

NORTHERN TERRITORY
LAW
REFORM COMMITTEE:
REPORT ON
PERPETUITIES

Report No. 40
July 2014

**MEMBERS OF THE NORTHERN TERRITORY LAW REFORM
COMMITTEE**

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TERMS OF REFERENCE

I JOHAN WESSEL ELFERINK, Attorney-General and Minister for Justice, ask the Northern Territory Law Reform Committee to investigate, examine and report on law reform in relation to:

- (i) whether the Northern Territory law should be amended, along the lines of section 61 of the South Australian *Law of Property Act 1936*, to allow for perpetual trusts; and
- (ii) the consideration of roll over relief from the tax implications of transferring / rolling over a trust.

Matters to Consider

The rule against perpetuities has the effect of limiting the period for which trusts creating a succession of interests in the same property can continue. The way in which it does so is to make a disposition void to the extent that it creates, or in some cases may create, an interest which may not be capable of vesting in its owner within the perpetuity period.

Northern Territory law relating to perpetuities is contained in Part 11 of the *Law of Property Act*. Part 11 was enacted in 2000. It repealed and replaced the *Perpetuities Act 1994*.

The *Perpetuities Act 1994* implemented reforms recommended by the Northern Territory Law Reform Committee Report No 15, 'Report on the Rules against Perpetuities and Accumulations'.

The Committee recommended adoption of the 'wait and see' rule rather than the approach as recommended in South Australia by the South Australian Law Reform Committee in its 1984 report 'Seventy Third Report of the Law Reform Committee of South Australia to the Attorney-General Relating to the Reform of the Law of Perpetuities'.

Part 11 of the *Law of Property Act* provides that a perpetuity period is defined as being a life in being plus 21 years; or 80 years from the date on which the settlement takes effect, whichever is specified in the settlement. There is a further proviso that if no perpetuity period is specified in the settlement, the perpetuity period is to be taken to be 80 years from the date on which the settlement takes effect.

The rule against perpetuities exists, in one form or another, throughout Australia other than South Australia. It also exists throughout the world. It has however been abolished in a number of jurisdictions (Ireland and some American states) and has never existed in Scotland.

The matter has recently been considered in Chapter 17 of the 'New Zealand Review of the Law of Trusts: A Trusts Act for New Zealand'. This report advocates for the reform of the law against perpetuities by repealing the current law (which is similar to that in place

in the NT) with a replacement rule that limits trusts to 150 years of operation.

I would be grateful to receive the Committee's Report by 31 July 2014.

Yours sincerely

JOHN ELFERINK

PERPETUITIES

INTRODUCTION TO PERPETUITIES

A developing nation will ultimately reach a stage where its citizens will seek and attain security of tenure of such real property as they may have acquired. In the case of larger and more powerful landowners their broad estates will usually originate in awards for loyal service to a successful monarch.

The necessary guarantee of security of tenure can only be a system which has developed a pattern of various rights and privileges to real property which are recognised and, more importantly, enforceable by law.

The law protected those who could, by proper legal process, prove title to real property; and also protected those who claimed through them to a lesser estate in the same property.

If one regards English history as commencing after the recall of the Roman legions in the 5th century, subsequent centuries did not encourage security of tenure. Successive invaders from the continent continually displaced those who had previously, and equally violently, seized land from the earlier inhabitants. Force, not law, was the determining factor. Some stability was obtained in the later Saxon kingdoms, if the King was powerful enough to enforce it.

All was swept away by the Norman Conquest, when William I displaced virtually all local title with grants to his own supporters. Nevertheless this brought more effective administration (c.f. Domesday book), and the courts set about developing laws of property which could guarantee that he who possessed an interest in land could rely upon the law to uphold it.

Property law, under the guidance of many great judges skilled in the medieval intricacies of that time, became complicated, esoteric and highly formalised. But the very solemnity and complexity of the proceedings created its own certainty; and he who successfully manoeuvred through the maze could be confident that any rival claimant faced a labyrinth of legal learning to get to him.

Greater protection of title encouraged greater confidence in planning to preserve estates for future generations. "Keep it in the family".

The urge to found a dynasty was strong in those who believed that their own superior talents could and should be passed on indefinitely to one's descendants, as much for society's benefit as for theirs.

But it was not for society's benefit. The "dead hand" of the settlor could prevent dealing of the land to raise capital for better economic use, successors in title could be incapable of proper management, and it

was no advantage to a developing nation to have substantial areas of land tied up under conditions which militated against its potential for improvement, and debarred more active and enterprising citizens from ownership.

Anxiety as to perpetual estates was not confined to English law. In Roman law a “fideicommissum” (a form of trust) was employed to extend settlements further than thought suitable. Justinian ultimately decreed that property could not be tied up for more than four generations; and this provision, with differing limitation periods, continued into continental law.¹

The judges in England may have been sympathetic to the “great name” argument, and the aristocratic desire to preserve it in property. Many were themselves owners of large estates; but they understood the dangers of perpetual possession.

The dissipation of young heirs, the splendour of great families, the prosperity of annexing sufficient possessions to support the dignities obtained by illustrious persons, afford specious arguments for perpetuating estates by entails, but, in a commercial country, to damp the spirit of industry, and to take away one of its greatest incentives, the power of honourably investing its acquisitions, would produce all the inconveniences, against which we have been guarding ... The safety of creditors and purchasers requires that the law should be fixed and certain with respect to the limitations of real property in family settlements.²

Hence the gradual introduction by the courts of limits to estates in futuro, - the Rule against Perpetuities.

The dynasts did not give up, and, for hundreds of years learned, subtle and erudite counsel devised wills, conveyances, trusts, successory titles, and much else, calculated to keep, until the crack of doom, or at least indefinitely, the ancestral estates in the hands of the legitimate descendants of the original settlor. To this, the courts replied with equal ingenuity, trimming, amending and changing their original defences in order to meet the equally variable challenges of the polyphiloprogenitive ambitions of the ancestral founder. The ultimate and ultimately successful defence was the Rule against Perpetuities. Essentially it created temporal boundaries beyond which the “dead hand” of the settlor could not operate.

The labyrinthine decisions of the many famous judges who developed and preserved the Rule in all its transcendental complexity

¹ *An Introduction to Roman Law* – J. K. B. M. Nicholas, Clarendon Law Series, 1962 pages 268-9. *The Oxford Companion to Law*. David M. Walker, Clarendon Press, 1980 pages 468-9.

