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GENERAL POLICIES GOVERNING THE APPLICATION OF THE RULE AGAINST PERPETUITIES TO POWERS OF APPOINTMENT

The rule against perpetuities is the principal restriction on the creation of future interests. It is a rule of policy designed to prevent the tying up of property through the creation of remotely contingent future interests, and is part of a broader policy of the law in favor of free alienability and transferability.[1] The classic statement of the rule is that by Gray:

> "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[2]

As indicated, the rule merely prohibits the creation of remotely contingent interests; it does not invalidate future interests merely because they may remain future, or non-possessory, for longer than the period allowed by the rule. This distinction, however, has not always been recognized in Maryland; in some early cases the Court of Appeals expressed the view that any interest under a trust which might continue for longer than the period allowed by the rule against perpetuities was void.[3] This view was later

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[1] See 6 AMERICAN LAW OF PROPERTY (1952) §24.3; GRAY, THE RULE AGAINST PERPETUITIES (4th ed. 1942) §§2, 2.1; 5 POWELL, REAL PROPERTY (1956) §759; SIMES AND SMITH, FUTURE INTERESTS (2nd ed. 1956) §1222; 4 RESTATEMENT, PROPERTY (1944) 2119, Social Restrictions Imposed Upon the Creation of Property Interests, Introductory Note and 2123, Part I, The Common Law Rule Against Perpetuities, Introductory Note. These frequently cited texts will be referred to hereinafter as: AM. L. PROP., GRAY, POWELL, SIMES & SMITH and RESTATEMENT, respectively.

[2] GRAY, §201.

[3] Barnum v. Barnum, 26 Md. 119 (1866); Collins v. Foley, 63 Md. 158 (1885); Collins and Bernard v. MacTavish, 63 Md. 166 (1884); Albert v. Albert, 68 Md. 352, 12 A. 11 (1888); Thomas v. Gregg, 76 Md. 169, 24 A. 418 (1892); Reed v. McIlvain, 113 Md. 140, 77 A. 329 (1910).

abandoned, and the present attitude of the Court applying the rule against perpetuities only to contingent interests is in accord with generally accepted principles.[4]

In applying the rule against perpetuities to powers of appointment there are certain special problems, and it is with these the present article deals.[5] First is the problem of creating a power so that the power itself does not violate the rule; second is the problem of the application of the rule to the exercise of a power; third is the application of the rule to gifts in default of appointment. In considering these problems it is necessary to distinguish between general and special powers, for the courts in applying the rule against perpetuities frequently make the result depend on how the power is classified. A power is said to be general if the donee of the power has unlimited authority to appoint the property to anyone, including himself or his estate.[6] On the other hand, a power is clearly special if the donee is limited in making his appointments to a relatively small group of persons not including himself.[7] These definitions obviously do not include all possible types of powers, and those which are not clearly general or special have been referred to as hybrid powers. Just how such powers will be dealt with by the courts in any particular case is difficult to predict; sometimes, and for some purposes, the rules relating to general powers are applied, while at other times, and for other purposes, the rules governing special powers may be applied.[8] In Maryland this difficulty is particularly acute because of the peculiar interpretation which the Court of Appeals has given to general powers. The Court has applied a restricted interpretation to what appears to be a broad general power and has denied the donee the right to use property subject to such a power for the pur-

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[4] Gambrill v. Gambrill, 122 Md. 563, 89 A. 1094 (1914).

[5] See Bettner, *The Rule Against Perpetuities as Applied to Powers of Appointment*, 27 Va. L. Rev. 149 (1940), for a general discussion of these problems.

[6] 5 AM. L. PROP. §23.12b; SIMES & SMITH, §875; 3 RESTATEMENT (1940) §320; *cf.* O'Hara v. O'Hara, 185 Md. 321, 44 A. 2d 813 (1945); Lamkin v. Safe Deposit & Trust Co., 192 Md. 472, 64 A. 2d 704 (1949). A typical general power of appointment gives the donee the authority to dispose of the property "to such persons, and in such shares and amounts as he may determine."

[7] *Ibid.* Perhaps the most typical special power of appointment is the power frequently given to a life tenant to dispose of the property "among his children in such shares and amounts as he may determine".

[8] For an excellent discussion of the difficulties involved in classifying hybrid powers, and an indication of how the courts should approach problems involving such powers, see Gold, *The Classification of Some Powers of Appointment*, 40 Mich. L. Rev. 337 (1942).

pose of paying his debts.[9] Thus in Maryland the donee, of what on its face appears to be an unlimited power, is in fact restricted in making his appointment in that he cannot appoint to himself, his creditors, his estate, or the creditors of his estate. However, for other purposes, such as the right of the donee to create new powers when making an appointment, the Court has applied the normal rules governing general powers.[10] Therefore, it becomes important to determine how the Court of Appeals will treat general powers when applying the rule against perpetuities.

