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Trusts—Rule Against Perpetuities—Cy Pres: Dominant General Testamentary Intent as a Prerequisite to Application—In re Estate of Chun Quan Yee Hop, 469 P.2d 183 (Hawaii 1970)

anon

RECENT DEVELOPMENTS

TRUSTS—RULE AGAINST PERPETUITIES—CY PRES: DOMINANT GENERAL TESTAMENTARY INTENT AS A PREREQUISITE TO APPLICATION—*In re Estate of Chun Quan Yee Hop*, 469 P.2d 183 (Hawaii 1970).

Testator provided that a trust "cease and determine upon the death of my wife . . . or thirty years from the date of my death, whichever shall last occur. . . ." After finding the provision violative of the Rule Against Perpetuities, the Supreme Court of Hawaii judicially adopted the *cy pres* (equitable approximation) doctrine to uphold the trust by shortening the period from 30 to 21 years. The court held specifically that "any interest which would violate the Rule Against Perpetuities shall be reformed within the limits of that rule to approximate most closely the intention of the creator of the interest." *In re Estate of Chun Quan Yee Hop*, 469 P.2d 183 (Hawaii 1970).

By judicially adopting *cy pres* in the perpetuities context, Hawaii joins only two states: New Hampshire and Mississippi.[1] While 14 other states have legislatively reformed the Rule Against Perpetuities in varying degrees,[2] the majority of American jurisdictions still adhere to the time-tested common law Rule.[3]

The New Hampshire courts have consistently adhered to the equitable approximation rule of *Edgerly v. Barker* since 1891;[4] however, the

1. Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962). There is a possibility that Kansas, by virtue of *In re* Foster's Estate, 190 Kan. 498, 376 P.2d 784 (1962), could be included. A void devise was modified in that case; however, there was no formal adoption of *cy pres*.

2. *See* notes 6-10 and accompanying text, *infra*.

3. The classic statement of the orthodox Rule Against Perpetuities is: "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." GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

While most of the American jurisdictions still submit to the unmitigated harshness of the Rule as stated above, Great Britain has enacted a statute which provides that where a gift violates the Rule Against Perpetuities by reason of an age contingency in excess of twenty-one, the contingency may be reduced to twenty-one in order to save the gift. Law of Property Act, 15 & 16 Geo. 5, C.2d, § 163, at 688 (1925). Several state statutes in the U.S. have been modelled after the British Provision. *See* note 7, *infra*.

4. 66 N.H. 434, 31 A. 900 (1891). For a detailed discussion of the rule, see text accompanying notes 15-25, *infra*.

See also Wentworth v. Wentworth, 77 N.H. 400, 92 A. 733 (1914); Gale v. Gale, 85 N.H. 358, 159 A. 122 (1932); Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).

movement for perpetuities reform elsewhere in the United States has only become viable within the last quarter-century.[5] Strong advocacy by legal scholars for implementation of reform measures has led to a number of legislative formulas which mitigate the destructive effect of the common law Rule.[6] Some provide for reduction of age contingencies,[7] which would be inadequate to empower courts to do what the *Chun* court did—reduce a term of years. Others, adopting a "Wait-and-See" approach, make the validity or invalidity of the interest turn on actual, rather than possible, events.[8] Still others make broad provision for effectuation of the creator's approximate intent.[9] Combining the latter two formulae is the Vermont provision, part of which is nearly verbatim the holding in *Chun*:[10]

5. *See generally* Leach, *Perpetuities: Cy Pres on the March*, 17 VAND. L. REV. 1381 (1964).

The first legislative provision enacted to reform the common law Rule dates back about two decades. PA. STAT. ANN. tit. 20, §§ 301.4, 301.5 (Purdon 1950). Mississippi did not decide Carter v. Berry, 243 Miss. 321, 147 So. 2d 843 (1962), until less than a decade ago.

6. Most notable is Professor Barton Leach, who, following the enactment of the Pennsylvania provision, *supra* note 5, struck while the iron was hot and soon thereafter authored *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952). In a later article, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 987-90 (1965), he recounts how, in turn, Massachusetts, Maine and Connecticut enacted modest perpetuities reform bills shortly after publication of the article. The cited passages in the latter article also demonstrate the distinct probability that Professor Leach penned the language used by the Hawaii court when he, with others, drafted the Vermont provision cited in the text at note 10, *infra*.

The pressure for perpetuities reform has not slackened with the advent of *cy pres* statutory provisions. *See, e.g.*, Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459 (1968).