² Report – Chancery cases 1759 Duke of Marlborough v Earl of Godolphin 7 Toml. P. C. 29. See also Campbell’s Lives of the Chancellors Vol VI page 329.

need not, (fortunately), be referred to here, save to record the ultimate result. As Professor Donahue comments:-

*The Rule against Perpetuities is notorious for its complexity and difficulty. It has been held that it is so difficult that a lawyer is not liable in malpractice for drafting an instrument which violates the Rule. Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).*³

In addition, Professor Barton Leach stated that the rule against perpetuities is:-

*“so abstruse that it is misunderstood by a substantial percentage of those who advise the public, so unrealistic that its “conclusive presumptions” are laughable nonsense to any sane man, so capricious that it strikes down in the name of public order gifts which offer no offence except that they are couched in the wrong words, so misapplied that it sometimes directly defeats the end it was designed to further...”*⁴.

For those who would wish to explore the subject in greater depth, a careful and detailed study is supplied by “Real Property Law in Queensland”⁵

Essentially the Rule, as finally established by the common and statute law over several centuries, can be summed up as : -

“No interest in property is valid unless it must vest (take effect), if at all, earlier than 21 years after the death of a person alive at the time the interest was created.”

This is the test adopted by many authorities, and, in particular, by Report No.15 of the NT Law Reform Committee, “Report on the Rules against Perpetuities and Accumulations” 1993.

This Committee records its gratitude for the work of this previous Committee, and adopts and incorporates into this Report the background and definition of the Rule, as set out in Report No. 15, and as it existed in the Northern Territory in 1993, and prior to the adoption

³ From: Charles Donahue, *Cases and Materials on Property: An Introduction to the Concept and the Institution* (tentative 4th ed. 2012) (multilithed) (*sic*) (based on Charles Donahue, Thomas E. Kauper and Peter W. Martin, *Cases and Materials on Property: An Introduction to the Concept and the Institution* [3d ed. 1993].)
Online reference: www.law.harvard.edu/faculty/cdonahue/courses/prop/.../Mats_c18.pdf
(Accessed 18/6/2014).

⁴ *Perpetuities: Staying the Slaughter of the Innocents* (1952) 68 *LQ Rev* 35,

⁵ C.MacDonald, L.McCrimmon, A.Wallace, M.Weir, *Real Property Law in Queensland* (3rd ed, Thomson Reuters, 2010) at Ch.7. See also, McCrimmon article *Gametes, embryos and the Life in Being* (2000) 34RPP&TJ 697

by the parliament of the Northern Territory of the Recommendations of that Committee. (Appendix 1).

For greater clarification, however, this present Committee sets out a short history of the acceptance of the Rule in the Territory prior to the present date.

The NT – 1789 - 1863

The Northern Territory, with its boundaries increased to the WA border in 1827, (see Appendix 2) remained part of NSW between 1789 and 1863. Presumably therefore, the Rules against Perpetuity might, theoretically, be said to operate in the Territory. Since, however, the only British activity was confined to isolated outposts such as Port Essington, designed to discourage French or Dutch claims to any sovereignty over the area, it is unrealistic to regard English Law in operation save as some esoteric jurisdictional theory.

The NT 1863 - 1911

In 1863 that part of NSW known as the Northern Territory was annexed to South Australia by Letters Patent of Queen Victoria “until we think fit to make other disposition thereof”.

The consequent “Northern Territory Act” 1863 of South Australia provided for sale of “Waste lands of the Crown” to be granted to “any person or persons in fee simple, or for an estate of freehold of for a term of years and which have not been dedicated and set apart for public use”. The expression “Waste lands of the Crown” was defined as “all lands within the said territory which now are vested in Her Majesty...”.

The terminology indicates clearly enough that the property laws of South Australia now applied to the Northern Territory. Those laws, inherited from England via NSW, included the Rule against Perpetuities, and, at that stage, South Australia had made no changes thereto. Whatever be the position prior to 1863, it is clear that thereafter the Rule applied in the Territory.

The NT 1911 - 1978

In 1911 the Commonwealth took over the Territory from South Australia, paying some 3.5 million pounds for the privilege.

S. 6(1) of the Commonwealth Northern Territory Acceptance Act 1910 states:-

“6(1) the Northern Territory is by this Act declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth, by the name of the Northern Territory of Australia”.

S. 7(1) provided that:-

“(1) Subject to this Act, on and after the commencing date, all existing laws of the Territory have the same operation as they would have had if this Act had not been enacted, subject to alteration or repeal by or under enactment.”

South Australia, having made no change in the Rule during the period 1863-1911 it remained in the same form in the NT; and continued in that form during Commonwealth administration.

NT – Self – Government 1978 onwards

By the “Northern Territory (Self-Government) Act 1978 the Commonwealth granted (with certain limitations not relevant here) self-government to the Legislative Assembly of the Northern Territory.

By s.57 of that Act the “existing laws of the Territory” (i.e. the laws prior to the commencement of the Act) remained in force “subject to alteration or repeal by or under enactment”.

Thus the Rule against Perpetuities as existing prior to that Act remained in force unless or until the Northern Territory legislature saw fit to change it; which it did in 1994.

The Report of the NT Law Reform Committee (No.15 of October 1993) on “The Rules Against Perpetuities and Accumulations” proposed a change from a rule of “initial certainty” to a rule of “wait and see”, as already adopted by various legislatures including all Australian States and Territories except SA and NT.

The Committee recommended that the NT Parliament follow the example of the other States and Territories (except SA) and the Committee presented a draft of two Bills which it recommended that the NT Parliament adopt.

These two draft Bills were, in their entirety, passed by the NT Parliament as the *Perpetuities Act 1994* and the *Trustees Amendment Act No. 2 1994*. The latter Act became incorporated into *The Trustee Act* as ss21A, 50A and 50B.

For completeness it should be noted that the NTLRC also dealt with two other doctrines developed by earlier common or statute law and relating to the Rule against Perpetuities, namely the “Rule in *Whitby v Mitchell*” and the “Rule against Accumulations”.

The Committee considered that these “Rules” “served no purpose”. Pursuant to the Committee’s recommendation, they were abolished by s.21 and 22 of the *Perpetuities Act*.

These doctrines remain abolished, there is no suggestion that they be revived and they are not relevant to the present Reference of the A-G to the present Committee.

The *Perpetuities Act* was repealed by the *Law of Property Act 2000*, but only for the purposes of including its provisions in the *Law of Property Act* which was passed as a consolidating Act. This is confirmed

in the Second Reading speech introducing the *Law of Property Act* "... the Bill consolidates into one Act many legislative provisions currently contained in imperial Acts, in South Australian Acts and Ordinances, and in Northern Territory Acts".

The provisions of what had been the *Perpetuities Act* became Part II of the *Law of Property Act 2000* (with some minor re-arrangement of the original text which did not affect its meaning or intent).

