

Descending Into Perpetuity

Recent cases, statutes tackle the dreaded Rule Against Perpetuities.

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The Rule Against Perpetuities used to give us heartburn. It used to turn our stomachs. It made us edgy and nauseated when we were in law school and studying for the bar exam, as if we had way too many shots of espresso, so we did what most attorneys do when they enter the practice of law: We banished all but the most cursory recollections of the Rule Against Perpetuities from our minds, and hoped (and prayed) that we would never see or hear about it again.

It wasn't until one of us watched the film *The Descendants* (2011) that the Rule Against Perpetuities reappeared in our lives.

For those of you who have not yet seen the film, it stars George Clooney, playing the role of Matt King, the sole trustee and decision-maker for a family trust (the King Trust) that had generated millions of dollars for its beneficiaries through a series of leases and land sales in Hawaii. In the film, the King Trust solicited bids for the contemplated sale of 25 pristine acres of ocean-front property in Kauai. Driving the film's plot is the ambiguously lamentable notion that the property must be sold, and the King Trust dissolved, within seven years, to avoid running afoul of the Rule Against Perpetuities.

The intent of this article is not to assess whether the Rule Against Perpetuities was accurately portrayed in *The Descendants*, or to discuss how it may have played a role in the dissolution of some actual Hawaiian trusts upon which

the movie may be based.¹ Instead, this article will explain, in the simplest language, the basic rules of "perpetuities," how the rules apply in New York, and a few other issues of which attorneys (particularly real estate attorneys) should be aware, using the film as a starting point for the discussion. As more particularly discussed below, these basic rules of "perpetuities" and their application in New York state and other jurisdictions, have recently been revisited, and numerous modifications have been instituted and discussed, due to a number of recent litigation challenges and statutory revision proposals.

New York Rule

In New York, unlike most other states, the Rule Against Perpetuities is based on the English common law rule, which, in turn, is rooted in the notion that property should not remain inalienable (i.e., non-transferable) for an unreasonably long period. In 1830, the Rule Against Perpetuities was codified in New York statutes. In 1958 and again in 1960, the Rule Against Perpetuities was the subject of major changes. These changes were incorporated into the provisions of the present Estates, Powers and Trusts Law, effective Sept. 1, 1967, which adhered closely to the common law rule.² In its current form in New York, the Rule Against Perpetuities (the New York rule) requires that all conveyances and transfers of present, contingent, or future interests in real property vest within a discernible period. Each interest must vest within 21 years after the death of a person who was alive at the time of such transfer, or at the time the interest was created; this person, who is known as a "measuring life," can also be an unborn child who was conceived prior to the conveyance or transfer, or at the time the interest was created.³ The "measuring life" does not need to be named in the conveyance or transfer instrument.

In order to better grasp how the New York rule works, it is helpful to look at two examples:

Example 1: Justin is an elderly gentleman with no family other than his much younger sister, Chloe, who has no children and is not pregnant. Justin's will states that his 25 pristine acres of undeveloped wilderness on Staten Island should be given to Chloe's first child to reach the age of 18, and if she has no children who turn 18, then it should be given to the Central Park Zoo. Using Chloe as the "measuring life" for purposes of this example, the New York rule requires that, within 21 years of her death, we know with certainty which (if any) of Chloe's children first reached the age of 18. Because we know with certainty that if Chloe has any children, all of them will turn 18 years of age within 21 years after Chloe's death, this bequest does not violate the New York rule.

Example 2: Slightly altering the fact pattern set forth above, Justin's will states that his Staten Island property should be given to Chloe's first child to watch *The Descendants*, and if she has no children who watch *The Descendants*, it should then be given to the Central Park Zoo. Using Chloe as the "measuring life" for purposes of this example, the New York rule requires that, within 21 years after her death, we know with certainty which, if any, of Chloe's children first watched *The Descendants*. Because it is possible that none of Chloe's children ever watches *The Descendants*, or that none of them does so within 21 years after Chloe's death, this bequest violates the New York rule.

When a conveyance or transfer of an interest in real property violates the New York rule, that conveyance or transfer is generally void ab initio, or treated as a legal nullity.⁴

Uniform Rule

The Rule Against Perpetuities in Hawaii, in contrast, is based on the Uniform Statutory Rule Against Perpetuities (the Uniform Rule). While the

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New York rule examines the *possibility* of remote vesting at the time of creation, and can void a transfer or conveyance of a present, contingent, or future interest in real property at any time after it is made, the Uniform Rule employs a less rigid “wait-and-see approach.” Under the Uniform Rule, these interests are *not* automatically voided—instead, they are deemed to satisfy the Uniform Rule if they (i) must vest or terminate within 21 years after the death of the “measuring life,” or (ii) do in fact vest or terminate within 90 years of the creation of the interest. They are voided only if they fail to vest or terminate within 21 years after the death of the measuring life *and* fail to vest or terminate within 90 years.

Under Example 2, above, Justin’s bequest (if governed by the Uniform Rule) would only be voided if none of Chloe’s children watched *The Descendants* within 90 years after Justin died (as opposed to void ab initio, as under the New York rule) or if she did not have any children.

In *The Descendants*, there was certainly no explanation of how the Rule Against Perpetuities affected the King Trust, and none of the characters questioned precisely why the King Trust had to be dissolved, or why the property it owned had to be sold. Because Hawaii follows the Uniform Rule, the King Trust presumably had to dissolve and sell its real property because all future or contingent interests in the real property it owned did not vest within 21 years after the death of the measuring life, and could not vest within 90 years after the interests were created or conveyed to the King Trust, thus running afoul of the Uniform Rule’s restrictions.