7. CONN. GEN. STAT. ANN. § 45-96 (1958); ME. REV. STAT. ANN. tit. 33, § 102 (1964); MD. ANN. CODE, art. 16, § 197A (Supp. 1961) (repealed 1970); MASS. ANN. LAWS ch. 184A, § 2 (1969); N.Y. E.P.T.L. § 9-1.2 (1967).

8. CONN. GEN. STAT. ANN. § 45-95 (1958); KY. REV. STAT. § 381.216 (1963); ME. REV. STAT. ANN. tit. 33, § 101 (1964); MD. ANN. CODE art. 16, § 197A (Supp. 1961) (repealed 1970); MASS. ANN. LAWS ch. 184A, § 1 (1969); OHIO REV. CODE ANN. § 2131.08 (Page 1968); PA. STAT. ANN. tit. 20, §§ 301.4, 301.5 (Purdon 1950); VT. STAT. ANN. tit. 27, § 501 (1967).

9. CAL. CIV. CODE 715.5 (Supp. 1970); IDAHO CODE § 55-111 (1957); KY. REV. STAT. ANN. § 381.216 (1963); MO. STAT. ANN. § 442.555 (Supp. 1970); OHIO REV. CODE ANN. § 2131.08 (Page 1968); TEX. REV. CIV. STAT. art. 1291b (Supp. 1970); VT. STAT. ANN. tit. 27, § 501 (1967); WASH. REV. CODE § 11.98.030 (1965).

The Washington provision reads as follows:

> If, at the expiration of any period in which an instrument creating a trust or any provision thereof is not to be rendered invalid by the rule against perpetuities, any of the trust assets have not by the terms of the trust instrument become distributable or vested, then such assets shall be then distributed as the superior court having jurisdiction shall direct, giving effect to the general intent of the creator or the trust.

WASH. REV. CODE § 11.98.030 (1965). There appear to have been no appellate decisions construing this provision as of April, 1971.

10. VT. STAT. ANN. tit. 27, § 501 (1967).

> Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of that rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and reforming an interest the period of perpetuities shall be measured by actual rather than possible events.

The majority in *Chun* acknowledged that the case was the first in Hawaii posing the question of whether a testamentary trust, clearly violative of the Rule by virtue of an excessive term of years, was to be judicially salvaged "in order to effectuate testator's intent."[11] The court affirmed that the common law Rule has continuing vitality and is responsive to the practical needs of modern times, outlining three broad policies of which the Rule is supportive: freeing wealth from hampering restrictions; giving the ultimate recipient control within a reasonable time; and letting the living control wealth. "Limiting an invalid term of thirty years," the court said, "does no violence to any of the above policies or to the testator's general intent."[12] Additionally, the court noted that a decedent's general testamentary intent has been judicially recognized in an analogous body of law applying the doctrine of equitable approximation to a charitable trust which would otherwise fail.[13]

After pointing out that the Rule Against Perpetuities is a "peremptory command of law" the object of which is to defeat—rather than effectuate—intention, two dissenting justices characterized the majority's simultaneous recital of the Rule's continuing validity and its refusal to apply it in the face of a clear violation as "the height of contradiction and illogic." They contended that "if no justification exists in reason or on grounds of public policy for the continued en-

11. 469 P.2d at 186.

12. *Id.*

13. *Id.* The theory of *cy pres* in the charitable trusts context may be expressed as follows: Although the donor intended to apply the gift to a *particular* charitable purpose designated by him, which subsequently became impossible, where it is shown that he had a more general intention to devote the property to charitable purposes, the court will save the charitable trust by carrying out the more general purpose and approximating his intent—for example, by applying the gift to a different institution than the one designated by the donor. *See, e.g.*, Town of Brookline v. Barnes, 327 Mass. 201, 97 N.E.2d 651 (1951); *In re* Syracuse University, 3 N.Y.2d 665, 171 N.Y.S.2d 545, 148 N.E.2d 671 (1958); Fairbanks v. City of Appleton, 249 Wis. 476, 24 N.W.2d 893 (1946); 4 A. Scott, The Law of Trusts § 399 (2d ed. 1956).

forcement of the Rule, then the court should, with directness, do away with the Rule."[14]

There is room for argument that the *Chun* majority has done precisely that.

Illustration of this assertion entails a re-examination of *Edgerly v. Barker*—the fountainhead of judicial *cy pres*—and its progeny. In *Edgerly*, testator left the bulk of his estate to trustees, providing: "[W]hen the youngest of said children [of testator's son] shall arrive at the age of forty years, then all my estate shall be theirs . . . ."[15] Using a remoteness-of-vesting test, the court determined that the interest would be void under the common law Rule.[16] However, since it appeared that testator's dominant intent was simply to make a gift—not to postpone vesting until the youngest reached the age of forty—the court, on that basis, applied *cy pres* and reduced the age contingency to twenty-one years, saying:[17]

> His intent that the grandchildren shall not have the remainder till the youngest arrives at the age of 40 years is modified by his intent that they shall have it, and that the will shall take effect as far as possible. The 40 years are reduced to 21 by his general approximating purpose, which is a part of the will.