In particular the "perpetuity period" and the "wait and see" provisions were retained as s.187 and s.190 respectively of the *Law of Property Act*.

"Wait and See Rule"

This Rule was designed to rectify certain problems which occurred or could occur under the classical definition of the Rule against Perpetuities as it is given in a slightly more detailed form than we have previously set out, and as defined in "Real Property Law in Queensland"

*"An interest is only good if it must vest, if it vests at all, not later than 21 years after the death of some life in being who was alive or en ventre sa mere at the creation of the interest. If no such life in being was in existence at the creation of the interest, then the term of 21 years only is allowed."*⁶

The learned authors of *Real Property Law in Queensland* stress that "the focus is on theoretical possibilities, not on actual events or probabilities".⁷

It followed that under the Rule as stated, a mere possibility that an interest would vest outside the perpetuity period would mean that the interest was void. This would defeat the intention of the settlor even when the theoretical possibility was remote from reality.

Many jurisdictions therefore enacted legislation to allow the court to 'wait and see' whether the interest would vest outside the perpetuity period.

In Report No.15 of 1993 the NT Law Reform Committee cited the provisions of the Ontario Perpetuities Act as a 'typical example' of the 'wait and see' approach.

3. *No limitation creating a contingent interest in real or personal property shall be treated as or declared to be invalid as violation the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.*

⁶ *Ibid* at [7.40].

⁷ *Ibid* at [7.100].

4. (1) *Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period shall be presumptively valid until actual events establish –*

- (a) *that the interest is incapable of vesting within the perpetuity period, in which case the interest...shall be treated as void or declared to be void; or*
- (b) *that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be void.*

The 1993 NT Law Reform Committee recommended the adoption of similar legislation in the Northern Territory. As previously mentioned, the recommendation was adopted and ultimately became s.190 of the *NT Law of Property Act*.

190 Wait and See

1. *If a provision of a settlement that creates an interest would, but for this section and section 189, infringe the rule against perpetuities, the interest is treated until the time (if any) it becomes certain that it must vest (if at all) after the end of the perpetuity period as if the provision did not infringe the rule and it becoming certain that it does infringe the rule does not affect the validity of a thing previously done in relation to the interest.*
2. *No limitation in a provision of a settlement that creates a contingent interest is to be treated as or declared to be invalid because it infringes the rule against perpetuities by reason only of there being a possibility of the interest vesting after the end of the perpetuity period.*
3. *Every contingent interest in a provision of a settlement capable of vesting before or after the end of the perpetuity period is to be presumed valid until events establish that the interest is incapable of vesting:*
 - a. *before the end of the perpetuity period, in which case the interest is to be treated as or declared to be void; or*
 - b. *after the end of the perpetuity period, in which case the interest is to be treated as or declared to be valid.*
4. *This section does not affect the operation of section 197.*

Similar provisions apply in:

NSW	<i>Perpetuities Act 1986 s.8</i>
VIC	<i>Perpetuities and Accumulations Act s.6</i>
QLD	<i>Property Law Act 1974 s.210</i>
WA	<i>Property Law Act 1969 s.103</i>
TAS	<i>Perpetuities and Accommodations Act 1992 s.9</i>
ACT	<i>Perpetuities and Accommodations Act 1985 s.9</i>

The “wait and see” rule does appear to rectify some of the more obvious difficulties of earlier versions of the Rule against Perpetuities. But the very expression “wait and see” carries within itself the expectation of delay. The delay may be considerable. The NT Report No.15 comments:-

‘Under the “wait and see” rule the instrument creating an interest is assumed to be valid and only becomes invalid if a contingent interest cannot or does not in fact vest within the perpetuity period. At the outset you cannot be certain that the instrument is valid, but you must “wait and see”, sometimes until the expiration of the perpetuity period.

This carries its own uncertainties in a settlement which should, for preference, be capable of immediate and practical interpretation. Indeed, the common law Rule against Perpetuities itself was designed to provide initial certainty,⁸ and the South Australian Report has suggested that in some cases the “wait and see” approach merely “puts off the evil day”.⁹

The Report of the Irish Law Reform Commission (2000) sets out the difficulties further:

It is undoubtedly true that the introduction of a “wait and see” principle would overcome the anomalies and injustices set out above. That said, it is by no means a flawless method of reform. To begin with it provides only limited relief. Where vesting occurs outside the perpetuity period, the “wait and see” principle is useless, and legatees’ interests continue to be disappointed. Secondly, the “wait and see” rule does not affect the length of the perpetuity period. This is especially problematic where there is no relevant life in being and the relevant perpetuity period is a mere 21 years. Thirdly, the introduction of a “wait and see” principle brings with it new problems of its own. Throughout the perpetuity period the validity of the gift remains mired in uncertainty, as does the identity of the proper recipient of any intermediate income generated by the subject matter of the gift.¹⁰

Furthermore, modern research might soon create more than a merely extreme example of science fiction. Scientific advances, already practicable, can extend the waiting period to a far greater degree than would be thought reasonable having regard to the philosophy of the common law to place temporal limits on the capacity of dead hand control of future alienation. The common law brought the ‘fertile octogenarian’ within the purview of the Rule.¹¹ But if the fertile

⁸ Ford and Lee, *Principles of the Law of Trusts* (Thomson Reuters, subscription service) at [7340].

⁹ South Australian Law Reform Committee Report, page 7.

¹⁰ Irish Law Reform Commission Report, page 21.

¹¹ *Jee v Audley* (1787) 1 Cox 324; 29 ER 1186.

octogenarian looms presently only as a remote possibility, what of the “fertile centenarian” to whom medical science can now grant parenthood, providing that the male or female desiring it has taken the precaution, during their fertile years, of depositing the appropriate genetic materials within a chamber properly frozen and prepared for preserving that material far into the future? This may add some fascinating uncertainties and immoderate length the “wait and see” rule.

The authors of *Property Law in Queensland* note that “[a]n argument can be made that the existence of reproductive material should be taken into consideration when ascertaining the life in being used to calculate the perpetuity period”.¹² They conclude that:-

*Further, the rule against perpetuities is a rule of certainty designed to invalidate interests that vest at too remote a time in the future. Recognition of a cryogenically preserved embryo as a life in being will promote uncertainty, and will produce an outcome that is incompatible with the policy reasons for the Rule’s continued existence. In particular, such recognition has the potential to tip the scales radically in favour of settlor or testator control, and may allow the Rule to be used for the very purpose for which it is currently designed to prevent. A settlor or testator, through the use of reproductive technology, could fetter the ability of future generations to deal freely with property.*¹³

Is the “wait and see” rule now worth waiting and seeing?

