

A man's estate plan included a revocable trust established 35 years ago with a bank as trustee. The principal asset of the trust has always been a very profitable, debt-free office building. The trust instrument instructs the trustee to pay the net income to the man for life; and, after the death of the man, to pay the net income to his wife for life; and, after her death, "to distribute the net trust estate as she may appoint by will, or in default of her exercise of this power of appointment, to my son (her stepson)."

The man died 30 years ago, survived by his wife and son. The man had not revoked or amended the trust agreement. A few years after the man's death, his wife remarried. She then had a daughter, was widowed a second time, and died last year. Her will contained only one dispositive provision: "I give my entire estate to my daughter, and I intentionally make no provision for my stepson." The daughter is now 22 years old.

The common-law Rule Against Perpetuities is unmodified by statute in the jurisdiction. There are no other applicable statutes.

The son brought an appropriate action against the daughter to determine who was entitled to the net trust estate and thus to the office building.

If the court rules for the daughter, what will be the reason?

- A. The jurisdiction deems "entire estate" to be a reference to the office building or to the wife's power of appointment.
- B. The Rule Against Perpetuities does not apply to powers of appointment.
- C. The wife intended that the son should not benefit by reason of her death.
- D. The wife's life estate and power of appointment merge into complete ownership in the wife.

Explanation:

The man's trust instrument conveys the net income of the trust estate to the man *for life*, then to the wife for life with a **power of appointment** subject to the son's future interest. The powerholder has the **right to designate** the **recipients** of a **beneficial property interest** (eg, trust). This power can be either:

general – if there are *no* **limitations** on the disposition of the property *or*

non-general – if there *are* **limitations on the disposition** of the property (eg, restrictions on the recipients, time, or manner of the disposition)

Here, the wife received a non-general power of appointment since she may dispose of the net trust estate only "by will" (ie, devise). If she **fails to do so**, then the property will **go to the designated remainderman** (here, the son). But since the wife devised her entire estate to her daughter, the reason for the daughter prevailing would be that this jurisdiction considers "entire estate" to be a reference to the office building or the wife's power of appointment.

(Choice B) The Rule Against Perpetuities (RAP) *does* apply to powers of appointment, so the exercise of this power is valid only if a trust would vest or fail to vest by the end of the life in being plus 21 years. Here, the appointment would have vested or failed immediately upon the wife's death, so RAP was not violated.

(Choice C) To exercise the power of appointment, the wife had to designate the recipient of the net trust estate. The fact that the wife identified the stepson as a nonrecipient is irrelevant.

(Choice D) A life estate and power of appointment do not merge into complete ownership (ie, a fee estate). However, the designated recipient will receive complete ownership of the property.

Educational objective:

The power of appointment gives a life tenant the right to designate recipients of a beneficial property interest. If the life tenant does not exercise this power, then the property will go to the designated remainderman.

References

Restatement (Second) of Property: Donative Transfers § 12.1 (Am. Law Inst. 1986) (power of appointment).

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Power of appointment