Legislation and Application

Hawaii is not alone in adopting the Uniform Rule; the Uniform Rule has been adopted by 30 states,⁵ and several other states have passed their own versions of a modified Rule Against Perpetuities that are even more liberal than the Uniform Rule,⁶ or abolished it altogether.⁷ Assemblyman Keith Wright of Assembly District 70 in Harlem sponsored a bill last year in the New York State Assembly, attempting to implement the Uniform Rule in New York.⁸ This bill was referred to the legislature’s Judiciary Committee on Jan. 4, 2012 and is awaiting further action. The status of this bill should be followed closely by real estate and other attorneys whose practice could be impacted by changes to the New York rule. New York real estate attorneys should be aware that the New York rule has recently been reviewed by the courts with respect to lease renewal provisions, purchase options, and purchase and sale agreements.

Although leases are subject to the New York rule, they are rarely voided as a result of the New York rule. This notion was recently clari-

fied by the Court of Appeals in *Bleecker St. Tenants v. Bleecker Jones*.⁹ In *Bleecker St.*, the tenant entered into a 14-year lease with nine consecutive 10-year renewal options. Under the lease, if a renewal option was not exercised by the tenant, the lease would become a month-to-month lease, although the tenant would retain its right to renew the lease for a 10-year period at any time. The landlord argued that because the renewal option extended beyond the term of the lease, it should be invalidated because it violated the New York rule. The Court of Appeals disagreed, holding that so long as the tenant’s possession was continuous, the tenant’s right to renew remained “appurtenant” to the lease and therefore did not violate the New York rule.

Notwithstanding this ruling, attorneys should be careful to avoid drafting renewal options that may, even theoretically, be exercised after the expiration of the lease term (e.g., after the tenant vacates the leased premises). As Judge Susan P. Read noted in her concurrence in *Bleecker St.*, New York law does not provide a “blanket exemption” from the New York rule for all lease renewals.¹⁰ Instead, in order to comply with the New York rule, lease renewal options must be explicitly stated in the lease, and occupancy must be “continuous,” leaving the tenant no option or right to renew the lease after their lawful possession ends.¹¹

The Court of Appeals has unequivocally established that the New York rule applies to options to purchase real property that do not derive from a preexisting lease.¹² Accordingly, attorneys should ensure that in drafting purchase options, particularly those with built-in contingencies, the options clearly vest within 21 years of the death of a measuring life. A recent New York case¹³ held that a purchase option agreement containing no definitive expiration date nonetheless satisfied the New York rule, given that the purchase option was to be exercised after a number of contingencies, each of which must have been completed within a few years.¹⁴ Real estate attorneys drafting purchase option agreements with contingent expiration or exercise dates should therefore be careful to outline concrete deadlines to ensure compliance with the New York rule.

Purchase agreements that do not include a definitive closing date have been challenged by parties wishing to void the proposed transaction, by claiming they violated the New York rule, but these challenges have rarely been successful. In *Kaiser-Haidri v. Battery Place Green*,¹⁵ the Appellate Division rejected a buyer’s attempt to rescind a condominium purchase agreement by asserting that it violated the New York rule. The court held that the contract’s failure to include

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a definite closing date was permissible, because time was “of the essence” and the closing was to take place concurrently with or shortly after certain specified events.¹⁶ Real estate attorneys should note that indefinite closing dates may be susceptible to legal challenge under the New York rule, in particular where closing mechanics and timing are not adequately addressed in the purchase contract.

Conclusion

Although the Rule Against Perpetuities magically disappears from the minds of many otherwise diligent lawyers immediately following the bar exam (or sooner), it is important for real estate, trust, and probate attorneys to stay abreast of developing legislation and case law in this area. Even if your clients aren’t impressed with your legal acumen, at least the person sitting next to you at an Academy Award-winning movie might be captivated by your analysis.

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1. <http://blogs.wsj.com/speakeasy/2011/11/26/the-descendants-aims-to-lay-down-the-law-in-hawaii/>; <http://the.honoluluadvertiser.com/article/2007/Jan/20/bz/FP701200333.html>; <http://archives.starbulletin.com/2004/11/28/news/story1.html>.

2. New York Jur 2d, §385; EPTL 9-1.1[b].

3. New York Jur 2d, §386; EPTL 9-1.1[b].

4. See, e.g., *Symphony Space v. Pergola Props.*, 88 N.Y.2d 466, 485 (N.Y. 1996) (Commercial purchase option declared null and void due to possibility of exercise after 24 years).

5. Uniform Law Commission, [http://www.uniformlaws.org/Act.aspx?title=Statutory Rule Against Perpetuities](http://www.uniformlaws.org/Act.aspx?title=Statutory%20Rule%20Against%20Perpetuities).

6. See, e.g., Iowa Code §558.68 (wait-and-see approach); 33 M.R.S. §101 (wait-and-see approach); Rev. Code Wash. (ARCW) §11.98.130 (150-year wait-and-see approach).

7. See, e.g., Idaho Code §55-111; N.J. Stat. §46:2F-9; R.I. Gen. Laws §34-11-38; S.D. Codified Laws §43-5-8.

8. New York State Bill Search, <http://assembly.state.ny.us/leg/>, Bill Nos. A02202, A01510, A00598, and A11629.

9. *Bleecker St. Tenants v. Bleecker Jones*, 16 N.Y.3d 272 (N.Y. 2011).

10. Id. at 278 (Read, J. concurring).

11. Id. at 278-79.

12. See *Symphony Space v. Pergola Props.*, 88 N.Y.2d 466, 478-79 (N.Y. 1996).

13. *Rozina v. Casa 74th Dev.*, 29 Misc. 3d 675 (N.Y. Sup. Ct. 2010).

14. Id. at 679.

15. *Kaiser-Haidri v. Battery Place Green*, 85 A.D.3d 730 (N.Y. App. Div. 2d Dep’t 2011).

16. Id. at 733.