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FUTURE INTERESTS-CONTINGENT CONSTRUCTION OF REMAINDER GIFT TO CHARITY

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FUTURE INTERESTS—CONTINGENT CONSTRUCTION OF REMAINDER GIFT TO CHARITY—Testator left property in trust to use the income, and such portions of principal as might be necessary, for the support, maintenance and education of his granddaughter during her life. Upon the death of the life tenant, the trustee was directed "to pay unto the Methodist Protestant University of Kansas City, Kansas, all the unexpended principal and interest thereof, if any, to have and to hold the same forever." Subsequent to the testator's death in 1904, but prior to the death of the life tenant, the remainderman assigned its interest to appellant's assignor, and then went out of existence.[1] In 1945 the life tenant died, and the trustee sued to terminate the trust and ascertain the beneficiaries. The lower court found an implied condition precedent that the beneficiary survive the life tenant, and directed the trustees to pay to the residuary legatees. On appeal, *held,* affirmed. *Horton v. Board of Education of the Methodist Protestant Church,* (Wash. 1948) 201 P (2d) 163.

It is generally accepted that a gift to a named charity lapses if the charity is not in existence when the gift takes effect.[2] The fundamental problem in such cases is to discover when the gift takes effect, and this depends on whether it is

[1] The remainderman continued a nominal existence, but for the purpose of this case, the court treated it as nonexistent.

[2] Fisk v. Attorney-General, 4 Eq. 521 (1867); In re Magrath, 2 Ch. 331 (1913); In re Withall, 2 Ch. 236 (1932); In re Flathers' Estate, 157 Wash. 84, 288 P. 281 (1930); Gladding v. St. Mathews Church, 25 R.I. 628, 57 A. 860 (1904). The court in the principal case finds no general charitable purpose, and hence does not feel the cy pres doctrine is applicable.

vested or contingent. Remainder estates are said be be vested if they are ready to take effect in possession or enjoyment whenever and however the preceding estate terminates, and contingent if possession and enjoyment are postponed until the happening of an express or implied condition precedent.[3] Since there is no express language of condition in the principal case, the pertinent issue is whether testator's will evidences an intent that the remainderman must survive the life tenant to take. Where the testator does not clearly indicate his intent, courts generally favor charities and early vesting,[4] especially where there is no alternative gift.[5] The language of the present will does not seem to justify a contingent construction. The words "after her death" and "to pay unto" seem more appropriately described as referring to the time of payment than as indicating a condition precedent of survivorship.[6] Of course, if the gift is conditioned on the occurrence of an event, a contingent construction is indicated,[7] but the words "if any" alone should not be held to make an otherwise vested gift contingent. They probably indicate merely the presence of the power to invade the corpus, and it is well settled that the presence of such a power does not affect the nature of the remainder.[8] Though there seems to be little in the language of the principal case to suggest a condition precedent of survivorship, the court concludes that the testator intended a contingent gift because the gift to charity was not postponed solely to let in the life tenant.[9] Granted, as the court holds, that the granddaughter was the preferred beneficiary, it does not follow that the gift to charity was intended to be contingent unless the result be explained in terms of the unsatisfactory "divide and pay over" rule.[10] Since the opposite conclusion

[3] GRAY, RULE AGAINST PERPETUITIES, 4th ed., p. 6 (1942); 1 SIMES, FUTURE INTERESTS, c. 5 (1936).

[4] Shufeldt v. Shufeldt, 130 Wash. 253, 227 P. 6 (1924); Estate of Isenberg, 28 Hawaii 590 (1925); see generally 69 C.J., Wills, pp. 597-602 (1934); PROPERTY RESTATEMENT, §243, comment (i) (1940).

[5] Dickerson v. Morse, 200 Iowa 115, 202 N.W. 601 (1925); In re Valentine's Will, 119 Misc. 442, 196 N.Y.S. 398 (1922); In re Brown's Estate, 289 Pa. 101, 137 A. 132 (1927). A question may be raised as to the effect of Wash. Rev. Stat. Ann. (Remington, 1932) §1404, which implies a reversion where there is no alternative gift over.

[6] Belcher v. Phelps, 109 Conn. 7, 144 A. 659 (1929); see 2 SIMES, FUTURE INTERESTS §354, (1936); In re Hurd's Estate, 303 Mich. 504, 6 N.W. (2d) 758 (1942) (remainder not divested by failure to survive the life tenant).

[7] Bowles v. Denny, 155 Wash. 535, 285 P. 422 (1930).

[8] In re Estate of Gochnour, 192 Wash. 92, 72 P. (2d) 1027 (1937); In re Ivy's Estate, 4 Wash. (2d) 1, 101 P. (2d) 1074 (1940); cf Moore v. Holbrook, 175 Va. 471, 9 S.E. (2d) 447 (1940).

[9] If the remainder is postponed solely to let in a life tenant, the "divide and pay over" rule does not render the gift contingent. See 69 C.J., Wills, §1721, n. 79.

[10] 69 C.J., Wills, §1721, p. 628, lists substantial authority for the rule that the words "pay to" indicate a contingent gift when no other words of gift are present, before or after "pay to." The exceptions to this rule are many. In re McQueen's Will, 99 Misc. 185, 163 N.Y.S. 287 (1917) (held rule inapplicable where no alternative gift over); Steinway v. Steinway, 163 N.Y. 183, 57 N.E. 312 (1900) (held rule inapplicable where other words of gift were present). Perhaps the words in the principal case, "to have and to hold the same for-

as to the testator's intent could well be reached,[11] the principal case illustrates the manner in which this rule is sometimes invoked by courts to reach desired results. Here, the desire to rule for the testator's relatives[12] leads the court to ascribe undue importance to the "pay to" and "if any" language, which was probably intended only to define more clearly the trustee's duties and powers.

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ever," could be construed as other words of gift. See 41 MICH. L. REV. 953 (1943) (noting the unsatisfactory nature of the "divide and pay over" rule).

[11] The testator was a trustee of the original remainderman and might well have intended a presently vested and alienable gift over.

[12] But to the effect that there are no presumptions in favor of heirs, see Hunt v. Phillips, 34 Wash. 362, 75 P. 970 (1904).