged for the life of the life tenant because of the difficulty in arriving at an acceptable division of the proceeds. Further, it would be a rare occasion when one of the remaindermen is not a minor.[14] In such instances, conveyance of the fee simple is necessarily delayed by judicial proceedings for the appointment of a guardian *ad litem*. Patently, the advantage of Act 163 in its simplicity and swiftness of procedure is then partially nullified. Secondly, in view of the available alternative methods for accomplishing identical results, the necessity of an act of such far-reaching impact is questionable. Under Arkansas law when alienation is desired to promote the best use of the land or to protect the economic interests of all the parties involved, the court of equity may be petitioned for an order approving the sale of the contingent remainder estate.[15] This procedure has the additional advantage of protecting the remaindermen not *in esse* since a share of the sale's proceeds is held in trust for those who will ultimately constitute vested remaindermen upon the death of the life tenant. In cases involving minors[16] this course is almost as simple as the one required under the act, but has the advantage of being just. On the other hand, if the legislature intended to relieve the parties from a burdensome court procedure requiring affirmative proof that a present sale will be necessarily advantageous, the act could have contained an additional provision allowing the court to approve the conveyance on the mere grounds of expediency or desire, and requiring the appointment of a trustee for investment and distribution of the proceeds. Such a statutory provision would not be unique to Arkansas in the area of future interests[17] and is utilized in several other states.[18] Again the interest of the unborn would be protected with but minimum burden on alienation. Finally, if the real purpose of Act 163 is to create a substitute for fine and common recovery, the simplest and most direct procedure would be the repeal of the earlier estate tail statute. Ever since *Taltarum's Case*[19] alienation

[13] On the other hand, should it be interpreted to mean the holder of the reversion, a conveyance would deviate from *O*'s intent, as evidenced by his conveyance, to have the after-born participate.

[14] *B*'s grandchildren as well as his children are contingent remaindermen and presumably must join in the conveyance.

[15] Walker v. Blaney, 225 Ark. 918, 286 S.W. (2d) 479 (1956).

[16] " . . . [E]quity has jurisdiction . . . to order . . . the sale . . . even if one of the remaindermen is a minor." Id. at 921.

[17] See Ark. Stat. Ann. (1947) §53-309.

[18] 2 POWELL, REAL PROPERTY §292, p. 546 (1950). But see id. at 542.

[19] Y. B. 12 Edw. IV, 19 (1472).

in fee simple by the tenant in tail has been an accepted incident of the estate tail.[20]

One further problem remains: is the act constitutional? Does the occasional sale that will be facilitated justify the general authorization to destroy the interests of the unborn remaindermen? It is generally conceded that expectancy interests are within the control of the legislature,[21] and various interests may often be constitutionally extinguished.[22] Moreover, the constitutional question in Arkansas will be primarily influenced by the case of *Love v. McDonald*,[23] which held that contingent remainders in property upon which the life tenant desires to place an oil or gas lease may be abolished under statute if part of the lease proceeds are held for those in whom the estate will vest on death of the life tenant. The opinion broadly stated in addition that contingent remainders were mere expectancies which were offered no constitutional protection.[24] Whether such contingent remainders are of sufficiently substantial character, however, to be given constitutional protection depends not upon their classification as vested or contingent, but upon other factors.[25] Even though numerous statutes authorize the sale of property as a means of unfettering estates, and have been sustained as a proper exercise of sovereign and paternal power,[26] the power upheld in the area of contingent remainders has been one not of extinction but of commutation. When courts hold that such interests are within the control of the legislature they generally mean that the legislature may compel the holder of an interest in land to accept as a substitute a corresponding interest in the proceeds from a sale of the land.[27] Indeed, this is one of the grounds upon which the *opinion* in *Love v. McDonald* can be

20 See 2 POWELL, REAL PROPERTY §196, p. 72 (1950); PROPERTY RESTATEMENT §79, and special note (1936).

21 E.g., Lee v. Albro, 91 Ore. 211, 178 P. 784 (1919).

22 See McNeer v. McNeer, 142 Ill. 388, 32 N.E. 681 (1892) (upholding legislation retroactively affecting rights of dower and curtesy); 19 L.R.A. 256 (1892). See also 19 L.R.A. 247 (1892). But the case of Tatum v. Tatum, 174 Ark. 110, 295 S.W. 720 (1927), in which the right of a contingent remainderman was said to be similar to the inchoate right of dower, should not be inadvisedly seized upon to substantiate a possible determination that the protectable attributes of the former are no greater than the latter.

23 201 Ark. 882, 148 S.W. (2d) 170 (1941).

24 The court, while recognizing that these estates have possible value, concluded that contingent remainders were not property within the contemplation of the Fourteenth Amendment. Id. at 889. *Accord:* Anderson v. Wilkins, 142 N.C. 154, 55 S.E. 272 (1906); Stanback v. Citizens Nat. Bank, 197 N.C. 292, 148 S.E. 313 (1929). *Contra:* Aetna Life Ins. Co. v. Hoppin, (7th Cir. 1914) 214 F. 928; Green v. Edwards, 31 R.I. 1, 77 A. 188 (1910).

25 See SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §136 (1956). One such factor is the recognition that the interest involved is one of probable substantial value, created by words of purchase and not limitation, and that its destruction must be balanced against the need for extinguishment in furthering the statutory policy.

26 See e.g., Geary v. Butts, 84 W. Va. 348, 99 S.E. 492 (1919).

27 Geary v. Butts, note 26 supra; Lee v. Albro, note 21 supra; Anderson v. Wilkins, note 24 supra. See also 33 IOWA L. REV. 692 at 700 (1948); SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 169-173 (1953).

criticized.[28] Accordingly, the constitutionality of Act 163 is a good deal more tenuous than that of the statute under consideration in that case.[29] Moreover, the fettering that is involved here is not to continue for more than the period of one life.[30] But having decided that the freeing of estates for alienation demanded a summary extinguishment of contingent remainders, Arkansas, by the passage of Act 163, has apparently taken a step backward in the field of real property law. The question for the Arkansas court now, however, will not be that "of choosing between alternative methods of handling the problems created by these interests, but the reasonableness of the method chosen by the General Assembly."[31]

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[28] The court was passing upon the constitutionality of a similar act empowering life tenants of estates originally conveyed in tail to execute oil and gas leases. Ark. Stat. Ann. (1947) §53-302. However, this act explicitly required the appointment by a court of a trustee to hold and invest the proceeds for the benefit of all contingent remaindermen. Thus, there was no extinguishment. Also, an argument can be reasonably made that the court's statement as to the destructibility of contingent remainders was but dictum, the act being justified under the police power to protect oil and gas reserves from depletion. See SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 188 (1953).

[29] While Act 163 was passed on grounds of convenience, the other statute was adopted under circumstances of urgency to allow immediate access to oil and gas reserves, and yet that legislature found it still appropriate to require protection of the unborn through representation.

[30] Whether or not this works an undue hardship on alienation can be inferred from a comparison with the rule against perpetuities, which represents the usual public policy against alienation and permits a fettering for longer than a single life.

[31] Trustees of Schools v. Batdorf, 6 Ill. (2d) 486 at 493, 130 N.E. (2d) 111 (1955).