The Recommendations of the NT Law Reform Committee- No 15 of 1993

The Law Reform Committee of 1993 brought the NT legislation into line with current legislation in other Australian States and Territories, certain Provinces in Canada, NZ legislation (as it then provided), and the legislation of England and Wales. Its primary recommendation was:-

“Recommendation 1: Introduction of a “wait and see” rule to replace the rule of initial certainty”

The Report noted:-

These provisions render void only those interests which cannot possibly vest within perpetuity period. As most contingencies are created by conditions that will remain unfilled for an indefinite period of time, few interests are void from the outset. This makes the “wait and see” rule attractive.

In view of the criticisms set out above the word “attractive” may seem unduly optimistic.

¹² C.MacDonald, L.McCrimmon, A.Wallace, M.Weir, *Real Property Law in Queensland* (3rd ed, Thomson Reuters, 2010) at [7.130]

¹³ *Ibid.*

Nevertheless, in our respectful submission, the recommendation of the NT Law Reform Committee of 1993 was the appropriate action to take at that time, when so many jurisdictions had gone no further, and it was appropriate to allow time to consider whether, in the NT and other jurisdictions, the amendment had sufficiently corrected the problems arising from the 'classical' Rule.

We note that the NT Law Reform Committee of 1993 was aware of difficulties still offering after the adoption of the 'wait and see' rule.

*The 'wait and see' approach, while attempting to give every opportunity for an interest to vest, lacks certainty by merely suspending the final determination of the validity of interests. If invalidity does occur, it may be necessary to reopen an estate which has been administered with assets dispersed or to delay administration for years in order to avoid perpetuities problem.*¹⁴

Part (i) of the present Terms of Reference inquires:

"(1) whether the Northern Territory law should be amended along the lines of s.61 of the *South Australian Law of Property Act 1936* to allow for perpetual trusts".

S.61 of the *South Australian Law of Property Act 1936* leaves no room for ambiguity in the heading to the section which reads:

61 Abolition of rules against perpetuities and excessive accumulations

The section then reads as follows:

(1) *A disposition of property is not invalid –*

(a) *Because of the remoteness from the dates of the disposition of the time an interest will, or may, vest in pursuance of the disposition; or*

(b) *Because, under the terms of the disposition, an interest is limited, for life, to a person who was unborn at the date of the disposition, with a remainder over to a child or other issue of that person; or*

(c) *Because it provides for or permits the accumulation of income.*

(2) *A right or power in respect of property is not valid because of the remoteness of the time it is to be, or may be, exercised.*

¹⁴ NT Report pages.13-14.

(3) A purported exercise of a right or power in respect of property is not invalid because of its remoteness from the time the right or power was created.

The boldest step of any Australian State or Territory. Rather than tinker with the Rule it simply abolishes it.

The reasons of the SA Committee are set out in its Report. Briefly, but emphasising that this is only a summary of a far more detailed Report, the reasons given by the SA Committee are as follows:

- (a) The “wait and see” rule “creates at least as many problems as it solves” (p.8).
- (b) “The great weakness in the cy-pres statute is that there must be discerned in what the donor or testator has written, or more usually has had drawn up for him, an intention which can be given effect to cy-pres. As the donor or testator will in general never have applied his mind to the question, or the problem would not have arisen, there will be many cases in which no such intention can be discerned however benevolent the approach of the Court may be”. (p.11).
- (c) Scotland has never has a rule against perpetuities, yet the Scots “have never suffered the slightest inconvenience by reason of the fact that they have never had such a rule”. (p.11).
- (d) As far as Australia is concerned, “the constantly varying tax laws would make a strict settlement completely impossible at the present day. No one in his sane senses would tie up property strictly for a life in being and 21 years thereafter”. (p.11).
- (e) “in any event the variation of trusts legislation.... Gives a wide powers of resettlement of trust property”. (p.12).

Part 1 of the Terms of Reference suggests that this Committee is being asked to choose between the present laws of the Northern Territory which still incorporate the Rule (albeit with some amendments designed to give greater ease of recognition and execution) and the South Australian jurisprudence which does not.

The Committee has come to the view that abolition of the Rule is not warranted, however, reform is required.

ALTERNATIVES

In a carefully balanced review of the Rule against Perpetuities, as it affects New Zealand law, the author Kellee Clark deals with the alternatives of inaction, abolition and reformation.¹⁵

While she cautiously refuses to rule in favour of any particular approach, an objective reader might feel that the arguments for inaction are unconvincing.

As to the other alternatives, and examining the reports of the Law Reform Commission of Ireland (2000) and the English Law Commission (1998) she contrasted the “Irish Model” with the “English Model”

The English Law Commission considered that if the Rule were substantially tightened, and an “inclusionary” approach adopted in which only the stated interests would be subject to the Rule, and if the “wait and see” rule were retained together with a single perpetuity period of 125 years, these changes would sufficiently meet the perceived difficulties in the Rule.

The English Commission considered the Rule as “*continuingly vital to oppose the dead hand. Evidence was given that, if the rule was abolished, future interests would be created that would, at present, fall foul of the rule*”

The Irish Commission was firmly of the view that abolition was preferable to reformation. They considered that no reformative rule, however designed, could avoid the problems associated with the vesting element.

Remote possibilities in which the Rule might still have some relevance, but which may also carry within themselves the seeds of uncertainty and expensive litigation, should yield to a more direct approach of clear and specific legislation.

The Report of the NT Law Reform committee of 1993 did not suggest that there be no further development from the recommendations it then made. It noted that in Manitoba (1982), South Australia (1984) and Saskatchewan (1987) law reform bodies had recommended that the Rule be abolished. It noted that the Rule had been described as a “compromise” by one commentator, and, by another as “long stop”, that is “a player kept out of the way where he can do no harm, but possibly in an unusual situation to do some good”.

It is irresistible to reply to that last observation by pointing out that no professional cricket team ever posts a long stop; and, if it ever did, it would be a gross insult to its wicket keeper.

The Report of the NT Law Reform Committee of 1993 can be properly construed as a suitably cautious remedy for change at a time when the more radical ideas of abolition had not been tested.

¹⁵ 2007 *Otago Law Review*.

It is now plainly time to take the step of abolishing reference to the common law and provide for a fixed perpetuity period.

MAXIMUM DURATION

Given the approach recommended by the Committee, it is necessary to consider the appropriate maximum duration for a settlement¹⁶.

The current default period in the Northern Territory is 80 years¹⁷. However, the available alternative of 'a life in being plus 21 years' can clearly extend duration well beyond that period, certainly up to more than 120 years.

The Committee sees no reason to reduce the maximum duration appreciably below the duration currently available.

