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DELAWARE LAW REVIEW

DIVORCE AND THIRD-PARTY TRUSTS IN DELAWARE

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I. DIVORCE IN DELAWARE

The Delaware Divorce and Annulment Act (Divorce Act) is in Chapter 15 of Title 13 of the Delaware Code.[1] Under the Divorce Act, the Family Court must enter a decree of divorce if, "it finds that the marriage is irretrievably broken and that reconciliation is improbable."[2] Delaware is a no-fault state. Hence, the Family Court may grant a divorce for, inter alia, "separation caused by incompatibility."[3] The Family Court has jurisdiction in a divorce matter where either the petitioner or the respondent resided in Delaware for at least six months immediately before commencement of the action.[4]

A . Property Division

1. Introduction

Delaware is an equitable-distribution state. Thus, the Divorce Act empowers the Family Court to divide, distribute, and assign "marital property" as the court deems just.[5] The first step the court must address is to identify what will be considered marital and nonmarital property between the parties. The court's decision is guided by Title 13 of the Delaware Code.

2. Identifying The Marital Property

a. Background

The court must identify the marital property before the court can allocate it."Marital property" is defined under Delaware law as: [6]

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1. Del. Code. Ann. tit. 13, §§ 1501 – 1523.

2. *Id.* § 1505(a).

3 *Id.* § 1505(b)(4).

4 *Id.* § 1505(a).

5. *Id.* § 1513(a).

6 . *Id.* § 1513(b) (emphasis added).

(1) All property acquired by either party subsequent to the marriage, *except* any of the following:

> a. Property acquired by an individual spouse by bequest, devise, or descent or by gift, except gifts between spouses, provided the gifted property is titled and maintained in the sole name of the donee spouse, or a gift tax return is filed reporting the transfer of the gifted property in the sole name of the donee spouse or a notarized document, executed before or contemporaneously with the transfer, is offered demonstrating the nature of the transfer.
>
> b. Property acquired in exchange for property acquired prior to the marriage.
>
> c. Property excluded by valid agreement of the parties.
>
> d. The increase in value of property acquired prior to the marriage.

(2) All jointly-titled real property acquired by the parties prior to their marriage, unless excluded by valid agreement of the parties. For purposes of this paragraph, "jointly-titled real property" includes joint tenancy, tenancy in common, and any other form of co-ownership.

When reading caselaw, it should be noted that Title 13 sections 1513(b)(1)[7] and (b)(2)[8] were added to the Divorce Act in 1993 and 2016, respectively.

Property given by one spouse to the other during marriage is marital property.[9] All property acquired subsequent to the marriage is presumed to be marital property regardless of how it is titled, but the presumption may be overcome by proof that the property was acquired by a method described within one of the exceptions above.[10]

b. Interpreting The Exceptions

The Supreme Court of Delaware interpreted two of the above exceptions in *Sayer v. Sayer*.[11] At the outset, Justice Moore summarized the issue and the court's conclusion as follows:[12]

> Marvin M. Sayer, the husband in this property division matter heard in the Family Court, appeals the denial of his claim to any part of the trust income to which his former wife, Genevieve duPont Sayer, became entitled during their marriage. The

7. 69 Del. Laws 55 (1993).

8. 80 Del. Laws 237 (2016).

9. Del. Code. Ann. tit. 13, § 1513(c).

10. *Id.* § 1513(c).

11. Sayer v. Sayer, 492 A.2d 238 (Del. 1985).

12. *Id.*

> sole issue before us is a matter of first impression in Delaware: When the right to receive trust income vests in one spouse during a marriage, to what extent, if any, is that income considered marital property subject to division between the parties? The Family Court ruled that a right to receive trust income, which vested in the wife during the marriage, was excludable under two exceptions to the statutory definition of marital property. However, we have difficulty with that reasoning. In our view the trust income paid during a marriage, or which a spouse is actually entitled to receive during that period, is not conceptually different from any other marital asset.

Justice Moore first observed:[13]

> In this case the Family Court decided that the wife's lifetime income interest in the testamentary trust, which had vested during the parties' marriage, was not marital property because it fell within the exceptions of 13 *Del. C.* § 1513(b)(1) [now 1513(b)(1)b] and (2) [now 1513(b)(1)d]. However, the post-marital vesting of a pre-marital contingent right to trust income is not an "exchange for property acquired prior to the marriage". 13 *Del. C.* § 1513(b)(1). *The "exchange" provision is intended to exclude from marital property only that which is "swapped" for pre-marital assets.*

He continued:[14]

> The Family Court's alternative reasoning, that the vesting during marriage of a pre-marital contingency came within the "increase in value" exception, is also inappropriate. As this Court has recognized, *the enhanced value provision is clearly directed to increases occurring from a price rise in pre-maritally owned assets*. The value of a vested interest in a trust is qualitatively as well as quantitatively different from the contingency that the wife possessed prior to the marriage. Under such circumstances the exclusion of this trust interest by reliance upon the increase in value exception is not appropriate.

The above-referenced exceptions within Title 13 are one aspect of the entire property-division process. There is nothing preventing a married couple from accumulating a broad array of property which must be addressed upon separation. Within the accumulated property, there is potential to find an article of property that is not addressed by statute.

c. Defining Marital Property

(1) Introduction

Often, when it comes time to divide marital property, the attitude of one or more of the parties is "What is mine is mine, what is yours is negotiable." That being said, the word "trust" does not appear in the statute. Of course, when

13. *Id.* at 239 (emphasis added).

14. *Id.* at 240 (emphasis added; citations and some internal quotation marks omitted).

something in the law does not have the benefit of a statute, it is left for the courts to consider. Below are some cases where the Delaware judiciary has considered when trust interests constitute marital property; they are instructive.