Edgerly, then, embodies a rather clear-cut statement that the general intent to make a gift, bequest, or devise must, in fact, be dominant before *cy pres* may properly be utilized to salvage the interest created.[18] Examination of later cases discloses that, in general, the New

14. 469 P.2d at 188.

15. 66 N.H. 434, 31 A. 900, 901 (1891).

16. The fact that a later child of the son might be born and might attain age 40 more than 21 years after the death of all persons in being at testator's death would, under an orthodox analysis, invalidate the whole gift. *See generally* Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 648-51 (1938).

17. 66 N.H. 434, 31 A. 900, 916 (1891).

18. *See* Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 21 (1963), where the author, after quoting from *Edgerly*, says:

> The crux of the matter, then, is the presence of a dominant and general intention, and the obvious inference of such an intention arising from the fact that a donor chose to give property to certain people. This is the basis for any statutory direction to approximate such an intention as closely as possible, that is, that the donor's paramount purpose is evident from the instrument.

In connection with Professor Browder's remarks concerning statutory directives, see text at notes 32-36, *infra*.

Hampshire court has retained and clarified this salient characteristic of *Edgerly*.

The New Hampshire court, in the early decisions following *Edgerly*, indicated that *cy pres* was not to be applied in mechanical fashion. Where a bill in equity sought construction of a will conditioning defendant remainderman's interest on the failure of the trustees of a charitable devise to perform their duties faithfully, *Edgerly* was cited for the proposition that the remainderman's interest was void because conditioned on an event which might never occur.[19] The court did not even discuss whether the remainderman's interest ought to be reformed so as to be conditioned on occurrence within the period of the Rule. Similarly, where a conditional fee was to be established with a remainder over to certain societies if the fee-holders failed to meet express conditions, the New Hampshire court relied in part on *Edgerly* for the proposition that the interest of the societies, limited on an indefinite failure of issue, conflicted with public policy and was void for remoteness.[20] Impliedly, then, the dominant-intent rationale of *Edgerly* is preserved in these early results.

Later, the court explicitly affirmed the *Edgerly* case as being one where "[the] limitations [were] slightly in excess of those permitted by law, and it appeared that there was a primary intent that the devise take effect, even though the precise limitation could not . . . ."[21] The view was reaffirmed in *Merchants National Bank v. Curtis*, where the court said the rationale of *Edgerly* was that:[22]

> [W]herever possible, a will should be construed to carry out the primary intent to accomplish a legal testamentary disposition even though the will may have inadvertently exposed a secondary intent to accomplish the testamentary disposition in an ineffective manner.

The Kentucky Court of Appeals, likewise, interpreted the New Hampshire rule in this way. In *Hussey v. Sargent*,[23] a case involving construction of the will of a New Hampshire domiciliary, the court

19. Rolfe & Rumford Asylum v. LeFebre, 69 N.H. 238, 45 A. 1087 (1898).
20. Merrill v. American Baptist Missionary Union, 73 N.H. 414, 62 A. 647 (1905).
21. Gale v. Gale, 85 N.H. 358, 159 A. 122, 123 (1932).
22. 98 N.H. 225, 97 A.2d 207, 211 (1953).
23. 116 Ky. 53, 75 S.W. 211 (1903).

was confronted with a provision for accumulation of specific portions of income for the benefit of testator's children, to be paid to them when testator's daughter reached the age of 35, or if she did not live that long, at such date as she would have reached 35. The Kentucky court applied the law of New Hampshire and found the *Edgerly* case controlling, saying:[24]

> [T]he court sustained [the bequest in *Edgerly*] . . . upon the theory that the *controlling* idea of the testator was that his grandchildren should have the remainder of his estate, and that the postponement of this devise until the youngest was 40 years old was *secondary and subordinate*, and that the court would not permit the plain intent of the testator that his grandchildren should have the estate to be defeated by the provision . . . .

However, the consistency with which the *Edgerly* rule has been applied in New Hampshire was marred by a 1914 case, *Wentworth v. Wentworth*.[25] There testator disposed of certain "family pictures" in his will as follows:[26]

> to the eldest of my sons who may be living at the decease of my wife and myself, to have and to hold the same in trust to preserve and to be transferred at his death to my next oldest son then alive, and so on in regular succession according to seniority, through all my sons, and then to the oldest grandson then alive, and at his death to the next oldest . . . and so on . . . forever.