The period adopted in the United Kingdom in 2009 as the perpetuities period is 125 years.¹⁸

The period recommended by the New Zealand Law Commission is 150 years, based on "increasing life expectancies" which would "allow most trusts established for the duration of a life in being plus 21 years to continue until their natural end."¹⁹

The Committee considers that a period of either 125 or 150 years would fall within the range of reasonable alternatives. It acknowledges that life expectancy is rising but notes that achievement of the policy aims behind the recommended changes does not necessarily require a link to life expectancy. However, it also acknowledges the reasoning of the New Zealand Law Commission in recommending a period which it considers will fit neatly with the long term transitional arrangements it has proposed.

In order to promote a common approach among Australasian jurisdictions which set a maximum statutory duration, the Committee recommends that the maximum duration be set at 150 years.

APPLICATION TO EXISTING SETTLEMENTS

When changes were made to Northern Territory legislation to implement the recommendations of NT Law Reform Committee Report No.15 of 1993, the following transitional provisions were included (and ultimately replicated in the *Law of Property Act 2000*):

¹⁶ The term 'settlement' is defined in *Law of Property Act*, section 183.

¹⁷ *Law of Property Act*, section 187.

¹⁸ *Perpetuities and Accumulations Act 2009* (UK), section 5.

¹⁹ New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Chapter 17, *Perpetuities and the maximum duration of trusts*, paragraph 17.12.

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- (1) *This Part applies in relation to a settlement taking effect before or after 1 August 1994.*
- (2) *This Part applies in relation to a settlement exercising a power of appointment taking effect after 1 August 1994, whether general or special and whether or not it applies in relation to the settlement creating the power of appointment.*
- (3) *This Part does not apply to render invalid an interest created by a provision of a will executed before 1 August 1994 but taking effect after that date if the provision would not have infringed the rule against perpetuities had the Perpetuities Act 1994 or this Act not been enacted and the will taken effect when it was executed.*

The Committee considers that there should be no change to the effect of section 184(3) in respect of wills executed before 1 August 1994.

However, it is necessary to consider whether legislative changes are required to deal with other existing settlements.

Existing trusts - New Zealand Law Commission

The New Zealand Law Commission discussed its proposed approach to existing trusts in the following terms²⁰:

17.26 The 150 year maximum duration rule will apply to all trusts currently in existence, as well as any trusts established after the rule comes into effect. However, the 150 year duration period will not apply to existing trusts automatically, and existing trusts will continue to be bound by the provisions in their respective trust deeds. Several submitters to the *Preferred Approach Paper* raised practical questions about how the proposed changes would be applied to existing trusts. We have attempted to avoid creating complex transitional provisions for existing trusts.

17.27 More significantly, in this area it is important to take account of the intention of the settlor and beneficiaries' interests. It is difficult to say in any particular instance that a settlor would have opted for a 150 year period. Extending the period would risk going beyond what the settlor intended. Once settled, trusts are only changed by agreement between the beneficiaries, by a court order or as provided for in the terms of the trust. Importantly, changing the vesting date not only changes the date by which all assets must vest, but would likely change the identity of the beneficiaries in whom the assets ultimately vest. Our view is that

²⁰ New Zealand Law Commission, *Review of the Law of Trusts*, 2013, Chapter 17, *Perpetuities and the maximum duration of trusts*.

it is not appropriate to be able to easily alter the period because this will also alter these beneficial interests.

17.28 Trusts (both existing and new) which include a mechanism to calculate the vesting date rather than specifying a duration, would continue until the earlier of the date resulting from the calculation, or 150 years from the establishment of the trust.

17.29 Where the distribution date in an existing trust is fixed, this date will continue to apply. It may be possible to vary the vesting or termination date of the trust using provision in the trust deed where it allows for this. It may also be possible to extend the period by variation, agreement of the beneficiaries, or applying to the court for approval of a variation.

17.30 Some submitters argued for some form of simple, less costly process to extend the duration of a trust to 150 years. We have considered various options including allowing trustees to vary the trust to extend the period, notwithstanding that the terms of the trust do not provide for this. We also considered providing a specific provision allowing the court to extend the duration of a trust using a less onerous test for approving a variation. However, we do not think it is appropriate for trustees to be able to effect this change where this is not provided for in the terms of the trust, since it affects those beneficiaries who may be about to receive property if a trust is close to its vesting date. Likewise, it is not appropriate to formulate any different or lower test for variation by the courts, as this also affects beneficial interests. We acknowledge that there is a cost involved in taking an application to court, but we consider that the question of whether the duration of a trust can be extended is best left to the courts.

The Law Commission's deliberations seem to have been primarily directed to the situation where there is already a specified duration in the instrument, and do not specifically address the situation where the deed is silent and there is a default period.

Existing settlements - Approach on abolition

The approach adopted in South Australia and supported by the Irish Law Reform Commission is essentially not to disturb invalidation or distribution of property that has taken place prior to the commencement of the legislation but otherwise to abolish the rule with application to existing settlements.

These reservations are unexceptionable whether one is considering complete abolition of the rule or introduction of a maximum duration.

Recommended changes

In practical terms, the change in approach recommended by the Committee does little more than replace a complex and uncertain maze of common law and statutory tests with a single, fixed maximum period — an outer boundary within which a settlor may do as they please.

Settlements will no longer be invalidated. In essence, the changes equate to inserting a mandatory provision in each settlement that, unless terminated earlier, the settlement will terminate after 150 years, with default provisions for distribution of assets should the settlement not otherwise provide.

Given the relatively small number of settlements of this type and the proposed duration of 150 years, there is extremely limited likelihood that any trust operating under the current law would reach its sesquicentenary.²¹

So, in that sense, the recommended changes could apply to existing settlements without any significant impact.

However, the question arises as to whether the recommended changes should, in recognition of the difficulties they seek to remedy, go further to alter the duration of existing settlements.

The Committee considered the issue in relation to three types of settlement — the first, where the term is calculated by reference to a life — the second, where there is a stated term of years or other period not calculated by reference to a life — and the third, where there is no stated term.

Reference to a life

Currently, a settlor may nominate a term calculated with reference to a life, so long as it is no more than ‘a life in being plus 21 years’. The term so referenced may, in the final outcome, be relatively short or could well extend beyond 120 years, depending on which life or lives are nominated.

References of this type sit at the heart of the problem that the recommended changes seek to overcome. The great bulk of the current Part 11 of the *Law of Property Act* recites a series of complex and labyrinthine common law and statutory interventions designed to overcome issues that the rule against perpetuities has given rise to over the years.

If existing settlements are not subject to reform in some way, this maze will continue in place, with the need for its many and complex statutory supports, for many decades into the future.

