

Qualified Transfers

Class 2.5

Qualified Transfers (Limits)

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Agenda

1. Review: Basics
2. General Rules on Invalidity
3. Public Policy
4. Uncertainty
5. Restraints on Alienation

Two Questions

1. When might conditional estates be invalid and for what reasons?
2. What are the consequences of invalidity?

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General Rules: Consequences

- **Condition Subsequent:** condition is struck down and transferee takes the estate absolutely
- **Condition Precedent:** condition is struck down and consequence is that grantee can never take interest
- **Determinable Limitation:** limitation is rendered invalid and entire transfer is defeated (i.e. transferee loses estate)

Public Policy

- *Re Leonard Foundation Trust*
- *McCorkill v McCorkill Estate*
- *Spence v BMO Trust Co.*

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1. “My entire estate to T in trust, to be distributed as scholarships tenable at any Canadian university to any member of the public who is white, male and Protestant.” (Leonard Foundation Trust)
2. “My entire estate to T in trust, to be distributed as scholarships to any student at Memorial University who is enrolled in the School of Theology and who subscribes to the Protestant faith.” (Ramsden Estate)
3. “To T in trust for my son and his grandchildren [where T pays the entire estate to the grandchildren because the son has not married a person of the Jewish faith].” (Fox)
4. “My entire estate to the National Alliance [a well-known Neo-Nazi organization based in the United States].” (McCorkill)
5. No bequest to the testator’s eldest daughter because she has had a child with a white man. (Spence v BMO)
 - public vs private
 - conditional vs absolute
 - explicit discriminatory language vs discriminatory effect
 - character of the recipient

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Uncertainty

- *H.J. Hayes Co. v. Meade*
- *Fennell v Fennell*

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Example Problem

Imagine that you are making a will in which you want to leave your house in Halifax to your kid (who currently lives here) on the condition that they do not move away from the city.

How would you draft this condition such that it is not uncertain?

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Legal standards for uncertainty

Conditions Precedent: must be possible to say with certainty that any proposed beneficiary is or is not a member of the class, i.e. language must be capable of some reasonable meaning (Leonard Foundation Trust)

Conditions Subsequent / Determinable Limitations: must be able to see from the beginning, precisely and distinctly, what events would trigger the condition (Re Downs)

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Cases

“To my son James . . . to reside on and cultivate the same. But should James desire not to reside on the property or cultivate it, then that portion to my son Harold if he pays James \$1000.” (Hayes v Meade)

“To my five named grandchildren” with the condition that all of my family can make use of the said house at any time without costs provided that they share in the upkeep of the said house.” (Fennell v Fennell)

CS vs CP:

- First question in Hayes is whether CP or CS: court applies (i) presumption against intestacy; (ii) construction in favour of early vesting (McKeen)
- If CP was found and rendered void, then gift fails completely. Since there is no residuary clause in the will, would be an intestacy.
- Court’s conclusion is REINFORCED by the basic principle to pursue the testator’s INTENTION (Thomas v Murphy): testator clearly intended for son James to receive something (either the land OR the \$1000), i.e. wanted to provide for his son

Uncertainty:

- Meade: two sources of uncertainty are: (i) the period of time within which the “residency requirement” must be met AND (ii) what residency entails (e.g. what if James left for short period of time?)
- Fennell: two sources of uncertainty are: (i) definition of “family”; (ii) what amounts to adequate contribution to upkeep of house

RESULT in both cases: CS is “struck down” and fee simple owner takes title absolutely.

Restraints on Alienation

“... the Optionee shall have the option, irrevocable from the date of the death of the survivor of the Optionors until one month after receiving written notice

of the death of such survivor, to purchase the said lands and premises. If the Optionee exercises such option the resultant purchase shall be for the price or sum of \$9,375.” (Trinity College School v Lyons)

Recall: *Re walker* = absolute restraint on alienation is void

TCS:

- Agreement between Bennetts and TCS, granting TCS an EXCLUSIVE OPTION to purchase Bennetts’ land after death of the survivor (within 1 month of death) for fixed price (\$9,375)
- ISSUE: is this “post mortem option” an invalid restraint on alienation of the fee simple?
- COURT SAYS: option for TCS to purchase fee simple is an INVALID restraint on alienation, so the option is invalid (and daughters take absolutely, i.e. free of the option)
- Seems clear that a simple right of first refusal — in which anyone else could match price — would be VALID
- Part of problem is that option to TCS specified a REDUCED price (\$9k vs \$135k)
- BUT: similar condition in *Stephens v Gulf Oil* was found valid (“Palen gives Stephens a right of first refusal of Palen’s land at fixed price of \$64k)
- Court: restraint in Trinity College is DIFFERENT because it REQUIRES executrix to sell the land if TCS exercises the option (condition in Stephens was only right of refusal if Palen chose to sell at some point in the future)

So — two problems with TCS condition:

- Fixed price way below market value
- Coercive condition such that executrix must sell if TCS chooses to buy

BASIC Principle = something less than “absolute” restraint on alienation may also be invalid