It is also usual to classify powers according to the mode of execution: that is, as testamentary powers or powers presently exercisable. A testamentary power is one which the donee may exercise only by will, while a power presently exercisable is one which the donee may exercise by an *inter vivos* instrument, such as a deed, or one exercisable either by deed or will.[11] Most powers, apparently, are testamentary, and a power presently exercisable is likely to be found only in an *inter vivos*, or living, trust where the donor and donee are the same person. Such powers are reserved by the settlor when he creates the trust and are frequently referred to as reserved powers. The fact that the power is reserved by the donor and that he and the donee are the same person may be an important factor in determining what rules the courts will apply to such powers. For example, the Court of Appeals has allowed the settlor of a trust, who reserved the power to dispose of the corpus, to appoint the property to his creditors for the purpose of paying his debts.[12] It thus appears that the Court is distinguishing between a general power which is reserved by the donor and one which is given by the

[9] Balls v. Dampman, 69 Md. 390, 16 A. 16 (1888); *Cf.* Connor v. O'Hara, 188 Md. 527, 53 A. 2d 33 (1947); Lamkin v. Safe Deposit & Trust Co., *supra*, n. 6. Note, *Rights of Creditors Under a Testamentary General Power of Appointment*, 4 Md. L. Rev. 297 (1940). If the power is special the creditors of the donee cannot reach the property subject to the power. Price v. Cherbonnier, 103 Md. 107, 63 A. 209 (1906); 5 AM. L. PROP. §23.15; 3 RESTATEMENT (1940) §326. Even where the power is general the creditors of the donee, in the absence of statutes to the contrary, can only reach the property subject to the power in those instances in which the donee has exercised the power. 5 AM. L. PROP. §§23.16, 23.17; SIMES & SMITH, §§944. 945; 3 RESTATEMENT (1940) §§329, 330.

[10] Lamkin v. Safe Deposit & Trust Co., *supra*, n. 6.

[11] SIMES & SMITH, §874; 3 RESTATEMENT (1940) §321.

[12] Wyeth v. Safe Dep. & Tr. Co., 176 Md. 369, 4 A. 2d 753 (1939), noted 4 Md. L. Rev. 297 (1940). See 5 AM. L. PROP. §23.18 and 3 RESTATEMENT, §328, 1948 Supp. (1949) 499. discussing the rights of creditors of a donee who has reserved a general power; these authorities indicate that the rights of creditors of a donee who has a reserved power are greater than the rights of creditors of a donee who is merely the beneficiary of a power granted to him by another.

donor to another as donee; and that, for the purpose of determining the rights of creditors of the donee, it applies the normal rules relating to general powers to reserved powers while applying a more restricted rule, similar to that governing special powers, to the cases where the donor and the donee are not the same person. The question is: How will the Court treat reserved powers for the purpose of the rule against perpetuities?

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In determining whether the donor has violated the rule against perpetuities in creating a power of appointment, we must consider the nature of such a power. If we think of the power itself as an interest in property, then the power must vest within the period allowed by the rule against perpetuities; that is, the donee must be determined and acquire the right to exercise the power within the permitted period. Clearly any power which is so restricted that it cannot be exercised within the period of the rule is void.[13] But, according to the traditional theory, a power itself is not property, it is a mere authority, or agency, given by the donor to the donee by which the latter may transfer the title from the donor to the appointee. This theory seems especially appropriate when applied to special powers where the donee is limited in making his appointment to a relatively small group of persons; but as the possible objects of the power are increased so is the donee's authority, and in the case of a general power presently exercisable where the donee has authority to appoint to anyone, including himself, he is for all practical purposes in the position of an owner. Although, according to the traditional theory, he still does not have title, he may at any time acquire it by exercising the power and for that reason is frequently treated as if he were the owner.[14] In the case of testamentary powers a restriction is placed on the exercise of the power by the donee which prevents him from making an effective appointment prior to his death. Thus, in the case of a testamentary power, the donee is not in the position of an owner; this is true even though the power is otherwise unlimited. It is, therefore, apparent

[13] 6 AM. L. PROP. §§24.31, 24.32; GRAY, §474.1; 5 POWELL, §786; SIMES & SMITH, §1272; 4 RESTATEMENT (1944) §390.

[14] This is especially true in the case of succession and estate taxes which now frequently treat the donee of a general power as if he were the owner of the property subject to the power and tax him accordingly.

that except in the case of a general power presently exercisable, the donee of a power of appointment is not in the position of an owner of the property subject to the power; and until the power is exercised, the property is effectively tied up within the policy of the rule against perpetuities. The rule, therefore, is that in the case of special powers presently exercisable and all testamentary powers, whether general or special, the power must be limited in such a manner that it is certain to be exercised within the period allowed by the rule against perpetuities from the time the instrument creating it takes effect or it is void.[15] On the other hand, in the case of general powers presently exercisable, if the power is limited in such a manner that it may be exercised within the period allowed by the rule from the time of its creation it is a valid power.[16]