The sister of a deceased older grandson, in possession of the pictures, sought to defend an action in detinue by the next eldest grandson, her cousin, on the basis that the interest created in him was void under the Rule Against Perpetuities. The court, citing *Edgerly*, stated:[27]

> The bequest is . . . invalid at common law by reason of the rule against perpetuities. . . . [I]t is the practice to carry out, so far as possible, the intention of the testator; and here, although a will might be invalid in its entirety under the rule . . . , the be-

24. *Id.* at 216 (emphasis added).
25. 77 N.H. 400, 92 A. 733 (1914).
26. *Id.* at 734.
27. *Id.*

> quests in it are good for the lives in being at the testator's death and 21 years and a fraction thereafter.

Plaintiff grandson was born during testator's life; therefore his interest was validated.

Apparently the testator in *Wentworth* was given the benefit of *cy pres*—"an essential element of equity jurisdiction"[28]—when his primary intent was not to make a simple gift to the natural objects of his bounty, but to tie up property for an unreasonable length of time by imposing a perpetual trust on persons unborn and unknown to him—the very evil sought to be avoided by imposition of the common law Rule. In view of the consistency with which the New Hampshire court has elsewhere expressed the requirement of a dominant general testamentary intent, *Wentworth* can only be regarded as aberrational.

But the result in *Wentworth* serves to accentuate the potentially major problem with the present Hawaii decision. *Chun*, by contrast with *Edgerly*, defines no clear-cut criterion, such as dominant intent, which must be satisfied before *cy pres* will be applied to save the bequest. To be sure, there *is* discussion of "general intent" and "general testamentary intent" in the opinion, but it is not explicit on this point and, indeed, the point is contradicted by a flat reading of the holding that "*any* interest which would violate the Rule Against Perpetuities" shall be reformed so as to come within its limits.[29] *Chun*, then, could be read to allow partial validity to be given to a scheme of devise running contrary to the Rule and the policy underlying it—where the dominant intent of the creator of the interest is not to make a simple gift, but to control property far into the future. If such schemes are to be given partial validity on a wholesale basis, as the specific holding suggests, then what obtains is a new rule of property—rather than an equitable rule of construction—one which effectively supersedes the common law Rule Against Perpetuities.[30] Any such ultimate result,

28. Carter v. Berry, 243 Miss. 321, 140 So. 2d 843, 855 (1962). The characterization of *cy pres* as an equitable rule of construction is examined in note 36, *infra*.

29. 469 P.2d at 187 (emphasis added).

30. Expanding the specific language of *Chun*, a more forceful expression of this rule of property might read:

> Every interest in real or personal property will be modified, if necessary, so as to vest within 21 years of some life in being at its creation, approximating, as nearly as is possible, the intent of its creator.

however, would clearly contradict the majority's assertion that the orthodox common law Rule has continuing vitality in Hawaii.[31]

In jurisdictions where legislative *cy pres* provisions, using language similar to that in *Chun*, appear to be broad directives to effectuate approximate intent, the courts may be confronted with the same problem, since, in all these jurisdictions except Idaho, the orthodox common law Rule Against Perpetuities is in effect as well.[32] Case law applying these statutes is virtually non-existent,[33] but one is still inclined to think that a dominant-intent rationale should emerge.[34] To give

31. *See* text accompanying notes 11-13, *supra*.

32. Some qualification of the textual assertion is in order. Several states have clearly indicated that the *cy pres* provisions are properly equitable rules of construction.

CAL. CIV. CODE § 715.5 (Supp. 1970), for example, allows reformation "to the extent that it can be reformed or construed within [the Rule Against Perpetuities (Cal. Civ. Code § 715.2] to give effect to the general intent of the creator of the interest whenever the general intent can be ascertained."

MO. STAT. ANN. § 442.555 (Supp. 1970) provides that whenever "reformation would more closely approximate the primary purpose or scheme" a petition for reformation may be filed to reform the instrument to the extent necessary to bring it within the Rule.

WASH. REV. CODE § 11.98.030 (1965), set out at note 9, *supra*., would allow the court to avoid the problem as well.

TEXAS REV. CIV. STAT. art. 1291b, § 1 (Supp. 1970) contains the provision that "any interest . . . shall be reformed," but section 2 makes it clear that the courts are granted "the power to reform or construe . . . in accordance with the doctrine of *cy pres*." Thus Texas, too, clearly has a rule of construction.

