

BAHAMAS

PERPETUITIES ACT 1995

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PERPETUITIES ACT 1995

An Act to modify the law relating to the avoidance of future interests in property on grounds of remoteness.

Short title

1. This Act may be cited as the Perpetuities Act, 1995.

Interpretation

2. In this Act -

“court” means the Supreme Court;

“disposition” includes the conferring of a power of appointment and any other disposition of an interest in or right over property, and references to the interest disposed of shall be construed accordingly;

“power of appointment” includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration;

“will” includes a codicil.

Validity dependent upon actual events

3.(1) Subject to subsections (2) and (3), a disposition of a non-vested interest in property becomes void if the interest disposed of fails to vest within the perpetuity period as defined by section 6.

(2) Every disposition of a non-vested interest in property shall be treated, until such time (if any) as it becomes established that the vesting will not take place within the perpetuity period, as if such disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

(3) Subsection (1) shall not apply -

(a) to charitable trusts;

(b) to the trusts of any fund registered under the Superannuation and Other

Trust Funds (Validation) Act.

When the perpetuity period begins to run

4. The perpetuity period begins to run -
- (a) in the case of an instrument inter vivos creating interests in property, other than those created by an instrument described in paragraph (b), at the effective date of the instrument;
 - (b) in the case of an instrument inter vivos creating interests in property which are revocable or amendable in the sole discretion of the grantor, at the time at which such right of revocation or amendment terminates;
 - (c) in the case of interests in property created by will, at the date of the death of the testator;
 - (d) in the case of an interest created in exercise of a general power of appointment, at the same date as would be applicable if the instrument exercising the general power were an instrument creating interests in property in accordance with paragraphs (a) and (b);
 - (e) in the case of an interest created in the exercise of a special power of appointment, at the date on which the period began to run in respect of the instrument creating such special power.

Powers of appointment

5.(1) For the purposes of the rule against perpetuities, a power of appointment shall be treated as a special power unless -

- (a) in the instrument creating the power it is expressed to be exercisable by one person only; and
- (b) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of the exercise of the power.

Provided that for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a

general power where it could have fallen to be so treated if exercisable by deed.

- (2) Where a disposition consists of the creation of -
- (a) a general power of appointment, such power becomes void if it does not become exercisable within the perpetuity period;
 - (b) a special power of appointment, such power becomes void in so far as it is not fully exercised within the perpetuity period.
- (3) Every disposition consisting of the creation of -
- (a) a general power of appointment shall be treated, until such time (if any) as it becomes established that the power will not become exercisable within the perpetuity period, as if the disposition were not subject to the rule against perpetuities;
 - (b) a special power of appointment shall be treated, until such time (if any) as it becomes established that the power has not been fully exercised within the period, as if the disposition were not subject to the rule against perpetuities.
- (4) Where an appointment is made in the exercise of a general or a special power of appointment, such appointment shall be treated, until such time, (if any) as it becomes established that the vesting of the interest created by such appointment will not take place or has not taken place within the perpetuity period, as if such appointment were not subject to the rule against perpetuities, and its becoming so established shall not affect the validity of anything previously done in relation to the interest created by the appointment by way of advancement, application of intermediate income or otherwise.

The perpetuity period

6.(1) Subject to subsections (2) and (4), and to sections 7, 15(3) and 18, the perpetuity period shall be a period measured by the lives of persons alive at the time when the perpetuity period begins to run in respect of any instrument creating interests in property (hereinafter called the “measuring lives”) plus twenty-one years.

(2) Where an instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition, instead of being any other period, shall be a period equal to such number of years, not exceeding eighty, as is specified in the instrument:

Provided that this subsection shall not apply where the disposition is made in exercise of a special power of appointment, but where a period is specified under this subsection in the instrument creating such special power, that period shall apply in relation to any appointment

which is made in exercise of the power.

(3) For the purposes of subsection (1) and of sections 3, 5(2) and 7 a person en ventre sa mere but subsequently born alive shall be treated as a person who was alive at the relevant time.

(4) Where no lives are applicable under subsection (1) and no period of years is specified under subsection (2), the perpetuity period shall be a period of eighty years.

The measuring lives

7.(1) Subject to subsection (3), where the perpetuity period applicable to a disposition is that laid down in section 6(1), the measuring lives shall be such of the following persons as are alive and identifiable at the time when the perpetuity period relevant to the disposition begins to run -

- (a) such persons as may be expressly selected in the instrument making the disposition as being the measuring lives for the purposes of the disposition;
- (b) the person or persons by whom the disposition was made;
- (c) any person to whom or in whose favour the disposition was made, that is to say -
 - (i) in the case of a disposition to a class of persons, any member or potential member of the class,
 - (ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied,
 - (iii) in the case of a disposition made in exercise of a special power of appointment -
 - (A) the donee of the power,
 - (B) where such power is exercisable in favour of members or a class, any member or potential member of the class, and
 - (C) where such power is exercisable in favour of one person only, that person, or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the others may in time be satisfied;

- (d) a person having a child or grandchild within paragraph (c) or any of whose children or grandchildren, is subsequently born, would, by virtue or his or her descent, fall within that paragraph;
- (e) any person during whose life or upon whose death, whether as an individual or as the survivor of a group of persons, or on the failure or determination of whose prior interest the disposition is expressly limited to take effect, and any parent or grandparent of such person:

Provided that only those lives as are within paragraph (a) shall be the measuring lives for the purposes of a disposition if the settlor or testator so manifests his intention.