Although there are no Maryland cases which deal directly with the application of the rule against perpetuities to the creation of an original power of appointment as distinguished from the validity of the exercise of the power, the cases raising the latter question, by implication, recognize the validity of a power of appointment which is so limited that it is certain to be exercised within the period allowed by the rule. Those cases all involve testamentary powers, both general and special, which are so limited that they must be exercised, if at all, by the will of the donee; the powers, therefore, cannot extend beyond the lifetime of a person in existence at the time the power was created and are valid within the principle of the rule, stated above, regarding testamentary powers.[17] There are in addition three early cases, which, although they were decided under the former rule that trusts which might extend beyond the period of the rule against perpetuities were invalid, shed some light on the problem of the creation of powers. In the first case, *Barnum v. Barnum*,[18] the testator left certain property in trust for a period which might extend beyond the time allowed by the rule against perpetuities and ex-

[15] 6 AM. L. PROP. §24.32; SIMES & SMITH, §1273; 4 RESTATEMENT (1944) §390 (2).

[16] 6 AM. L. PROP. §24.31; SIMES & SMITH, §1273; 4 RESTATEMENT (1944) §390 (1).

[17] Albert v. Albert, 68 Md. 352, 12 A. 11 (1888); Thomas v. Gregg, 76 Md. 169, 24 A. 418 (1892); Graham v. Whitridge, 99 Md. 248, 57 A. 609, 58 A. 36 (1904); Reed v. McIlvain, 113 Md. 140, 77 A. 329 (1910); Levenson v. Manly, 119 Md. 517, 87 A. 261 (1913); Gambrill v. Gambrill, 122 Md. 563, 89 A. 1094 (1914); Hawkins v. Ghent, 154 Md. 261, 140 A. 212 (1928). In none of the above cases was any question raised regarding the validity of the creation of the power of appointment.

[18] 26 Md. 119 (1866).

pressly authorized the trustee to lease the property. The Court, in holding that the trust and the power to lease were both void, said:

> "The general principle is, that every power, the direct object of which is to create a perpetuity, is absolutely void. . . . The exceptions to the rule . . . arise out of the distinctions between general and limited or special powers. But in every case, the *execution* of the power, being distinct from the power itself, must conform to the requisition of the rule against perpetuities, or run the hazard of being avoided. And where a power is itself valid, in not transgressing the rule, the donee, in executing it, may go beyond the proper boundary."[19]

Here is a definite recognition by the Court that the rule governing the creation of powers differs from that determining the validity of the exercise of a power by the donee, and further that there may be a distinction between the rules governing general, or unlimited, powers on the one hand and special, or limited, powers on the other. In the *Barnum* case the power, being a limited power to lease the property, which might extend beyond the period allowed by the rule against perpetuities, was held invalid. This is analogous to a special power presently exercisable which, according to the rule previously stated, must be so limited that it is certain to be exercised within the period of the rule. In two other cases the validity of powers to lease were also considered; in both cases the powers were upheld and the *Barnum* case distinguished because the powers were so limited that they could be exercised only within the lifetimes of persons named in the instruments creating the trusts or within the period of twenty-one years thereafter.[20]

In the recent case of *Lamkin v. Safe Deposit & Trust Co.*,[21] the Court of Appeals was presented with the question whether the donee of a power of appointment may create new powers when making an appointment. In that case the donor left property in trust for his wife for life with a general testamentary power in the wife to dispose of the corpus; when the donee died she exercised the power by creating a trust for her sister for life with a general testamentary power in the sister to dispose of her share of the corpus.

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[19] *Ibid* 172-3.

[20] Collins v. Foley, 63 Md. 158 (1885); Collins v. MacTavish, 63 Md. 166 (1885).

[21] 192 Md. 472. 64 A. 2d 704 (1949).

The sister subsequently left a will by which she exercised the power in favor of various named persons, including her husband. The Court held the appointments by the sister valid, and in answer to the argument that if donees were allowed to create new powers this might be continued indefinitely, thus tying up the property forever, said:

> "The answer to this contention is simply that no appointee can grant a further power of appointment which may be exercised or which may create estates commencing beyond the period prescribed by the rule against perpetuities, *counting from the death of the original donor*. Whether any subsequent power violates the rule, depends on what might be the situation in these respects. Such a question, as to the estates created under a subsequent power, can be determined only when that power is exercised, which, in this case, is at the death of [the donee]. Her appointments did not violate the rule against perpetuities, and therefore we find no merit in the appellant's contention as applied to this case. If the contention were upheld that the question must be determined as of the time of the original will, it would mean that no testamentary power of appointment would ever be valid, because in no case could it be said that some donee might not, in the exercise of the power, fix the time of the vesting of an estate which he could appoint to a time beyond the duration of lives in being and twenty-one years thereafter."[22]

Although the case deals primarily with the problem of delegation of powers, there was a definite recognition of the rule that the new power must be limited in such a way that it is certain to be exercised within the period allowed by the rule against perpetuities. But if the new power were a general power presently exercisable, then it could be argued that it would be valid if it were so limited that it might be exercised within the period allowed by the rule. However, this may be questionable in Maryland in view of the restricted construction which the Court of Appeals has applied to general powers.[23]

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[22] *Ibid* 483-4. Bracketed material supplied.