(2) *A.I.D. v. P.M.D.*

In *A.I.D. v. P.M.D.*,[15] Chief Justice Herrmann of the Supreme Court of Delaware considered the availability of income that the husband received during marriage from an inter vivos trust that became irrevocable prior to marriage. He concluded that, "we need not, and therefore do not, reach the issue of whether the trust income constituted marital property,"[16] but that, "we find no abuse of discretion in the award of $40,000 to the wife under all of the circumstances of this case, payable out of future trust income, if necessary."[17]

(3) *Frank G.W. v. Carol M.W.*

In *Frank G.W. v. Carol M.W.*,[18] Justice Quillen of the Supreme Court of Delaware described the controversy as follows:[19]

> Husband and wife were married on July 29, 1967 and divorced on July 29, 1979. Husband's grandmother died on September 24, 1953. She created a testamentary trust which provided that upon the death of husband's mother, the trustee was to assign and pay over the corpus and accrued unpaid income of the trust to the mother's lineal descendants. When the husband's mother died on February 15, 1973, while the parties hereto were married, husband's share of the trust property was distributed to him.
>
> A second trust, an irrevocable inter vivo*s* trust, was established in 1956 by husband's mother for his benefit. The trustee, "in his absolute and sole discretion", was authorized to apply the net income of the trust to husband's benefit. Further, upon reaching the age of 25, husband was to receive the unexpended income and principal of the trust. Husband turned 25 on June 14, 1970, after he had been married for three years, and, pursuant to the trust provisions, received the corpus and accrued income from the 1956 trust at that time.
>
> A third trust, a testamentary trust, created by the husband's mother in 1957, vested in the husband at her death in 1973. This trust was subject to postponement of enjoyment. Partial distribution of this trust took place in 1975 and the final distribution of $106,630 took place in 1980, following the 1979 divorce.

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15. A.I.D. v. P.M.D., 408 A.2d 940 (Del. 1979).

16. *Id.* at 942.

17. *Id.* at 943.

18. Frank G.W. v. Carol M.W., 457 A.2d 715 (Del. 1983).

19. *Id.* at 717.

Justice Quillen summarized the parties' positions as follows:[20]

> During ancillary proceedings, subsequent to Family Court's grant of husband's petition for divorce, a question arose as to whether the funds received from the trusts constituted marital property or non-marital property. It appears from the start of the ancillary proceedings, wife conceded that the "rights" to the trusts were "vested" in the husband when the trusts were created prior to the parties' marriage. But the wife argued that the "classical" future interest concept of "vesting" was not determinative of the issue of whether the property received by husband during marriage constituted non-marital or marital property. Instead, she argued, equitable principles required the Court to look to when the husband actually received the possessory interest in the property. When the trusts were dissolved, the parties were married; therefore, the wife argued, the property was subject to equitable distribution during ancillary proceedings. The husband took the position that, since the property was vested properly in him prior to marriage, there could be no argument that the property constituted marital property.

He noted:[21]

> These conflicting positions as to when the trust properties were "acquired" stem from the nature of the gift. The trusts were divided into multiple parts: present gifts of income and deferred gifts of enjoyment of the corpus.

The court held:[22]

> [W]e find that the meaning of "acquired" in our statute signifies the actual receipt or the right to receive the corpus of a trust. Thus, the assets of the corpus of the 1953 testamentary trust, the assets of the corpus of the 1956 *inter vivos* trust and the first distribution of the 1957 testamentary trust are marital property. The final $106,630.00 distribution of the 1957 testamentary trust which occurred after divorce, is non-marital property.

Following *Frank G.W.*, it was not clear whether a future interest in a trust or in some other kind of property constituted marital property. The Delaware Supreme Court resolved this uncertainty in *Gregg v. Gregg*.[23] There, Chief Justice Christie wrote:[24]

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20. *Id.* at 717 – 18 (footnote omitted).

21. *Id.* at 720 (citation omitted).

22. *Id.* at 727.

23. Gregg v. Gregg, 510 A.2d 474 (Del. 1986).

24. *Id.* at 480 (citations omitted).

> Property interests not yet reduced to possession can be acquired during marriage within the meaning of § 1513, and if such an interest still exists at the time of a divorce, the interest is to be regarded as marital property ….
>
> In the case at bar, the husband acquired a future interest in the farm during the marriage. This future interest has a present value and will continue to have value until Mr. Gregg comes into actual possession of the land. Under the circumstances, we hold that the value of this existing future interest must be treated as marital property.

(4) *Sayer v. Sayer*

In the *Sayer* case mentioned above, Justice Moore said:[25]

> While we conclude that the Family Court erred in its judgment interpreting 13 *Del. C.* § 1513(b), it does not follow that Mrs. Sayer's entire lifetime interest in the trust income is marital property. As this Court has previously stated, "vesting, in and of itself, cannot determine proper characterization of property as marital or non-marital property."
>
> The question of what portion of trust income is marital property, when the right to receive the income vests during the marriage, has not previously been addressed in Delaware. However, this Court has considered a related aspect in *Frank G.W. v. Carol M.W.* The main issue there was whether property held in several trusts created before the marriage, but distributed to the husband during marriage, was part of the marital estate. The Court held that the corpora of pre-marital trusts distributed during the marriage were marital property, while the assets dispersed after the divorce were not.
>
> After an extensive discussion of several approaches to the characterization of non-marital versus marital trust assets, this Court chose to adopt a possessory definition of the term "acquired". We stated that:
>
> Acquired in 13 *Del. C.* § 1513(b) is to be defined to reflect the reality presented to our Courts-assets are to be characterized in regard to the actual or constructive possession by the parties. This definition reflects the statutory purpose of allocating available resources fairly between the parties in consideration of both monetary and non-monetary contributions made to the well-being of the family. Such a definition also enables our Courts to value trust assets in a logical and workable manner based on values which were subject to the control and enjoyment of the marital unit.

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25. *Sayer*, *supra* at 240 (footnote, citations, and some internal quotation marks omitted).

Turning to the present case, he wrote:[26]

> Applying this same rationale to a spouse's interest in trust income, we conclude that the term "acquired" in 13 *Del. C.* § 1513(b) means the actual receipt or the right to presently receive the trust income. That rationale is particularly compelling here in light of the spendthrift provision applicable to Mrs. Sayer's trust.

Although the court held that trust income received during marriage might be marital property, Justice Moore's opinion contains three important caveats.

First, he noted that, "it is certain that the wife had no right whatever to receive any part of the corpus during the marriage …."[27]

Second, he specified:[28]

> [I]t is apparent that the extent of the marital property derived from this trust could only be that which was paid or actually due Mrs. Sayer while she was married. The money that the wife receives after the divorce is non-marital property.

Finally, in remanding the case to the Family Court, Justice Moore noted:[29]

> [W]e do not imply that the husband is entitled to any distribution of Mrs. Sayer's trust income. That remains a question within the Family Court's sound discretion.

