

A widow created a testamentary trust to which she devised real property that was rented under a long-term lease. The trust was to pay the income from the trust to the widow's son for life and then accumulate the income from the trust until the son's first-born child reached 30 years of age, at which time the trust property was to be distributed to that child. Neither the will nor the trust contained any specific provision for distribution of the trust property if the son's first-born child were to die before reaching the age of 30. At the time of the widow's death, the widow's son had no children. Subsequently, the son had a child.

The son has recently died. His only child is now five years old. The trustee has sought a judicial ruling as to what to do with the trust property.

The applicable jurisdiction continues to follow the common law Rule Against Perpetuities but modifies it in accord with the *cy pres* doctrine.

If the court determines that the trust violates the Rule Against Perpetuities, what should the court order the trustee to do?

- A. Maintain the trust under its existing terms, because the *cy pres* doctrine allows the trust to continue under its existing terms despite violating the Rule Against Perpetuities.
- B. Maintain the trust until the child either lives for another 21 years or dies, because the *cy pres* doctrine allows the trust to be reformed as close as possible to the grantor's intent.
- C. Terminate the trust, because the child's interest in the trust violates the Rule Against Perpetuities and cannot be saved under the *cy pres* doctrine.
- D. Terminate the trust, because the child's interest in the trust violates the Rule Against Perpetuities and the *cy pres* doctrine applies only to charitable gifts.

Explanation:

Rule Against Perpetuities (RAP)

Traditional common law rule

Renders contingent future interests void if they *could* vest more than 21 years after some life in being when interest was created:

Contingent remainders
Executory interests
Vested remainders subject to open
Powers of appointment
Rights of first refusal
Options

Reforms

"Wait & see" stance (most jurisdictions) – otherwise invalid interest is valid if it vests within 90 years of its creation
Cy pres doctrine (few jurisdictions) – otherwise invalid interest will be reformed to come "as close as possible" to grantor's intent without violating RAP

The **Rule Against Perpetuities (RAP)** applies to **contingent future interests in grantees**, where the grantee is unascertained or there is a condition precedent to the interest becoming vested. RAP renders these interests **void** if they **could vest** more than 21 years after the end of **some life in being** when the interest was created. Here, the child's future interest in the trust is subject to RAP because it is contingent upon the child's reaching 30 years of age. And it violates RAP because the 5-year-old child cannot turn 30 within 21 years of the son's death.

However, this jurisdiction applies the ***cy pres* doctrine** to interests that violate RAP. This doctrine allows a court to make changes to a conveyance to come "**as close as possible**" to the **grantor's actual intent** without violating RAP (**Choice C**). Here, the widow did not provide for an alternative taker in the event that the child's interest failed, so her intent was to save the child's interest in the trust if possible. Therefore, the court should change the age contingency and order the trustee to maintain the trust until the child lives for another 21 years (or dies).

(Choice A) The *cy pres* doctrine allows courts to reform a conveyance to prevent it from violating RAP, but it does not allow a trust that violated RAP to continue under its existing terms.

(Choice D) While the *cy pres* doctrine was created by courts to save charitable gifts, it can also be applied when RAP would void a contingent future interest in a noncharitable grantee (as seen here).

Educational objective:

In a few jurisdictions, the *cy pres* doctrine allows a court to reform a conveyance to come as close as possible to the grantor's intent while staying within the bounds of the Rule Against Perpetuities—eg, by reducing the time limit for a future interest to vest to 21 years after the end of the last life in being when the interest was created.

References

Restatement (Second) of Property: Donative Transfers § 1.5 (Am. Law Inst. 1983) (applying *cy pres* principles to reform interests that would otherwise fail under the Rule Against Perpetuities).

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