[23] But see Ortman v. Dugan, 130 Md. 121, 100 A. 82 (1917), where the donor created a trust for his son for life, and after the death of the son for his issue, with the power in the son's children, upon attaining the age of twenty-one, to dispose of the property by will or otherwise. There was also a gift in default and the problem before the Court was the validity of the gift in default. However, in discussing that problem the court apparently assumed that the power was valid, an assumption which is true only if the normal rules governing general powers are applied: for, although the

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Once a power of appointment has been properly created by the donor, the donee must use care in exercising it to make certain that he does not violate the rule against perpetuities. In determining whether the interests created by the exercise of a power of appointment are valid, the courts have again made distinctions based on the type of power involved. These distinctions are dependent upon the theory that a power of appointment is not the same as title to the property subject to the power, but is a mere authority, or agency, in the donee; that title to the property subject to the power remains in the donor prior to the appointment by the donee; and that the exercise of the power by the donee is merely an event which causes the title to pass from the donor to the appointee. These principles find expression in the "relation back" doctrine by which the courts purport to read the appointment by the donee back into the instrument creating the power and treat the transfer as if it had been originally made by the donor.[24] By using this doctrine some rather remarkable results have been achieved;[25] but the truth is that the transfer of property through the use of a power of appointment involves two transactions by two persons (the creation of the power by the donor and its exercise by the donee) both of which are necessary to complete the transfer. What the courts do, when they apply the traditional theory of the operation of powers, is to ignore the donee's part in the transfer and to stress only the act of the donor. So long as the results achieved by the use of the traditional theory are in accord with the general policies of the law and assist the court in reaching what it considers a fair and just decision the theory is followed, but when the theory conflicts with stronger policies of the law

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power was so limited that it would vest in the donee within the period allowed by the rule against perpetuities, it was not certain to be exercised within that period. The case. therefore, is in accord with the rule that general powers presently exercisable are valid if so limited that the power may be exercised within the period allowed by the rule against perpetuities.

[24] 5 AM. L. PROP. §§23.2, 23.3; 3 POWELL, §387; SIMES & SMITH, §§911-915.

[25] For example, through the use of a power it was possible to evade prohibitions against devising land, Sir Edward Clere's Case, 6 Co. Rep. 17 b, 77 Eng. Rep. 279 (1599); to cut off inchoate dower, Ray v. Pung, 5 Madd. 310, 56 Eng. Rep. 914 (1821), 5 B. & Ald. 561. 106 Eng. Rep. 1296 (1822); to authorize married women to transfer property, Armstrong v. Kerns, 61 Md. 364 (1884). See Simes, *The Devolution of Title to Appointed Property*, 22 Ill. L. Rev. 480 (1928), for a general discussion of the effect of the "relation back" theory of the operation of powers of appointment on the transfer of title.

and its application would achieve a result which the court does not desire it is abandoned, and we find the court stressing the act of the donee as an essential and independent transaction.[26]

When the application of the rule against perpetuities is involved, the courts have usually applied the "relation back" theory and viewed the appointment by the donee as if it were a part of the instrument by which the donor created the power. This, in effect, requires that all interests created by the donee in the exercise of the power must be so limited that they are certain to vest within the period allowed by the rule counting from the time the donor created the power.[27] Applied to testamentary powers, either general or special, or to special powers, either presently exercisable or testamentary, this rule seems sound since in all such cases the creation of the power by the donor has placed a clog on the title which cannot be removed until the donee exercises the power; the creation of the power thus ties up the property within the policy of the rule against perpetuities. On the other hand when a general power presently exercisable is involved, the donee stands in a position which approximates that of an owner; he has complete control over the property and can transfer good title at any time so that it is not tied up within the policy of the rule. Therefore, in determining the validity of interests created by the donee in the exercise of a general power presently exercisable, the courts have usually computed the period (for the purposes of the requirement of vesting under the rule against perpetuities) from the time of the exercise of the power by the donee rather than the time of its creation by the donor.[28]

There is another principle which somewhat modifies the application of the "relation back" doctrine when applying

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[26] Compare the willingness of the courts to apply the "relation back" doctrine to achieve the results mentioned in footnote 25, *ibid*, with their refusal to apply the theory to assist donees in avoiding the disability of infancy, Thompson v. Lyon, 20 Mo. 155 (1854), or those trying to cheat their creditors. Browning v. Blue Grass Hardware Co., 153 Va. 20, 149 S. E. 497 (1929).