(5) *Brady v. Tigue*

In *Brady v. Tigue*,[30] Judge Conner of the Delaware Family Court described a matter to be addressed as follows:[31]

> Marion D. Tigue, Wife's mother, departed this life on June 30, 1985 having executed her last Will on August 1, 1983 in which she established a trust (designated as the "Brady Trust") for the benefit of Wife's children from her first marriage. Under this trust in her mother's Will, Wife is to receive income for her life and has the right to request the trustee to invade the principal to provide properly for the support, suitable recreation, and education of herself and her children ….
>
> Husband requests that the "Brady Trust" corpus be considered a marital asset, included in the marital estate, and that he be awarded 15% of its current value.

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26. *Id.*

27. *Id.* at 239 n.1.

28. *Id.* at 241 (footnote omitted).

29. *Id.*

30. Brady v. Tigue, 1988 Del. Fam. Ct. Lexis 6 (Del. Fam. Ct. June 23, 1988). Delaware courts give unpublished opinions substantial precedential weight. Crystallex International Corp. v. Petroleos De Venezuela, S.A., 879 F.3d 79, 85 n.8 (3d Cir. 2018).

31. *Brady*, *supra* at *2 – 3.

Judge Conner rejected the husband's request as follows:[32]

> Since the Supreme Court has held that the corpus of premarital trusts, distributed during the marriage are marital property, it follows that the corpus of a post-marital trust that would be distributed during the marriage would also constitute marital property. However, the corpus of this particular trust was not distributed to Wife during this marriage and may never be distributed to Wife. Whether Wife will ever receive any portion of this trust principal rests upon the sole discretion of the trustee. *Husband's attempt to receive a share of this trust corpus can only be characterized as ridiculous*. He requests that he be awarded 15% of an asset that Wife has no legal right to enjoy any percentage of and may never receive any portion thereof. Without addressing the question of whether the right to invade the principal qualifies the trust corpus as marital property, Husband's request is rejected as totally inequitable, and in recognition of the testator's clear intent to protect her estate from her daughter's second husband for the benefit of her grandchildren.

Husband was not entitled to share in trust income either:[33]

> It also is academic whether Husband should be barred from sharing in the trust income paid to Wife during the marriage by the spendthrift provision set forth in paragraph 8 of Marion Tigue's Will. Husband made no request to share in any of the trust income that was paid during the marriage. The Supreme Court in *Sayer v. Sayer*, held that trust income received during the marriage constituted marital property. The Supreme Court, however, stopped short of ruling that the former spouse was entitled to any distribution of that trust income and left that question within the sound discretion of the trial Court. In this case, had Husband made a request to share, it most likely would have been rejected due to Wife's need for all this income to meet her own expenses, in the absence of interim alimony or spousal support.

(6) Continued Relevance Of Precedents Questionable

The continued relevance of the cases summarized in (2) - (5), which were decided between 1979 and 1988, is questionable. This is because, as noted above, a new exception was added to the statute in 1993. Under that exception,[34] property is not marital property if an individual spouse acquired the property from someone except the other spouse by bequest, devise, descent, or by gift and can confirm that by title, gift-tax return, or contemporaneous affidavit. Most trust interests - principal and income - should be covered by that exception. To date, though, there is no pertinent caselaw.

(7) Discretionary Trust Interest Might Not Be "Property"

The above authorities have focused on distinguishing between marital property and nonmarital property. Nevertheless, as recognized by the *Brady* decision, a discretionary-trust interest might not constitute "property" of any kind; it might be an "expectancy" that is not subject to division at all.

32. *Id.* at *3 – 4 (emphasis added; footnote and citation omitted).

33. *Id.* at *5 – 6 (citation omitted).

34. Del. Code. Ann. tit. 13, § 1513(b)(1)a.

In practice, when meeting with clients regarding their estate planning, the topic of protecting an inheritance (and the frustration of not having a crystal ball to see into their children's futures) frequently arises. The concept that an inheritance is able to stay in further trust, with an adult child as a beneficiary and not an owner, particularly for the purposes of property division, is often a very comforting thought. Via a trust, the child can still have the benefit of an inheritance, but the risk is greatly reduced.

d. Allocating The Marital Property

Once the marital property is identified the court must allocate it. Although some time is inevitably spent explaining it to a client who has been wronged, marital misconduct is irrelevant.[35] In allocating marital property, the court is to consider factors including:[36]

> (1) The length of the marriage;
>
> (2) Any prior marriage of the party
>
> (3 The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties;
>
> (4) Whether the property award is in lieu of or in addition to alimony;
>
> (5 The opportunity of each for future acquisitions of capital assets and income;
>
> (6 The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker, husband, or wife;
>
> (7) The value of the property set apart to each party;
>
> (8 The economic circumstances of each party at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the party with whom any children of the marriage will live;
>
> (9) Whether the property was acquired by gift, except those gifts excluded by paragraph (b)(1) of this section;
>
> (10) The debts of the parties; and
>
> (11) Tax consequences.

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35. *Id.* § 1513(a).

36. *Id.* § 1513(a)(1) – (11).

Although "trust" doesn't appear in the factors, courts have considered trust interests - whether marital property or nonmarital property - under factors (3),[37] (5),[38] and (7).[39] The Family Court has powers to ensure that orders, whether issued by the Court or stipulated and agreed-to by the parties, are implemented and enforced.[40]

C. Alimony

1. Introduction

The Family Court may award interim alimony to a dependent party during a divorce proceeding.[41] If a marriage has lasted less than 20 years, a person is eligible for alimony for up to 50% of the term of the marriage.[42] If a marriage has lasted at least 20 years, a person is eligible for alimony for an unlimited time period.[43] Any person awarded alimony generally has an ongoing duty to seek vocational training or employment,[44] a duty that the Court takes very seriously. A person seeking alimony will routinely have to show proof of an on-going and genuine job search to the Court. A written waiver of the right to alimony before, during, or after marriage is binding[45] if it was validly executed.

Unless otherwise agreed in writing, the obligation to pay alimony ceases upon the death, remarriage, or cohabitation of the receiving party.[46] A person receiving alimony must notify the other party of remarriage or cohabitation.[47] Although remarriage is easy enough to verify, what constitutes cohabitation is frequently argued over. Many alimony-paying parties use the services of private investigators to shore up their allegations when requesting that the Court terminate their alimony obligation.