²¹ The Committee does not recommend any change to the current exclusions provided in section 195, *Superannuation and other funds* or section 197, *Options*.

One immediate solution would be to substitute the 150 year maximum duration arrangement in any existing settlement that expresses a perpetuity period based on ‘a life in being plus 21 years’.

In considering such an approach, there are four interests to be considered:

1. Private interests of beneficiaries who enjoy (or may qualify for) the benefits of the settlement during its term may potentially be advanced, as the term would be extended;
2. Private interests of residuary beneficiaries who will (or may) take a gift only on termination or failure of an earlier gift may potentially be delayed or denied, again due to extension of the term;
3. The interests of the settlor. The Committee considers that by far the most common intention of a settlor adopting a perpetuity period of ‘a life in being plus 21 years’ is to extend the duration of the settlement for as long as possible. Thus a change that may increase the maximum duration slightly should not be seen as likely to be contrary to the settlor’s intent.
4. The public interest in administration of the law would be advanced by having one simple system apply to all trusts created before or after the introduction of the change, rather than the alternative which would require the development and maintenance of transitional provisions that require the continuation of complex arrangements surrounding the law of perpetuities for many decades to come.

If a decision is made to extend the maximum period to the more clear cut duration of 150 years, the Committee considers that period should apply to any existing settlement that adopts the terminology of ‘a life in being plus 21 years’.

The Committee acknowledges that this approach has the potential in a small number of cases, to negatively impact on individuals described in point 2 above. However, the benefit to the community, trust administrators and lawyers in maintaining a simple and consistent approach to administration of the law in this area justifies this step.

For cases where such a change results in demonstrable injustice, there could be provision for application to the Court by an aggrieved party to alter the terms of the settlement or its legislated duration²².

An alternative would be to refrain from altering the terms of such settlements by legislation but providing for applications to the Court to

²² Section 50AA of the *Trustee Act, Cy-pres modification in certain cases*, might form a useful starting point for formulation of such a provision.

alter the duration of a settlement to 150 years. However, the Committee anticipates that there would be limited interest in expending the legal and court costs involved in such a process and it would be necessary to maintain the operation of the whole of Part 11 indefinitely, with all its complexities, to ensure that unaltered trusts were catered for.

A term of years

Currently, a settlor may alternatively nominate a term that is not more than 80 years. The Committee considers that the intentions of a settlor in nominating a set duration should generally continue to stand.

The Committee acknowledges that if a settlor has nominated an 80 year period, they may have done so because that was the longest period then possible. However, if that was the intention of the settlor, it is far more likely that they would have chosen the more extended period of 'a life in being plus 21 years'.

In any event, it may be appropriate to allow for an application to the court, as discussed above, seeking to extend the duration to some period not exceeding the 150 year limit.

No stated term

The current default period where there is no stated term is 80 years. Should this be extended to the recommended 150 year term for existing settlements?

Again, the Committee has considered the four interests set out above:

1. Private interests of beneficiaries who enjoy (or may qualify for) the benefits of the settlement during its term may potentially be advanced, as the term would be extended by 70 years;
2. Private interests of residuary beneficiaries who will (or may) take a gift only on termination may potentially be delayed or denied for 70 years;
3. The interests of the settlor in this case would appear to support a longer period as they have not specified any limit. However, it is also arguable that they may have omitted to specify a period in the knowledge that there was an 80 year limit.
4. In this case, the public interest in administration of the law would be advanced by having one duration rather than having two potential durations that could lead to uncertainty.

There are some differences in the analysis of the interests to be considered. However, the Committee has come to the view that the same approach should be adopted and that existing settlements that do not state a term should now have a maximum duration of 150 years.

Again, the Committee acknowledges that this approach has the potential in a small number of cases, to negatively impact on individuals described in point 2 above. And similarly, for cases where such a change results in demonstrable injustice, there could be provision for an application to the Court by an aggrieved party to alter the terms of the settlement or its legislated duration.

In similar terms to above, an alternative would be to refrain from altering the terms of such settlements by legislation but to provide for applications to the Court to alter the duration of a trust up to 150 years.

Recommended approach for existing settlements

In summary, the recommended approach of the Committee in respect of existing settlements is that:

- a) the changes not apply to any invalidation or distribution of property that has taken place prior to the commencement of the changes;
- b) where the duration is stated in the form, 'life in being plus 21 years' or similar, the new maximum duration provisions (150 years) should apply;
- c) where there is no stated term, the new maximum duration provisions (150 years) should apply;
- d) where there is already a stated duration in the instrument (other than by reference to a life), the recommended changes should have no impact;
- e) a party aggrieved by a change under b) or c), should be able to apply to the Court to adjust the settlement or its statutory duration in order to do justice between the interested parties based on the impact of the changes;
- f) where a settlement nominates the maximum duration as 80 years, an interested party should be able to apply to the Court to increase the statutory duration to no more than 150 years.

ABOLITION

Recent Developments

The trend seems to be moving towards abolition. The recent report of the Law Commission of New Zealand, - “Review of the law of trusts – A Trust Act for New Zealand” September 2013, makes the primary recommendation: -

“(1) Repeal the Perpetuities Act 1964 and provide that the common law Rule against Perpetuities is of no application in New Zealand from the date of repeal forward.

(2) Provide a default duration of 150 years for all trusts (a shorter period may be specified in the terms of the Trust)”

The same Report reminds us that , “the rule has now been abolished in six Canadian provinces and 21 states within the United States of America, as well as Ireland and South Australia”.

This Committee generally adopts and relies upon the arguments already set out by the Law Commission of New Zealand and adds that, if one could envisage an Australian State which had no constraint on perpetuities, but now felt that some such constraints should be created, it would be highly unlikely that the parliamentary draftsman of that State would introduce anything like the Rule against Perpetuities, with its attendant hordes of metaphysical speculation. Rather, he or she would commence simply by asking what times of limitation were required, and would then proceed to draft a statute in clear and concise terms to that effect.

This Committee therefore recommends that a provision similar to that recommended by the Law Commission of New Zealand be adopted. The common law rule as amended by Part 11 of the *Law of Property Act* (NT) should be repealed, and a maximum statutory perpetuity period of 150 years should be substituted. It is acknowledged that some shorter periods have appeared in similar legislation, but we consider that the 150 year period is preferable. It is the period recommended for New Zealand, it covers (with an appreciable margin for error) any life plus 21 years possibility, and it deals adequately with any attempt at dead hand control of property.

Part II of the Terms of Reference

Part (ii) of the present Terms of Reference inquires:

“(ii) the consideration of roll over relief from the tax implications of transferring / rolling over a trust”.