[27] 6 AM. L. PROP. §24.34; GRAY, §§514, 515, 525, 526; 5 POWELL, §788; SIMES & SMITH, §§1274, 1275; 4 RESTATEMENT (1944) §392. One of the consequences of this rule is that the donee cannot dispose of property subject to a power to the same extent that he can his own property, and he must, therefore, be careful, when disposing of both types of property by the same instrument, not to inadvertently violate the rule against perpetuities, Albert v. Albert, 68 Md. 352, 12 A. 11 (1888); Fiduciary Trust Co. v. Mishou, 321 Mass. 615, 75 N. E. 2d 3 (1947).

[28] 6 AM. L. PROP. §24.33; GRAY, §524; 5 POWELL, §787; SIMES & SMITH, §1274; 4 RESTATEMENT (1944) §391.

the rule against perpetuities to powers of appointment. This is the so-called "second look" doctrine which takes cognizance of the fact that the donee, when he exercises the power, is acting some time after the donor created it, and he may, therefore, have knowledge of facts which were not available to the donor. Thus, in selecting his appointees and creating his interests, he may act with certainty whereas the donor could not. The result is that in determining the validity of the interests created by the donee in the exercise of the power, the facts existing at the time he exercises the power may be considered although the time period is computed from the date the donor created the power.[29]

There are a number of Maryland cases involving testamentary powers, both general and special, in which the question of the validity of the donees' appointments under the rule against perpetuities has arisen. In its decisions the Court of Appeals has recognized and applied the above stated rules and principles in so far as the problems have been presented to it. The "relation back" doctrine has frequently been stated and applied by the Court. For instance, in *Thomas v. Gregg*,[30] the donor left one half of his estate in trust for the benefit of his daughter, the donee, for life with a remainder to her issue, subject to certain restrictions, and gave a testamentary power to the daughter to dispose of the property to her children, grandchildren, children of her sister, or some descendant of the donor. The donee by her will appointed the property to "my children now living, and those that may hereafter be born to me" to be held in trust during the lifetimes of the children. The Court in holding the appointment void said:

> "It has been always held without question that a limitation under a power of appointment must be construed as if it were inserted in the instrument creating the power. . . . Now, a limitation in Mr. Gregg's will restraining the alienation of this property for the life of his daughter, and for the lives of children who might

[29] 6 AM. L. PROP. §24.35; GRAY, §523.5; 5 POWELL. §788; SIMES & SMITH, §1274; 4 RESTATEMENT (1944) §392. For example, if the donor should leave property in trust, the income to be paid to the donee during his lifetime, with the power in the donee to appoint the property, by his will, among his children; the donee might, if none of his children were born after the trust was created, appoint the property to his children contingent upon their attaining an age greater than twenty-one although the donor could not have done so. This is so because at the time the donor creates the trust it is possible for the donee to have after born children while at the time the donee exercises the power the facts establish that there were no after born children and thus all takers are lives in being.

[30] 76 Md. 169, 24 A. 418 (1892).

> be born to her after his death, would extend to a life then in being and to lives which by possibility might come into being after his death. In point of fact a child was born to her after his death; but this circumstance makes no difference in the application of the rule. It would be the same if the child had not been born; as it depends on the question whether a child might by possibility be born; and not on the fact that it was actually born. Our conclusion is that the limitation in question transgresses the rule against perpetuities, and is therefore void."[31]

In several other cases the Court has stated and applied the "relation back" doctrine in determining whether the interests created by the exercise of the powers were valid under the rule against perpetuities.[32]

In *Hawkins v. Ghent*[33] a husband and wife conveyed certain property in trust for the wife for life with the power in the wife to devise the property for the use of her children, or descendants, and her husband, and if none then a general power to devise the property was given the wife, and in case the powers were not exercised the property was disposed of by a default clause. The wife, in exercise of her power, devised the property in trust for her children for their lives and after their death in further trust for a period of twenty years to pay the income to their children or descendants, and at the end of the twenty year period to distribute the property to the children or descendants then living and if none to other designated persons. The children, who were all born after the execution of the trust deed, claimed the limitations in the will violated the rule against perpetuities. The Court held the life estates in the children were valid and refused to pass on the validity of the other interests since they were contingent and the persons who might ultimately be entitled to them were not before the Court. In answer to the argument that since the power was a reserved power and the donor-donee had the right, under certain circumstances, to revoke the deed of trust the period of the rule against perpetuities should be

[31] *Ibid* 174-5. The holding that the appointment violated the rule against perpetuities was based on the *Barnum* case which has since been overruled. See discussion, *supra, circa*, pp. 93-94, and footnotes 3 and 4.

[32] Graham v. Whitridge, 99 Md. 248, 57 A. 609, 58 A. 36 (1904); Reed v. McIlvain, 113 Md. 140, 77 A. 329 (1910); Levenson v. Manly, 119 Md. 517, 87 A. 261 (1913); Gambrill v. Gambrill, 122 Md. 563. 89 A. 1094 (1914); Hawkins v. Ghent, 154 Md. 261, 140 A. 212 (1928); Lamkin v. Safe Deposit & Trust Co., 192 Md. 472, 64 A. 2d 704 (1949).