In *Du Pont v. Du Pont*,[48] Chancellor Seitz of the Delaware Court of Chancery considered:[49]

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37. *See* In re Marriage of Tweedale v. Tweedale, 1996 WL 861492, at *7 (Del. Fam. Ct. Dec. 17, 1996); Preston v. Preston, 1999 WL 689292 (Del. Fam. Ct. May 11, 1999).

38. *See* Gibson v. Gibson, 1986 Del. Fam. Ct. Lexis 226, at *11 (Del. Fam. Ct. Oct. 31, 1986); *Brady*, *supra*, at *17–18.

39. *See Gibson*, 1986 Del. Fam. Ct. Lexis 226, at *36 – 37.

40. Del. Code. Ann. tit. 13, § 1513(d) – (f).

41. *Id.* § 1512(a).

42. *Id.* § 1512(d).

43. *Id.* § 1512(d).

44. *Id.* § 1512(e).

45. *Id.* § 1512(f).

46. *Id.* § 1512(g).

47. *Id.* § 1512(g).

48. Du Pont v. Du Pont, 160 A.2d 586 (Del. Ch. 1960).

49. *Id.* at 587.

> [W]hether the defendant-husband's remainder interests under the three spendthrift trusts involved would be available either through action by the defendant or by judicial process to meet any separate maintenance order which might be entered for the plaintiffs.

The chancellor observed:[50]

> I do not believe the court has the right to strike down the spendthrift provisions at this stage at least under the present circumstances. Moreover, no implication concerning the result which might be reached at a later stage is to be drawn from the language employed.

He concluded:[51]

> The court rules that if plaintiffs prove their right to and need for support, in fixing the amount thereof the court will assume that no money is available through execution process or lien against defendant's interests in the trusts involved.

2. Determining Who Is Entitled To Alimony

The Family Court may award alimony, as established in the Delaware Code, in the following circumstances:[52]

> (b) A party may be awarded alimony only if he or she is a dependent party after consideration of all relevant factors … in that he or she:
>
> (1) Is dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment;
>
> (2) Lacks sufficient property, including any award of marital property made by the Court, to provide for his or her reasonable needs; and
>
> (3) Is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that he or she not be required to seek employment.

In *Preston v. Preston*,[53] Judge Buckworth of the Delaware Family Court wrote:[54]

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50. *Id.* at 588 – 89.

51. *Id.* at 590.

52. Del. Code. Ann. tit. 13, § 1512(b).

53. Preston, *supra*.

54. *Id.* at *8 n.3 (citations and internal quotation marks omitted).

> As the Supreme Court of Delaware noted in *Gregory J.M. v. Carolyn A.M.:* Dependency, while not defined by the Statute, means more than a minimal existence or subsistence level. Its meaning is to be measured against the standard of living established by the parties during their marriage.

In denying alimony to Wife in *In re Marriage of Tweedale v. Tweedale*,[55] Judge Tumas of the Delaware Family Court had to resolve the following issue:[56]

> [T]he court must determine whether the principal distribution of $1,000 per month that Wife receives from the trust created by her mother should be considered in determining her dependency upon Husband. Husband argues that it should, relying upon § 1512(b)(2) and (c)(1), and *Grant v. Grant*. Wife argues that it should not, relying upon the definition of "income" in 13 *Del. C.* § 513(b)(5).

The court held:[57]

> Under both § 1512(b)(2) and (c)(1), the court must consider the principal distribution that Wife receives each month from her mother's trust. In contrast to § 513(b)(5), which arguably draws a distinction between principal and income, § 1512(b)(2) and (c)(1) do not, and Wife's reliance upon the definition of "income" set forth in Chapter 5 (which addresses child and spousal support) therefore is misplaced.

More recently in *F.S. v. L.R.S.*,[58] Judge Kuhn of the Delaware Family Court noted the standards for the court to abide by in determining a party's income. She provided the following guidance:[59]

> A party's income includes salaries, wages, commissions, and bonuses; and income from self-employment. The Court must also include dividends pensions, interest, *trust income*, annuities and capital gains.

As evidenced in Judge Kuhn's guidance in *F.S. v. L.R.S.* the court has been required to address the concept of trusts when addressing the separation of a marital couple.

3. Determining The Amount Of Alimony

In awarding alimony, the court must consider factors including:[60]

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55. In re Marriage of Tweedale v. Tweedale, *supra*.

56. *Id.* at *10 (citation omitted).

57. *Id.* at *10.

58. F.S. v. L.R.S., 2003 WL 22263037 (Del. Fam. Ct. Apr. 30, 2003).

59. *Id.* at *4 (emphasis added; footnotes and internal quotation marks omitted).

60. Del. Code. Ann. tit. 13, § 1512(c).

(1) The financial resources of the party seeking alimony, including the marital or separate property apportioned to him or her, and his or her ability to meet all or part of his or her reasonable needs independently;

(2) The time necessary and expense required to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, physical and emotional condition of both parties;

(6) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;

(7) The ability of the other party to meet his or her needs while paying alimony;

(8) Tax consequences;

(9) Whether either party has foregone or postponed economic, education or other employment opportunities during the course of the marriage; and

(10) Any other factor which the Court expressly finds is just and appropriate to consider.

In *Preston v. Preston*,[61] Judge Buckworth took Wife's trust income into account under factor (1),[62] further demonstrating the incorporation of trust interests in assessing marital assets.

D. Child Support

In Delaware, parents have an equal duty to support a child under age 18 whether born in or out of wedlock.[63] Parents also have a duty to support a child until he or she receives a high school diploma or attains age 19, whichever first occurs.[64] The Family Court has jurisdiction to resolve issues of child support.[65]

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61. *Preston*, *supra*.

62. Del. Code. Ann. tit. 13, § 1512(c)(1).

63. *Id.* § 501(a), (c). *See* Del. Fam. Ct. C.P.R. 500 – 510.

64. Del. Code. Ann. tit. 13, § 501(d).

65. *Id.* §§ 507 – 508.

The availability of trust resources arose in calculating child support in *Hobbs v. Koly*.[66] Regarding Father's duty to contribute to private school tuition, Judge Crowell of the Delaware Family Court said:[67]

> Father has limited means with which to contribute to private school tuition and usually the Court would not expect him to contribute to private school expenses with such a limited income. Father's support obligation, however, is nominal in this case primarily because of Mother's substantial trust income. If Mother's income were similar to Father's, his support obligation, without the private school expense, would be considerably greater, actually more than twice what his present obligation would be even including the private school expense.