This part of the Terms of Reference inquires, if it be the view of the Committee under part (i) that the law in respect of perpetuities should be

reformed, whether an amendment to, or a resettlement of, a trust deed or settlement (referred to hereafter as an amendment) made in consequence of that reform, should be exempt from stamp duty.

For example, where a trust deed or settlement was entered into before the reform on the basis that the law at the time permitted only a perpetuity period either of a life in being plus 21 years or of 80 years, should stamp duty be payable to the extent that the deed or settlement is subsequently amended on account of the longer period of 150 years?

The Committee envisages that any such exemption would be transitional in nature, i.e. it would apply only to amendments of existing trust deeds or settlements. The liability for stamp duty on trust deeds or settlements created entirely after the reform is enacted would have to be determined according to the ordinary principles upon which such duty is imposed.

We note at the outset that the enactment of the *Perpetuities Act* (NT) and the related amendments to the *Trustee Act* (NT), both of which commenced on 1 August 1994, were not, as far as the researches of the Committee can determine, accompanied by any amendments to the *Taxation (Administration) Act* (NT) or the *Stamp Duty Act* (NT) exempting existing trusts or settlements from duty.

Whether such an exemption should be enacted for the reform presently proposed turn to a large degree on whether the reforming statute would apply only to trust deeds and settlements created after its enactment or whether it would also apply retrospectively to deeds and settlements in existence at the time.

Clearly, if the effect of the reforming statute is to compulsorily amend existing deeds or settlements regardless of the terms of the trust or settlement, and if as a result of such an amendment stamp duty becomes payable, an obvious case for relief against the imposition of stamp duty can be made. It is the view of the Committee that it would be patently unfair to impose stamp duty in those circumstances and it therefore recommends that the statutory reform include provision exempting such amendments from stamp duty.

On the other hand, where a trust deed or settlement is voluntarily amended because the person with the power to amend thinks it convenient to take advantage of the longer perpetuity period, the case for relief against stamp duty is less obvious. Certainly, it was not thought expedient to provide for such relief as part of the first wave of reform in 1994.

Increasing the number of beneficiaries is one way in which a trust deed or settlement may sought to be amended to take advantage of the longer perpetuity period. Inquiries with the office of the Commissioner of Taxes has suggested that where the effect of the amendment to the

deed or settlement is merely to include additional family members in the class of beneficiaries, then it may be that stamp duty should not be payable. However, not so where strangers or non-family members are sought to be added. This, with respect, seems entirely sensible.

It is the view of the Committee that an exemption along the lines suggested by the office of the Commissioner of Taxes should be implemented. However, care should be taken to ensure the exemption is limited to amendments which arise solely out of the extended perpetuity period and not any other amendments. Further, the Committee recommends that the exemption be the subject of a suitable sunset clause, say 12 months.

RECOMMENDATIONS

The Committee recommends the following steps.

1. Abolish the common law rule against remoteness of vesting.
2. In its place, provide:
 - a) a legislated maximum duration of 150 years for all settlements (a shorter period may be specified in the terms of the settlement).
 - b) that at the expiry of 150 years, all settlement property is to be vested in accordance with the provisions contained in the terms of the settlement, or if the instrument of settlement is silent about who is to receive the property, it is to be vested in all surviving beneficiaries in equal shares.
3. Provide the following transitional arrangements in respect of settlements in existence at the time the law is changed:
 - a) the changes not apply to any invalidation or distribution of property that has taken place prior to the commencement of the changes;
 - b) where the duration is stated in the form, 'life in being plus 21 years' or similar, the new maximum duration provisions (150 years) apply;
 - c) where there is no stated term, the new maximum duration provisions (150 years) apply;
 - d) where there is already a stated duration in the instrument (other than by reference to a life), the recommended changes have no impact provided the stated duration does not exceed 150 years;
 - e) a party aggrieved by a change under b) or c), may apply to the Court to adjust the settlement or its statutory duration in order to do justice between the interested parties based on the impact of the changes;
 - f) where a settlement nominates the maximum duration as 80 years, an interested party may apply to the Court to increase the statutory duration to no more than 150 years.
4. Amend the Law of Property Act (in particular Part 11) to implement the above changes.

5. Make consequential amendments required to recognise the above changes, for example, to the Superannuation Act (section 44) and the Trustee Act (sections 21A and 50AA).
6. Where a pre-existing trust deed or settlement is voluntarily amended to take advantage of the new perpetuity period, the amendment should not attract stamp duty where the effect of the amendment is to add additional family members to the class of beneficiaries. The stamp duty exemption, in such circumstances, should be the subject of a 12-month sunset clause.
7. If the legislative changes have the effect of compulsorily subjecting a pre-existing trust deed or settlement to stamp duty, the stamp duty legislation should provide for an exemption.

Recommendations in respect of the stamp duty issues:

8. Where a pre-existing trust deed or settlement is voluntarily amended to take advantage of the new perpetuity period, the amendment should not attract stamp duty where the effect of the amendment is to add additional family members to the class of beneficiaries. The stamp duty exemption in such circumstances should be the subject of a 12-month sunset clause.
9. Where the legislative changes have the effect of compulsorily subjecting a pre-existing trust deed or settlement to stamp duty, the stamp duty legislation should provide for an exemption.

APPENDIX 1

NTLRC: Report on the Rules Against Perpetuities and Accumulations

2. THE COMMON LAW

(a) The Rule Against Perpetuities

The rule of law known as the rule against perpetuities is one of the rules developed by English courts to restrict dispositions of property which might tie up land or wealth indefinitely or for too long a time. The rule developed in the late 17th century, when family settlements were often made with the intention of keeping property within landed families from generation to generation and to protect family fortunes against profligate heirs and their creditors. These settlements effectively prevented the sale or mortgage of land for substantial periods of time. The courts thought it necessary to place some restraint on schemes that tied up land 'in perpetuity'.

The rule against perpetuities was designed to strike a balance between a wealthy family's ambitions for its descendants and the needs of a market economy in which land ought to be traded like any other commodity. The rule achieved this object by focusing on the vesting of future interests in the property. The rule is usually stated as follows:

No interest in property is valid unless it must vest (take effect), if at all, earlier than 21 years after the death of a person alive at the time the interest was created.

The rule is one of initial certainty

The rule requires that it must be certain, when the disposition is made, that the property must vest (if it is ever going to vest) in a person within the perpetuity period.

Examples of dispositions which do not offend against the rule are:

Example 1

A gives land to B to vest 20 years after A's death.
(Land vests in B (if at all) less than 21 years after A's death).

Example 2

A gives land to B to enjoy during B's life (a 'life estate') then after B's death to B's oldest surviving child (if any).
(Land will vest in B's child less than 21 years after B's death.)