[33] *Supra*, n. 32.

determined from the time of the exercise of the power rather than from the date the power was created, the Court said:

> "We shall . . . not express at this time an opinion as to whether, with respect to the application of the rule against perpetuities, the execution of the testamentary power conferred by the deed of trust may be referred to the time when the donee's will took effect, rather than to the date of the deed, in view of the fact that the donee was also the donor of the power, and that the deed authorized her to revoke the trust under certain conditions. For the purposes of this decision we have treated the execution of the power as being referable to the date of the deed, but we have not intended to foreclose the question whether it may properly be referred to the later period suggested in the argument. The present life estates are valid upon either of those theories."[34]

Since the powers involved were testamentary it is doubtful whether the fact they were reserved powers should make any difference, but if a general power presently exercisable were reserved by the donor, then he would be in a position approximating that of an owner of the property subject to the power, and, for the purposes of the requirement of vesting under the rule against perpetuities, the Court of Appeals might compute the period from the time the power was exercised rather than from the date of its creation.[35] Also if the donor-donee has an unrestricted right to revoke the trust, the Court might in determining the validity of the appointed interests compute the period of the rule from the time of the exercise of the power rather than its creation.[36]

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[34] Hawkins v. Ghent, *supra*, n. 32, 266.

[35] This is the general rule and it would seem applicable, even in Maryland, under a reserved power since the Court of Appeals has indicated that in such cases the donor-donee has the authority to appoint the property to his creditors and thus, presumably, also to himself or his estate or the creditors of his estate. Wyeth v. Safe Deposit & Trust Co., 176 Md. 369, 4 A. 2d 753 (1939), noted 4 Md. L. Rev. 297 (1940). The position of the donor-donee, in such cases, approximates that of an owner of the property subject to the power, and therefore, in determining the validity of the interests created by the donee in exercise of the power the rule against perpetuities should be applied as of the time the appointment is made.

[36] GRAY, §524.1; 4 RESTATEMENT (1944) §373. See Ryan v. Ward, 192 Md. 342, 64 A. 2d 258 (1949), where the Court of Appeals considered this problem and indicated its accord with the proposition that where the settlor of a trust has the absolute power to revoke the trust during his lifetime, the validity of interests created under the trust are to be determined, for

Several Maryland cases have applied the "second look" doctrine and thereby upheld limitations which otherwise would have been invalid under the "relation back" principle. In the early case of *Albert v. Albert*[37] the donor left property in trust for his son, the donee, for life with a remainder to the children of the son, subject to the power of the son to appoint the remainder, by his will, in such shares and amounts or proportions as he wished, including the power to create trusts. The son left a will in which he disposed of his own property and the property subject to the power by blending them together and dividing the total into shares, giving some of the shares outright and some in trust to each of his children; other shares were given in trust for his grandchildren, and there were also limitations in favor of the wives of his sons and the children of his grandchildren. In determining the validity of the appointments made by the son, the Court considered each gift separately since they were made to individuals and not to a class. The Court also took account of the facts at the time the appointments were made, the "second look" doctrine, and noted that as all of the son's children were born before the death of the donor, the life estates to them and the remainders following them were valid. And since some of the grandchildren, to whom gifts had been made on condition they attain the age of majority, were certain to reach that age within twenty-one years from the death of the donee, the gifts to them were sustained. The Court also stated that if the wives of the sons were born before the death of the donor the limitations to them would be valid, but that the gifts to the grandchildren born after the death of the donor and the remainders over following their deaths were invalid.[38] In addition to the excellent opinion in the *Albert* case, the Court of Appeals has also recognized and applied the "second look" doctrine in the cases of *Graham v. Whitridge*[39] and *Lamkin v. Safe Deposit & Trust Co.*[40]

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the purposes of the rule against perpetuities, as of the time of the death of the settlor rather than the date of the execution of the trust; but the Court refused to apply the rule to the case before them because the settlor in that case had only a limited power to revoke the trust.

[37] 68 Md. 352, 12 A. 11 (1888).

[38] Here again the invalidity of the life estate in the grandchildren is based on the former Maryland rule of the Barnum case. See discussion, *supra*, pp. 93-94, and footnotes 3 and 4.

[39] 99 Md. 248, 57 A. 609, 58 A. 36 (1904).

[40] 192 Md. 472, 64 A. 2d 704 (1949).