E. Premarital Agreements

Premarital agreements are enforceable in Delaware. Delaware's version of the Uniform Premarital Agreement Act (Premarital Agreement Act) is in Subchapter II of Chapter 3 of Title 13 of the Delaware Code.[68] Under the Premarital Agreement Act, a premarital agreement must be in writing and signed by both parties but need not be for consideration.[69] Such an agreement may cover specified matters[70] and takes effect upon marriage.[71] In the best circumstances, both parties have separate counsel and the resulting agreement is signed well in advance of the anticipated marriage.[72] As stated earlier, a well-drafted trust created by a parent for the benefit of a child can act as a de facto premarital agreement with regard to trust property.

Not all premarital agreements are enforceable. Section 326(a) provides:

> A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (1) Such party did not execute the agreement voluntarily; or
>
> (2) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

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66. Hobbs v. Koly, 1998 WL 915866 (Del. Fam. Ct. July 9, 1998).

67. *Id.* at *6.

68. Del. Code. Ann. tit. 13, §§ 321 – 328.

69. *Id.* § 322.

70. *Id.* § 323.

71. *Id.* § 324.

72. *Id.* § 326(a).

c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

The Family Court has authority to resolve any question of unconscionability.[73] The below cases are illustrative.

In *James v. James*,[74] which predated adoption of the Premarital Agreement Act, Judge Ableman of the Family Court of Delaware sustained a premarital agreement.[75] The court reasoned:[76]

> I therefore hold that the Antenuptial Agreement into which the James' entered on December 11, 1986 is valid and enforceable as each spouse made fair and reasonable disclosure to the other of his or her financial status, each entered into the agreement voluntarily and freely, with the benefit of independent, competent counsel, and the substantive provisions of the agreement are fair to each party. Thus, the Motion to Set Aside Antenuptial Agreement is hereby denied.

Similarly, in *L.W. v. J.J.W.*,[77] which followed adoption of the Premarital Agreement Act, Judge Buckworth of the Family Court of Delaware upheld a premarital agreement because:[78]

> The Court concludes that Wife entered into the Agreement voluntarily; that its terms were not unconscionable; that she was provided a fair and reasonable disclosure of Husband's assets; that she expressly waived any right to disclosure beyond that provided in the Agreement; and that she had or reasonably could have had adequate knowledge of Husband's financial obligations. Therefore, Wife's Motion to Set Aside Prenuptial Agreement is DENIED and Husband's Countermotion for Specific Performance of Premarital Agreement is GRANTED.

II. THIRD-PARTY TRUSTS IN DELAWARE

A. The Spendthrift-Trust Statute

Delaware's third-party spendthrift-trust statute[79] contains the following protections for a beneficiary's interest:

- The creditors of a trust beneficiary generally have only such rights against the beneficiary's interest in the trust or the property of the trust as are expressly granted to the creditors by the governing instrument and Delaware law.

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73. *Id.* § 326(b).

74. James v. James, 1995 WL 788187 (Del. Fam. Ct. May 18, 1995).

75. *Id.* at *20.

76. *Id.* at *20.

77. L.W. v. J.J.W., 2014 WL 4203848 (Del. Fam. Ct. June 27, 2014).

78. *Id.* at *13.

79. Del. Code. Ann. tit. 12, § 3536.

- The provision's protections apply regardless of the nature or extent of the beneficiary's interest, whether or not the interest is subject to an exercise of discretion by the trustee or another fiduciary, and regardless of any action that the beneficiary takes or might take in the future.
- The protection is not limited to a certain amount.
- A beneficiary's interest that is not subject to the rights of his or her creditors is exempt from all legal or equitable process instituted by such creditors, including garnishment.[80]
- A beneficiary's creditor may not bring an action against the trustee or the beneficiary in order to:
- (1) compel the trustee, another fiduciary, or the beneficiary to notify the creditor of a distribution;
- (2) compel the trustee or the beneficiary to make a distribution, whether or not distributions from the trust are subject to the exercise of discretion by a trustee or another fiduciary;
- (3) prohibit the trustee from making a distribution to or for the benefit of the beneficiary, whether or not distributions from the trust are subject to the exercise of discretion by a trustee or another fiduciary; or
- (4) compel the beneficiary to exercise a power of appointment or revocation.
- A beneficiary's voluntary, involuntary, direct, or indirect assignment of an interest that the governing instrument prohibits him or her from assigning is void.
- A beneficiary may not waive a spendthrift clause's protections.
- The provision's protection extends to claims for forced-heirship, legitime, marital-elective-share, or similar rights.
- The provision's protection applies to a trust beneficiary's interest until trust property actually is distributed.
- A trustee may make direct payment of a beneficiary's expenses, even if the beneficiary has outstanding creditors.
- A trustee is not liable to a beneficiary's creditors for paying the beneficiary's expenses.
- A creditor of a trust beneficiary has no right against the beneficiary's interest if the beneficiary has a non-general *inter vivos* or testamentary power of appointment over the trust.[81]
- A creditor of a trust beneficiary has no right against the beneficiary's interest if the beneficiary has a general *inter vivos* or testamentary power of appointment over the trust unless and to the extent that the beneficiary actually exercises the power.[82]
- A beneficiary receiving payments from a charitable-remainder trust (CRT) or a lifetime marital-deduction trust or other trust may release his or her interest in favor of succeeding beneficiaries, even if the trust has a spendthrift clause.[83]

Three exceptions exist to the protection afforded by the statute - two statutory and one court-made.

B. Statutory Exceptions To Spendthrift-Trust Protection

The statute states that a creditor of a trust beneficiary may reach the assets of a trust if and to the extent that the beneficiary may revoke the trust in his or her own favor.[84]

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80. *Id.* § 3536(a).

81. *Id.* § 3536(d).

82. *Id* .§ 3536(d)(1), (2).

83. *Id.* § 3536(e).

84. *Id.* § 3536(d)(3).