(2) Where the question relates to the validity of a general or special power of appointment or of an option the measuring lives are the person or persons by whom the disposition was made and the person or persons upon whom such power or option is conferred.

(3) Where the ascertainment of the date of death of the survivor of the measuring lives, whether because the number is large or for any other reason is not reasonably practicable, viewed from the date on which the perpetuity period begins to run in respect of the disposition, the measuring lives applicable to any disposition shall be reduced, category by category, within subsection (1) by the exclusion of all the lives in that category which makes such ascertainment impracticable.

(4) Where an application is made to the court under section 19 for a determination of the measuring lives applicable to a disposition, the onus of establishing that the lives in any particular category are ascertainable shall be upon the party so asserting.

Reduction of age

8.(1) Where the vesting of a disposition in favour of any person or persons is postponed until the attainment by such person or persons of an age in excess of twenty-one years and it becomes apparent at any time that -

- (a) the disposition, in respect of any one or more of such persons would, apart from this section, vest outside the perpetuity period; but
- (b) it would not so vest if the specified age had been twenty-one years,

the disposition shall be treated for all purposes as if, instead of being limited by reference to the age in fact specified it had been limited, in respect of the separate interest or share of each such person or persons, by reference to the age nearest that age which would, if specified instead, have allowed the disposition to such person to vest within the period.

(2) Subsection (1) shall be construed so as to allow the age to be reduced only in respect of

any person whose interest would otherwise vest outside the perpetuity period; and any such reduction in respect of a disposition in favour of one such person shall not, by reason only of such reduction, effect the reduction of the age of vesting in respect of any other such person.

(3) Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons -

- (a)* the reference in paragraph (b) of subsection (1) to the specified age shall be construed as a reference to all the specified ages; and
- (b)* that subsection shall operate to reduce each such age so far as is necessary, but not below the age of twenty-one years, to allow the disposition to vest within the period.

Gift to a class

9. Where, subject to section 8, in the case of a gift to a class, the interest of one or more members of the class vests during the perpetuity period, but either -

- (a)* it becomes established that the interests of another member or other members will not vest within the perpetuity period; or
- (b)* the interests of such other member or members do not vest within such period,

the person or persons described in paragraphs (a) and (b) shall be deemed for all the purposes of the disposition to be excluded from the class.

Condition relating to death of surviving spouse

10. Where a disposition is limited by reference to the time of death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of that person, and that time has not arrived at the end of the perpetuity period, the disposition shall be treated for all purposes as if it had instead been limited by reference to the time immediately before the end of that period.

Ulterior and dependent limitations

11.(1) Any rule of the common law to the effect that an interest is invalid by reason only of the fact that it is ulterior to and dependent upon a prior interest which is void for perpetuity is hereby abolished.

(2) The vesting of such ulterior interest shall not be prevented from being accelerated on the failure of the prior interest by reason only that the prior interest fails to vest within the perpetuity period.

Presumption and evidence as to the age of procreation

12.(1) Where any question arises -

- (a) respecting the rule against perpetuities;
- (b) in relation to the closing of a class;
- (c) as to the time at which payments may be made from a trust;
- (d) in relation to the termination of a trust or a period of accumulation; or
- (e) for any other like reason,

as to the ability of a person to have a child at some future time, then subject to subsection (2), it shall conclusively be presumed that a male is capable of procreating a child at the age of fourteen years or over, but not under that age, not after death, and that a female can conceive, and subsequently bear a child at the age of twelve years but not under that age or over the age of fifty-five years.

(2) In the case of a living person evidence may be given to show that such person, although within the ages laid down in subsection (1) is incapable of procreating or conceiving a child at the time in question.

(3) Where any such question is decided by treating a person as unable to reproduce at a particular time and he or she does so, the court may make such order as it thinks fit for placing the persons interested in the property which is the subject of such decision, so far as may be just, in the position such persons would have held if the question had not been so decided.

(4) The foregoing provisions of this section (except subsection (2)) shall apply in relation to the possibility that a person will become the parent of a child by adoption, legitimation or other means as they apply to his or her ability at that time to procreate or conceive a child.