Examples of dispositions which do offend against the rule are:

Example 3

A gives land –

- (1) to B a life estate;
- (2) to B's first child (if any) to attain 25.

(B's first child may turn 25 more than 21 years after B's death, eg. he or she is one year old when B dies.)

Example 4

A gives land –

- (1) to B a life estate;
- (2) to B's first child (if any) a life estate;
- (3) remainder to that child's first child (if any).

(Land may not vest in child's child within 21 years of B's death, whereas the rule requires that it must be certain that when the disposition is made it must vest within the perpetuity period.)

Example 5

A gives land –

- (1) to B a life estate;
- (2) to all of B's grandchildren who reach 21.

(The gift to the grandchildren is wholly invalid because one grandchild may reach 21 more than 21 years after B's death. For gifts to a class, the rule is: one out all out.)

To what property does the rule apply?

The purpose of the rule was originally to ensure the free alienability of land. According to Sappideen and Butt (p. 3), most commentators agree that the rule no longer serves this purpose, see Maudsley pp. 220–224, Allan pp. 31–32.

However, the common law rule has been applied to many dispositions of personal property, powers of sale, a special power of appointment (the common law modifies the rule when it applies to general powers), the creation of options to purchase land (in some jurisdictions, not others) and various other interests, but does not apply at all or with full force to certain charitable gifts, certain covenants over land (however, it does apply to contingent easements) and certain trusts: see Sappideen and Butt pp. 7–11, American Jurisprudence pp. 36–73.

Example 6

A transfers land to X Pty. Ltd., subject to an option exercisable by Y Pty. Ltd. to buy the land at valuation, the option to remain open for 25 years.

(There is no relevant life in being, so the perpetuity period is 21 years. The option may be exercised beyond the perpetuity period, so it is invalid: see *Worthing Corporation v Heather* [1903] 2 Ch 532.)

Example 7

A gives to B and B's heirs –

- (1) a right for 999 years to use existing roads on his or her farm;
- (2) a right to use any future roads on his or her farm.

(The first gift is valid because it vests immediately, even though it lasts for 999 years. The second gift is void because it may not vest (i.e. a road may not be built) within the perpetuity period.)

It has been said that the range of interests to which the rule against perpetuities applies may be extended as the necessity arises, and that the court proceeds on the principle that the rule is to be applied where no other sufficient protection against remoteness is attainable: *Re Ashforth, Sibley v Ashforth* [1905] 1 Ch 535, at p. 545.

How long is the perpetuity period?

The perpetuity period is defined by reference to 21 years after the end of a "life in being" at the time the interest is created.

A life in being includes the entire period from conception. Accordingly, a person born 8 months after the interest is created may be a life in being for the purpose of the rule. Similarly, the period of gestation may be added on to the 21 years, so an interest that must vest 21 years and 8 months after the life in being may be valid.

How does the rule apply to a gift to a class of people?

A gift is to a class of persons when it is to those who come within a certain specific category and who, if they are to take at all, are to take one divisible object in certain shares. Gifts of my land "to all the children of X living at my death" are class gifts. But a gift of property to be equally divided between five daughters of X is not a class gift because a distinct share is given to each beneficiary as if she had been named.

The rule against perpetuities as applied to class gifts is: if a single member of a class might take a vested share outside the perpetuity period, the whole gift fails, even in respect of those members of the class who have already satisfied any required condition. A class gift cannot be good as to one party and void as to the rest because the share of every member may be increased or diminished by the void contingency.

Example 8

T gives property to his wife for life, then to such of the children of his brothers and sisters who attain 21. At T's death, his father and mother were alive but both were aged 66. He had two brothers and two sisters, of whom the youngest was 32, and several nephews and nieces, of whom the eldest was 14: *Ward v Vander Loeff* [1924] AC 653. (The gift to the nephews and nieces is invalid. There is a common law conclusive presumption of fertility in respect of any man or woman, however young or however old. T's 66-year-old parents might have a further child who might outlive the other brothers and sisters and then have a child. Such a child would attain a vested interest more than 21 years after any life in being.)

What is the effect of breaching the rule?

The general effect of a particular disposition being void under the rule against perpetuities is that the instrument containing the disposition takes effect as if the invalid disposition, and all dispositions dependent on it, were omitted.

(b) The Rule in *Whitby v Mitchell*

English courts grappled with the question of perpetuities before the rule against perpetuities was finally formulated. At least as early as 1556, in *Chudleigh's Case* 1 Co. 120, doubts were expressed about the practice of piling contingency upon contingency in order to keep land within a family.

A rule, also known as the rule against double possibilities, was stated in a case in 1890 and has been known since as the rule in *Whitby v Mitchell* (1890) 44 Ch.D. 85:

If an interest in land is given to an unborn person, any remainder to his or her issue is void, together with all subsequent limitations.

Some grants may infringe this rule without infringing the rule against perpetuities; for example, a grant of a life estate to a person who has no children at the time of the grant, remainder to his or her first-born son for life, remainder to the first-born son of that son to be born within 21 years of the death of a nominated person then living or ascertainable from a list. Since the most remote interest vests within 21 years of the death of a living person, the rule against perpetuities is avoided. The rule in *Whitby v Mitchell*, however, will still apply.

(c) The Rule Against Accumulations

The accumulation of income within a trust is a common device where interests are vested in minors. Maintenance and support are normally permitted at the discretion of the trustee and the remaining income, if any, is accumulated (usually re-invested).

The rule against accumulations is not directed specifically at trusts but affects them. It is concerned with the person who seeks to set aside a fund, have it accumulate for many years, and then, at the end of the period, have it passed to a beneficiary, usually a lineal descendant of the settlor. To prevent this accumulation, the U.K. Parliament passed the Accumulations Act in 1900 (presently in force in the Northern Territory).

The Act limits the accumulation period to one of four periods which the settlor (person creating the fund) might choose:

- the lifetime of the settlor;
- 21 years from the death of the settlor;
- the minorities of persons living at the settlor's death; or
- the minorities of person entitled to the accumulated sum on coming of age.

The rule against accumulations determines for how long income from property may be accumulated in such a way as to prevent it being enjoyed by anyone in the meantime.

The rule against accumulations relies on accumulation periods which are arbitrary and may be difficult to apply. They may result in otherwise avoidable litigation. There are practical problems, too. If a parent sets up a trust for his or her mentally handicapped child, with a discretionary power to accumulate income, the rule would apply to allow accumulations for only the parent's lifetime, or worse, the minority of the child. The parent's intention to provide a discretionary trust for the duration of the child's lifetime could not be accomplished.

APPENDIX 2