APPLICATION OF THE RULE AGAINST PERPETUITIES TO GIFTS IN DEFAULT OF APPOINTMENT

When the donor creates a power of appointment, he should, and usually does, make provision for the disposition of the property subject to the power in case the donee fails to make an appointment. Since the interest of the donee is normally a life estate, the gift in default, if it takes effect at all, will do so at the death of the donee which is within the period allowed by the rule against perpetuities from the time the donor created the power. However, if the gift in default should be contingent upon the happening of an event which is beyond the time allowed by rule, the gift, of course, would be void.[41] On the other hand, even though the gift itself will take effect within the time allowed by the rule against perpetuities, the donor in disposing of the property may attempt to create interests which will not vest within the period allowed by the rule; in such case the interests are void. In determining whether the interests created by the default clause violate the rule against perpetuities, the type of power given to the donee and the facts existing at the time the power expires may be important just as they are in cases where the donee exercises the power. If the donee has a general power presently exercisable, the property subject to the power has not in fact been tied up during the existence of the power; therefore, the validity of the gift in default (the result of the non-exercise of the power) like the validity of the interests created by the exercise of the power should be determined as of the time the power expires (normally the death of the donee).[42] This means that the interests created by the default clause are valid provided they vest within the period allowed by the rule against perpetuities counting from the time the power expires. On the other hand if the power is a special power, even though it is presently exercisable, or a testamentary power, either general or special, the mere exist-

[41] This is likely to be the case where the power itself is created in such a way that it violates the rule against perpetuities, — that is, where it is not certain to be exercised within the period allowed by the rule; however, such interests are not, strictly speaking, created by a gift in default of appointment.

[42] The justification for this approach is that in fact the property has not been tied up within the policy of the rule against perpetuities during the lifetime of the donee, and is not exercising the power the donee is choosing to allow the property to pass under the default clause rather than exercise the power; therefore, the validity of the disposition which he is in effect making should be governed by the test which would have applied if he had exercised the power and made an identical disposition. This position, however, is not beyond question; see the authorities cited n. 43, *infra*.

ence of the power constitutes a clog on the title to the property subject to it, and interests created by the gift in default, like the interests created by the exercise of such a power, must vest within the period allowed by the rule against perpetuities counting from the time the power was created; but since the failure of the donee to exercise the power occurs some time after the creation of the power, it is proper for the court, in determining the validity of the gift in default under the rule against perpetuities, to take note of the facts existing at the time the power expires.[43]

There are a number of Maryland cases in which the Court of Appeals has upheld a gift in default where the attempted appointment failed.[44] In each instance all the interests created by the gift in default vested within the period allowed by the rule against perpetuities counting from the time the donor created the power, although in none of the cases did the Court expressly discuss the problem of the rule against perpetuities. In one case, *Ortman v. Dugan*,[45] a gift in default of appointment was held invalid; in that case the donor placed property in trust for her son for life, remainder to his issue with the power in his children to dispose of the property by will upon attaining the age of twenty-one, and in default of any such disposition, or if the children should die without leaving issue, to her daughter for life, remainder to her issue. The son died without leaving any issue surviving him and the daughter and her issue attempted to convey the property; the question before the Court, therefore, was the validity of the gift in default. The Court held the gift void as a violation of the rule against perpetuities because the son might have

[43] This is a special application of the "second look" principle and seems proper in view of the fact the donee himself could make a similar appointment which would be valid; it is an extension of the "second look" principle into what has been termed the "wait and see" doctrine. There is, as yet, not much authority for this new approach outside of certain recent statutory enactments, and the text writers and law review commentators are in disagreement as to the desirability of adopting the doctrine. *Cf.* 6 AM. L. PROP. §24.36; Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721 (1952); Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L. Q. Rev. 35 (1952); Leach, *Perpetuities Legislation, Massachusetts Style*, 67 Harv. L. Rev. 1349 (1954); Leach, *Perpetuities Reform by Legislation*, 70 L. Q. Rev. 478 (1954); with 5 POWELL, §§765, 788; SIMES & SMITH, §§1230, 1276; Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 Mich. L. Rev. 179 (1953). In the only case dealing with the problem, the Massachusetts court applied the doctrine. Sears v. Coolidge, 329 Mass. 340, 108 N. E. 2d 563 (1952).

[44] For example Albert v. Albert, 68 Md. 352, 12 A. 11 (1888); Reed v. McIlvain, 113 Md. 140, 77 A. 329 (1910); Gambrill v. Gambrill, 122 Md. 563, 89 A. 1094 (1914); Hughes v. McDaniel, 202 Md. 636, 98 A. 2d 6 (1953).

[45] 130 Md. 121, 100 A. 82 (1917).

had children who could have survived him for more than twenty-one years, and thus the exercise of the power, or the gift in default thereof, might not occur within a life in being and twenty-one years from the time the donor created the power. However, the facts established that the only children of the son had died prior to the execution of the will by the donor; consequently, at the time the power expired and the gift in default took effect, it was clear that there was no violation of the rule against perpetuities. Under the principles stated above the gift could have been upheld, but the Court of Appeals did not consider the application of the "second look" approach. Until the problem has been directly presented to the Court and it has either accepted or rejected the principle, it is impossible to tell whether the Court will apply the "second look" doctrine to gifts in default. Certainly the decision in the *Ortman* case should not be construed as a rejection of the principle in such cases.