In addition, a spendthrift clause in a self-settled trust does not prevent a creditor of the trustor-beneficiary from satisfying a claim from the trustor-beneficiary's interest to the extent that such interest is attributable to the trustor-beneficiary's contributions,[85] unless a trust meets the requirements of Delaware's Qualified Dispositions in Trust Act[86] or is a lifetime marital-deduction trust, credit-shelter trust, or other trust.[87] Nevertheless, a trust may include a provision authorizing the trustee to reimburse the trustor for income taxes attributable to the trust on a discretionary basis without causing the trust to become self-settled.[88] In addition, the possessor of any power of withdrawal (not just the possessor of a \$5,000/5% power[89]) is not treated as the trustor due to the lapse, waiver, or release of the power.[90]

C. Narrow Court-Created Exception To Spendthrift-Trust Protection - *Garretson v. Garretson* (1973)

The Supreme Court of Delaware created an extremely narrow public-policy exception to the protection provided by section 3536 in the 1973 *Garretson v. Garretson* case.[91] In *Garretson*, the wife filed an action in the Court of Chancery for the following reason:[92]

> In order to obtain jurisdiction over the husband, now a resident of the State of Florida, the plaintiff obtained a sequestration order under which the income from the testamentary trust, payable to the husband, was seized in order to coerce his appearance in the Court of Chancery.

> The court held that:[93]

> It is to be noted that both § 3536 and ITEM II of the will provide in terms that the trust property shall 'not be subject to the rights of the creditors of (such) beneficiary, (and) shall be exempt from execution, attachment, distress for rent, *** on behalf of such creditors ***. The question thus presented is whether or not a wife, seeking support from her husband, is a creditor within the meaning of the word as it is used in § 3536 and in ITEM II of the will. If the wife is a creditor, then seizure of any of the trust assets on her behalf is prohibited by the terms of § 3536 and of ITEM II of the will. The Chancellor concluded that the wife was not a creditor in that meaning of the word, and we agree with that conclusion.

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85. *Id.* § 3536(c).

86. *Id.* §§ 3570 – 3576.

87. *Id.* § 3536(c)(4).

88. *Id.* § 3536(c)(2). *See* Rev. Rul. 2004-64, 2004-2 CB 7 (July 6, 2004).

89. *See* I.R.C. §§ 2041(b)(2), 2514(c).

90. Del. Code. Ann. tit. 12, § 3536(c), flush language at end.

91. Garretson v. Garretson, 306 A.2d 737 (Del. 1973).

92. *Id.* at 739.

93. *Id.* at 740 – 41 (citations omitted).

> An action brought by a wife seeking separate maintenance from her husband who has deserted her is an attempt on her part to compel the performance of a duty imposed by law upon the husband to support his wife and dependents.
>
> The weight of authority is to the effect that a wife seeking such relief is not a creditor and is not bound by the spendthrift provisions of a trust from reaching the trust assets. A wife, under such circumstances, can hardly be a creditor who is defined as 'one to whom a debt is owing by another person who is the debtor'.

Garretson allowed a current – but not a divorced – spouse to reach the assets of a third-party spendthrift trust for support,[94] but Nevada practitioners often misrepresent the breadth of this court-created exception. Typical is the following statement in a January 2016 article:[95]

> Delaware provides that spouses who are beneficiaries of discretionary trusts do not receive protection of their trust assets from alimony claims of a divorced spouse.

In the *Garretson* case, Chief Justice Wolcott of the Supreme Court of Delaware noted that, "[w]e … consider that … the record discloses solely that the individual parties are still husband and wife."[96] The court concluded:[97]

> It of course remains to be seen, if the husband appears generally in this litigation and subjects himself to the jurisdiction of the Court of Chancery, whether, on final hearing, his contentions with regard to his Mexican divorce will be ultimately upheld, in which event we assume that the wife would lose her status as wife, and there may be an entirely different situation then facing the Chancellor. This question, however, is not before us, and we make no ruling upon the future outcome of the course of the litigation.

D. Cases Refusing To Create Exception To Spendthrift-Trust Protection

1. Introduction

In *Garretson*, the Supreme Court of Delaware found that a wife who sought support from a husband who had deserted her was not a "creditor" under section 3536. Subsequently, three plaintiffs asked the Court of Chancery to create new judicial exceptions to the statute. All three efforts were unsuccessful.

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94. *Id.* at 737.

95. Richard A. Oshins & Steven G. Siegel, *The Anatomy of the Perfect Modern Trust - Part 1*, Est. Plan., Jan. 2016, at 3, 12 (footnote omitted).

96. *Garretson*, *supra*, at 739.

97. *Id.* at 742.

2. *Gibson v. Speegle* (1984)

In the *Gibson v. Speegle* case,[98] Vice Chancellor Berger set the stage as follows:[99]

> This is the decision on the petition and proof of claim filed by Aetna Casualty and Surety Company of America ("Aetna") seeking an order requiring the payment of Aetna's outstanding judgment against Gary Barwick ("Barwick") from the proceeds of a partition sale. One-half of those proceeds, or the sum of $12,799.20, is the share allocated to Arlene B. Gibson ("Gibson"), trustee of a testamentary trust created for the benefit of Barwick by his mother, Virginia Barwick. Gibson contends that Virginia Barwick's will created a spendthrift trust and that Aetna, as a "creditor" within the meaning of 12 Del. C. § 3536, is not entitled to satisfy its judgment from the trust assets.

The vice chancellor first rejected the plaintiff's public-policy argument:[100]

> Aetna contends that ours would be a sorry system of justice if the spendthrift statute were applied to allow a criminal such as Barwick to avoid having to pay for his crimes. Aetna suggests that its position is not unlike that of a wife suing her husband for support and attempting to reach her husband's interest in a spendthrift trust. This Court has concluded that a husband in those circumstances should not be allowed to enjoy the benefits of the trust while neglecting his legal obligation to support his dependents. The husband-wife situation, however, is distinguishable because a spouse has a statutory duty to support the other spouse and their children. Aetna has not cited any authority indicating that a tort-feasor owes a similar duty to a tort claimant.

She then considered – and expressed sympathy for – the plaintiff's contention that a tort victim should not be considered a "creditor" under the statute:[101]

> The term "creditor" is not defined in the statute and has not been construed in Delaware other than in the context of the husband and wife support situation described above. However, the authors of several respected treatises on trusts have concluded that tort claimants should not be considered "creditors" for purposes of a spendthrift trust provision. Their reasoning is sound. If a business extends credit to a spendthrift trust beneficiary, it does so at its own risk. A person who is injured by a tort-feasor, by contrast, did not choose to do business with the tort-feasor and should not be prevented from receiving compensation for his injuries by the terms of a spendthrift trust.