Cy-pres at conclusion of perpetuity period

13.(1) Where it has become apparent that, apart from the provisions of this section, any disposition would be void solely on the ground that it infringes the rule against perpetuities, and where the general intention originally governing the disposition can be ascertained in accordance with the normal principles of interpretation of instruments and the rules of evidence, the

disposition may, on application to the court by an interested person, be varied so as to give effect as far as possible to the general intention of the settlor or testator within the limits of the rule against perpetuities.

(2) Subsection (1) shall not apply where the disposition of the property has been the subject of a valid compromise.

Administrative powers of trustees

14. The rule against perpetuities shall not operate to invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property for full consideration, or to do any other act in the administration (as opposed to the distribution) of any property, and shall not prevent the payment to trustees or other persons of reasonable remuneration for their services.

Options relating to land

15.(1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the term of a lease if -

- (a) the option is exercisable only by the lessee or his successors in title; and
- (b) it causes to be exercisable at or before the expiration of one year following the determination of the lease.

(2) Subsection (1) shall apply in relation to an agreement for a lease as it applies in relation to a lease, and “lessee” shall be construed accordingly.

(3) Subject to subsection (4), in the case of a disposition consisting of the conferring of an option to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities shall be twenty-one years, and section 6 of this Act shall not apply.

(4) Subsection (3) shall not apply to a right of pre-emption conferred on a public body in respect of land used or to be used for religious purposes where the right becomes exercisable only if the land ceases to be used for such purposes.

Avoidance of contractual and other rights in cases of remoteness

16. Where a disposition inter vivos would fall to be treated as void for remoteness if the rights and duties thereunder were capable of transmission to persons other than the original

parties and had been so transmitted, it shall be treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his, and no remedy shall lie in contract or otherwise for giving effect to it on making restitution for its lack of effect.

Possibilities of reverter, conditions subsequent, exceptions and reservations

17.(1) In the case of -

- (a) a possibility of reverter on the determination of a determinable fee simple; or
- (b) a possibility of a resulting trust on the determination of any other determinable interest in property,

the rule against perpetuities shall apply in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise, on breach thereof, to a right of re-entry or an equivalent right in the case of property other than land, and where the provision falls to be treated as void for remoteness the determinable interest shall become an absolute interest.

(2) Where a disposition is subject to any such provision, or to any such condition subsequent, or to any exception or reservation, the disposition shall be treated for the purposes of this Act as including a separate disposition of any rights arising by virtue of the provision, condition subsequent, exception or reservation.

Non-charitable purpose trusts

18.(1) Nothing in this Act shall affect the operation of any rule of law rendering void, for reasons other than failure to comply with the rule against perpetuities, certain dispositions under which property is to be applied for purposes which are not charitable or for the benefit of corporations which are not charities.

(2) Any such trust, if valid under the general law apart from the rule against perpetuities, shall be valid for a period of eighty years only.

(3) Any such trust which is in existence at the date of the commencement of this Act shall continue for either the period for which it would continue if this Act had not been passed, or for a period of eighty years from the date of the commencement of this Act, whichever period is the

shorter.

Application to the court for directions

19. An executor or a trustee of any property or any person interested therein, or in the validity or invalidity of an interest in that property may apply to the court for the opinion, advice or direction of the court with respect to the following matters -

- (a) the construction of the will or trust instrument;
- (b) a determination of the persons who are measuring lives for the purposes of the disposition;
- (c) whether a person who is a measuring life shall be presumed dead;
- (d) whether, prior to the determination of the perpetuity period governing the disposition, any interest shall be treated as incapable of vesting during that period;
- (e) at the conclusion of the perpetuity period, for the variation of the terms of the will or trust instrument in accordance with section 13;
- (f) any other matter on which such application could properly be made to the court according to current practice as if this Act had not been passed.

Application of Act

20.(1) Subject to subsection (2), the provisions of this Act shall apply in relation to instruments in respect of which, in accordance with section 4, the perpetuity period begins to run after the commencement of this Act, and in the case of an instrument made in the exercise of a special power of appointment shall apply, in accordance with section 4(e), only where the instrument creating the power takes effect after such commencement.

- (2) (a) Section 5(1) shall apply to instruments coming into effect both before and after the commencement of this Act to determine, for the purpose of the application of the rule against perpetuities, the distinction between general and special powers of appointment;
- (b) section 14 shall apply for the purpose of enabling a power to be exercised at any time after the commencement of this Act notwithstanding that the power is conferred by an instrument which took effect before that commencement;
- (c) section 12(1)(b), (c), (d) and (e) shall apply to instruments coming into effect both before and after the commencement of this Act, but shall not apply so as to affect any questions which have been determined, by litigation or compromise or otherwise, before the commencement of this Act;
- (d) section 18 shall apply so as to terminate, after a period of eighty years, non-charitable purpose trusts, whether created before or after the commencement of this Act.
- (3) This Act shall apply in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made.
- (4) This Act binds the Crown.