CONCLUSIONS

In summary it may be stated that the Court of Appeals, in applying the rule against perpetuities to powers of appointment, has in general followed well settled and orthodox rules. In the case of testamentary powers, both general and special, the donor in creating the power must limit it in such a way that it is certain to be exercised within the period allowed by the rule from the time the instrument creating the power takes effect. The same rule is applicable to special powers presently exercisable. In the case of general powers presently exercisable the rule may be otherwise; courts usually uphold such powers if they are limited in such a way that they may be exercised within the period allowed by the rule against perpetuities counting from the date of the instrument creating the power. This is true because such a power approximates ownership, and the donee of such a power is in the position of an owner of the property subject to the power; once he has acquired the right to exercise the power the property is no longer tied up within the policy of the rule against perpetuities. However, as has been indicated, in Maryland a general power is in a sense a limited power in that the donee cannot appoint the property to himself, his creditors, his estate, or the creditors of his estate and his position, therefore, does not quite approximate that of an owner. But in allowing the donee of a general power to create new powers when making an appointment, the Court of

Appeals applied the usual rule governing general powers and ignored the fact that a general power in Maryland is a limited power, and there are some *dicta* in the Maryland cases which indicate that the Court may distinguish between general and special powers in applying the rule against perpetuities. It is, therefore, at present impossible to say whether the fact that the power is a general power presently exercisable is of any importance in determining the validity of the power under the rule against perpetuities. However, if the power expressly authorizes appointments to the donee, his creditors, his estate, or the creditors of his estate there is no reason for not applying the normal rule; also if the power is reserved by the donor in creating a living trust, it would seem that the usual rule should apply.

With regard to the validity of the interests created by the donee in the exercise of powers of appointment, the Court of Appeals has applied the normal rules in so far as the problems have been presented to it. Again the cases all involve testamentary powers, both general and special, and the rule requiring the interests to vest within the period allowed by the rule against perpetuities, counting from the time the power was created by the donor rather than the time of its exercise by the donee, is the same as that applied by other courts. The same rule is usually applied to special powers presently exercisable and there seems no reason to doubt it will also be applied in Maryland. The only question is with respect to the rule to be applied to general powers presently exercisable. The answer to that problem depends on whether a general power in Maryland is to be treated as a limited power, and since that question has not yet been answered it is impossible to say whether a different rule will be applied in such cases. However, as previously suggested, if the power expressly gives the donee the authority to appoint to himself, his creditors, his estate, or the creditors of his estate, or if it is a reserved power, there is no reason to doubt the application of the normal rules.

In determining the validity of gifts in default of appointment, under the rule against perpetuities, the following principles should be applied: (1) If the gift in default is contingent upon the happening of an event which is beyond the time allowed by the rule, counting from the creation of the power, the gift is void. (2) When the gift in default follows a general power presently exercisable, the validity of the interests created therein is determined as of the time the power expires. (3) Gifts in default following special

powers presently exercisable or testamentary powers, either general or special, are valid providing the interests vest within the period allowed by the rule counting from the time the power was created; but in determining whether the interests vest within the period allowed by the rule, the facts existing at the expiration of the power may be considered. Here, as in other problems involving powers of appointment in Maryland, the results will depend upon how the Court of Appeals classifies general powers when applying the rule against perpetuities and whether the "second look" doctrine is applied to gifts in default.

If the Court of Appeals, in applying the rule against perpetuities to powers of appointment, should treat general powers as limited powers and apply the rules applicable to special powers, it will have the effect of restricting both the donor in creating such powers and the donee in exercising them.[46] This restriction may, as has been indicated, be largely overcome by careful draftsmanship when the power is created. Until this matter is settled, the law of powers of appointment in Maryland will remain uncertain and to some extent inconsistent.

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[46] In the opinion of the writer the Court of Appeals should not treat general powers as limited powers when applying the rule against perpetuities. Although the interpretation applied by the Court to general powers has somewhat restricted the donee in disposing of the property subject to the power, and also the creditors of the donee in reaching such property. the restrictions are slight and do not in fact seriously interfere with the donee's power of disposition. The donee of a general power presently exercisable is for all practical purposes in the position of an owner and the normal rules governing such powers should be applied by the Court. Furthermore, the reason given by the Court for restricting the donee of a general power in disposing of the property is unsound and does not justify the Court's position. (The only reason the Court has given for restricting the donee is that the property subject to the power is the property of the donor and not of the donee. But this proves too much; it would bar the donee from making any disposition! The answer to the Court's argument is that the donee may dispose of the property because the donor gave him authority to do so, and the authority is unlimited.) Since the restriction is based on an error there is no reason why the Court should continue to perpetuate and expand that error. Furthermore, the situations in which the restriction might make a difference are very few and only involve general powers presently exercisable. Since all these difficulties may be avoided by the Court applying the usual rules where general powers presently exercisable are involved, it is to be hoped that they will do so; in fact it would seem desirable for the Court to abandon entirely their restricted interpretation of general powers.