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98. Gibson v. Speegle, 184 Del. Ch. Lexis 475 (Del. Ch. May 30, 1984), *remanded*, 494 A.2d 165 (Del. 1984).

99. *Id.* at *1.

100. *Id.* at *5 (citations omitted).

101. *Id.* at *6 (citations and some internal quotation marks omitted).

Nonetheless, Vice Chancellor Berger, deferring to the decision of the general assembly, dismissed this argument as well:[102]

> In the absence of a statute, I would not hesitate to adopt this view and allow Aetna's claim. I am not at all comfortable with the fact that Virginia Barwick, by use of a spendthrift trust, assisted her son in avoiding his obligation to pay for his crimes. However, it is not the Court's function to write the law but only to interpret it. The statute enacted by the General Assembly contains no exceptions. Dean Griswold proposed a form of statute which, he believed, should retain the desirable elements of spendthrift trusts while eliminating most of the levels which accompany such trusts in their unrestrained form as early as 1947. The proposed statute, which contained an exception for tort claimants, among others, was available to the General Assembly in 1959 when § 3536 was amended. The fact that such a modification was not enacted leaves me no choice but to conclude that the General Assembly intended § 3536 to be an "unrestrained" form of spendthrift provision. As a result, I reluctantly conclude that Aetna is a creditor within the meaning of § 3536 and its proof of claim must be denied.

3. *Parsons v. Mumford* (1989)

The next case was Chancellor Allen's 1989 decision in *Parsons v. Mumford*,[103] in which he described the controversy as follows:[104]

> Plaintiffs are judgment creditors of the individual defendant. The corporate defendant is trustee of a trust in which the judgment debtor has a remainder interest. The suit seeks, among other relief, an order directing the trustee, upon termination of the trust, to pay over a portion of the remainder interest, if then due to the judgment debtor, to plaintiffs in satisfaction of their judgments.

Following *Gibson*, the chancellor concluded that, "while there are strong equities in favor of the limited remedy sought, the provisions of Section 3536 of Title 12 prohibit it in these circumstances."[105]

4. *Mennen v. Fiduciary Trust International of Delaware* (2017)

The latest controversy involved trusts created by George S. Mennen in 1970. In this case, the beneficiaries of one trust attempted to reach the assets of a second trust in order to remedy investment losses caused by the principal beneficiary of the second trust in his capacity as trustee of the first trust. In her 2015 final report,[106] Master LeGrow observed that:[107]

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102. *Id.* at *6 – 7 (citations omitted).

103. Parsons v. Mumford, 1989 WL 63899 (Del. Ch. June 14, 1989).

104. *Id.* at *1.

105. *Id.* at *5.

106. Mennen v. Wilmington Trust Co., 2015 WL 1897828 (Del. Ch. Apr. 24, 2015).

107. *Id.* at *1.

> Whatever my personal views regarding the policy supporting spendthrift clauses, I am bound by state statute and controlling precedent to conclude that the spendthrift clause bars the plaintiffs from satisfying the judgment against the individual trustee from the assets in the individual trustee's trust.

She therefore recommended that the Court of Chancery hold that:

- A person with a tort claim is a "creditor" under section 3536;[108]
- A public-policy exception to section 3536 should not be created for tort claims;[109]
- A public-policy exception to section 3536 should not be created for claims against a "persistent wrongdoer";[110] and
- The remedy of "impoundment" is not available.[111]

After procedural issues were resolved,[112] Vice Chancellor Laster adopted Master LeGrow's final report as written early in 2017:[113]

I would like to think that I could improve on then-Master LeGrow's decision, but I know that I cannot.

The Supreme Court of Delaware affirmed:[114]

> This 21st day of June 2017, after careful consideration of the parties' briefs and the record on appeal, we have determined that the Court of Chancery's … February 27, 2017 Report Pursuant to Delaware Supreme Court Rule 19(c) should be affirmed for the reasons stated … by the Master in Chancery in her well-reasoned April 24, 2015 final report on the motion for summary judgment ….

E. Drafting Suggestion

In light of *Garretson*, Delaware attorneys routinely include language, such as that highlighted below, in spendthrift clauses in third-party spendthrift trusts:

> A beneficiary may not alienate or in any other manner assign or transfer his or her interest in any trust hereunder, and no one (*including a spouse or former spouse*) may

108. *Id.* at *6.

109. *Id.* at *7.

110. *Id.* at *8.

111. *Id.* at *12.

112. Mennen v. Wilmington Trust Co., 2017 WL 751201, at *1 (Del. Ch. Feb. 27, 2017).

113. *Id.* at *2.

114. Mennen v. Fiduciary Trust Int'l of Del., 166 A.3d 102, 102 (Del. 2017).

> attach or otherwise reach any interest of any beneficiary hereunder to satisfy a claim against that beneficiary, whether the claim is legal or equitable in origin.

Based on the foregoing decisions, it is believed that Delaware judges will exercise restraint in refusing to honor such a provision because, at least since 2000,[115] a Delaware statute has provided in relevant part:[116]

> The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this section. It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.

F. The Discretionary-Trust Statute

Black's Law Dictionary defines a "discretionary trust" as, "a trust in which the settlor has delegated nearly complete or limited discretion to the trustee to decide when and how much income or property is distributed to a beneficiary."[117] Historically, Delaware did not have a statute that covered the ability of creditors to reach a beneficiary's interest in such a trust. Given the uncertainty that now exists on this issue as described below, however, Delaware has adopted legislation in Title 12 in order to provide that:

- A beneficiary who is eligible to receive distributions from a trust in the trustee's discretion has a discretionary interest;[118]
- A creditor may not directly or indirectly compel the distribution of a discretionary interest, except to the extent expressly granted by the terms of a governing instrument in accordance with Delaware's third-party spendthrift-trust statute;[119]
- A court may overturn a trustee's decision regarding a discretionary interest only if the court finds that the trustee abused its discretion within the meaning of Restatement (Second) of Trusts § 187, not Restatement (Third) of Trusts §§ 50 and 60.[120]

The Scott treatise explains the difference between the approaches of the Second and Third Restatements of Trusts as follows:[121]

> Under the Second Restatement, the relevant inquiry seems to have been whether "reasonable men might differ" on the propriety of the exercise of the power. The inference is that the trustee's decision should

115. 72 Del. Laws 388, § 9 (2000).