Idaho's perpetuities statute may be the strangest of all. IDAHO CODE § 55-111 (1957) reads:

> The absolute power of alienation of real property can not be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of the persons in being at the creation of the limitation or condition, and 25 years thereafter; there shall be no rule against perpetuities applicable to real or personal property, nor any rule prohibiting the placing of restraints on the alienation of personal property; no trust heretofore or hereafter created, either testamentary or inter vivos, shall be declared void, but shall be so construed as to eliminate parts violating the above provisions, and in such a way that the testators or trustors wishes are carried out to the greatest extent permitted by this act; that there shall be no presumption that a person is capable of having children at any stage of adult life.

The Vermont, Ohio and Kentucky statutes cited in note 9, *supra*., however, contain substantially the same language as that used by the court in *Chun* ("any interest . . . *shall be* reformed") (emphasis added). It is mainly those jurisdictions which are referred to in the textual assertion.

For further discussion of why these provisions *should* be characterized as rules of construction, see notes 34-36, *infra*.

33. In fact, from among the statutory provisions discussed in note 33, *supra*., there appears to have been but a single case. *In re* McNeill's Estate, 230 Cal. App. 2d 449, 41 Cal. Rptr. 139 (1964), refers in passing to the California *cy pres* provision, § 715.5, as evidencing legislative intent to construe the Rule Again Perpetuities (§ 715.2) liberally. The court did so and construed one testator's devise as presently vested with beneficial enjoyment delayed.

34. In addition to the reasons set forth in the text, it is worth noting here the possible significance of the use of the word "reformed" (". . . shall be reformed so as to

partial effect where the dominant intent of the donor is to create an interest which would exceed the limits of the Rule could lead to an anomolous practice of giving effect to "approximations" of intent without regard to the equities of the situation. Furthermore, the net result of such an approach would be to invariably favor the legislative *cy pres* provisions over the common law Rule—thereby superseding express legislative intent, in some cases, that the Rule Against Perpetuities be in effect in the particular jurisdiction.[35] The *cy pres* provisions, then, ought to be characterized as equitable rules of construction.[36]

The *Chun* result is probably correct. Testator's dominant intent to make a general testamentary gift is evident.[37] Yet, the Hawaii court is open to criticism. The element of confusion introduced by discussing testamentary intent only generally, while stating the holding so broadly, leaves Hawaii perpetuities law on shaky footing; if, as seems likely, the court has not evolved a new rule of property superseding the common law Rule Against Perpetuities, then it may later have to

. . . .") rather than, for example, "amended" or "modified" in these statutes. Though by itself inconclusive, the word ordinarily connotes an equitable remedy. *See* BLACK'S LAW DICTIONARY 1446 (4th ed. 1951).

See also Professor Browder's statement of the basis of these statutory provisions at note 18, *supra.*

35. In California, Kentucky and Ohio the orthodox rule is codified. In Texas, there is a constitutional prohibition against perpetuities. In Missouri, Washington and Vermont the rule is not codified.

36. That such a characterization is proper is shown in the language of the court in Carter v. Berry:

> *Cy pres* in the United States is a doctrine of approximation, is applicable to devises and is an essential element of equity jurisdiction. It is a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor.

243 Miss. 321, 140 So. 2d. 843, 852 (1962). Likewise, the court in *Chun* adverts to the equitable nature of the doctrine, calling it "equitable approximation" throughout the opinion. *See, e.g.*, 469 P.2d at 184.

Since *Carter* was decided, there have been no appellate decisions in which it played a significant part. It has been cited in general support—giving effect to intent in wills—on a few occasions. Due to this lack of development, *Carter* is not as valuable as *Edgerly* in gauging the impact of *Chun.* This note presupposes that the Hawaii court would look to the New Hampshire development in deciding cases following *Chun.*

37. Chun Quan Yee Hop died leaving 16 children. On termination he wished ¾ of the trust corpus to go to the then-survivors among his four sons, and any lawful issue of a deceased son, and other ¼ to go to the then-survivors among his twelve daughters, and lawful issue of any deceased daughter.

From this, the court may well have thought the primary general testamentary intent so readily evident that it did not require explicit reaffirmation. Indeed, in 84 HARV. L. REV. 738, 740 (1971) the note writer read *Chun* as being a case where the primary general intent requirement was not diminished at all.

clarify the basis for its holding. It is the opinion of the writer that the Hawaii court, when the occasion arises, should explicitly adopt the "dominant intent" rationale of *Edgerly*, thus effectuating the apparent desire of the present majority to retain the common law Rule, subject to application of *cy pres* where proper.[38]

38. *See* text following note 11, *supra.*