116. Del. Code. Ann. tit. 12, § 3303(a).

117. Black's Law Dictionary 1742 (10th ed. 2014).

118. Del. Code. Ann. tit. 12, § 3315(b).

119. *Id.* § 3536.

120. *Id.* § 3315(a). *See* Merrill Lynch Tr. Co., FSB v. Campbell, 2009 WL 2913893, at *10 (Del. Ch. Sept. 2, 2009).

121. 3 Scott and Ascher on Trusts § 18.2.6 at 1361 n.2 (citations omitted).

stand, in the absence of a judicial finding that no reasonable person could conclude that the trustee had acted reasonably. Under the Third Restatement, the relevant inquiry seems to be whether "the trustee's decision is one that would not be accepted as reasonable by persons of prudence."

G. Comment

On September 25, 2018, Master Griffin issued her report in *In re: The Trust of FBO Samuel Francis duPont under trust agreement dated August 4, 1936*,[122] wherein trustees of a trust sought instructions from the court as to the proper distribution of the principal and income of a trust, which granted the donee a nongeneral testamentary power of appointment.[123] In this particular matter, a divorcing beneficiary's exercise of his nongeneral power of appointment became an issue when it was included as part of his 1962 divorce settlement agreement. The same beneficiary later exercised his non-general power of appointment in contravention of this agreement. The subsequent filing of a request for instructions by the trustee to the Delaware Court of Chancery demonstrates that this area of the law is complicated but holds benefits to those who choose to create a trust to protect their assets.

In sum, Delaware third-party spendthrift and discretionary trusts provide beneficiaries with formidable protection from the claims of their creditors, including in the divorce setting. As the existing caselaw demonstrates, when a provision has been tested, the trust has proved an effective and reliable means of asset protection.

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122. In re Trust FBO duPont Under Trust Agreement dated August 4, 1936, 2018 WL 4610766 (Del. Ch. Sept. 25, 2018).

123. *Id.*

IS IT TIME TO MODERNIZE THE LAWS OF OLD ENGLAND?

ARGUMENTS FOR STATUTORY ADJUSTMENTS TO THE RULE IN SHELLEY'S CASE AND THE RULE AGAINST PERPETUITIES

Robert J. Krapf*

One of the pleasures of practicing real estate law in Delaware is the comparative absence of statutory preemptions of the common law and the relative scarcity of case law. This can spur one's historic interests in delving into the common law that Delaware has preserved from its colonial origins. The flipside of this, of course, is that we Delaware lawyers remain saddled with arcane common law rules that seem at odds not just with modern commercial transactions but with the intent of the parties.

Two of these instances are the "Rule in Shelley's Case" and the "Rule against Perpetuities." Both have their origins in English common law of, respectively, the 16th and 17th centuries. Both came to Delaware by way of our colony's adoption of the laws of England. And both remain part of Delaware's common law in the twenty-first century. Perhaps, after half a millennium, it is time to rethink them both.

I. THE RULE IN SHELLEY'S CASE IN DELAWARE: A RELIC READY FOR ABOLITION?

A. Introduction

The Rule in Shelley's Case has a long history of continuous application in Anglo-American common law. The rule itself is simple, but is so fact-dependent as to have created headaches for courts over the past five centuries. This article will address what the rule is, how it arose, how it impacts Delaware real estate, and why it may be time to abolish by statute.

Not surprisingly, the Rule in Shelley's Case is a statement of law made in a namesake reported case.[1] The rule commonly refers to the statement of circumstances in which what appear to be two distinct estates granted in a deed are collapsed into one estate. Specifically, if the instrument contains a grant of a life estate to a specified person and a grant of a remainder to the heirs of that person (e.g., "to A for life, remainder to the heirs of A"), the law does not recognize the separate grant to the heirs after the estate in the named grantee, but conflates the two grants into a fee simple estate in the grantee.[2] If given literal effect, such a grant would create a contingent remainder in the heir, as that remainder estate

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1. *Wolfe v. Shelley*, as reported in Coke's Reports and other sixteenth and seventeenth Century reports. For applicable citations, *see* C. Sweet, ed., Challis's Law of Real Property (3rd ed. 1911), 152. For a modern discussion of the Rule in U.S. law, *see* Am. Jur. Estates §§ 106 et seq. (*See also* Restatement of Property, Future Interests § 312 and Donative Transfers § 30.1; 99 ALR 2d 1161 (1965); and J. Borron, ed., Simes and Smith, Future Interests (3d ed), §1541 et seq.

2. Note that if the grant references the "heirs of his body," the rule would construe the grant as creating a fee tail.

is contingent on a life estate of the named grantee.[3] What the rule does is complete the grant to the heir not as words of purchase effecting the grant of an estate,[4] but as words of limitation[5] on the grant to the named grantee, making the latter estate one of fee simple under which whoever is the heir ultimately takes by inheritance. When the rule says that the words "heirs" or "heirs of the body" of the named grantee are words of limitation[5] and not words of purchase, it simply means that "heirs" or "heirs of the body" refer to and are read in connection with the estate given to the named person, extending or modifying that estate, and are not taken as describing a group to whom an estate will attach at the time of the grant.[6]

In Shelley Case,[7] Edward Shelley and his wife Joan owned property in the Manor of Barhamwick located in Sussex, England. They held the property in tail for the heirs of them together.[8] Edward and Joan had two sons: Henry, the eldest, and Richard. Joan predeceased Edward, as did their son Henry. Son Henry left a pregnant widow, whose name is lost to history, as well as a daughter, Mary. The widow gave birth to a son, also named Henry, who was the defendant in the case. Prior to the birth of young Henry, Edward used the judicial process of recovery to create in himself a life estate, then to certain identified persons for a term of years and then to the male heirs of his body.[9] The judicial process to carry out this creation of the estate was made final after Edward's death, but before young Henry's birth. Uncle Richard claimed the estate on the basis that as young Henry was not yet born at the time the estate would vest (at Edward's death), Richard was the sole owner in tail. Richard proceeded to lease the lands in question to a Nicholas Wolfe. Young Henry subsequently claimed the tenancy, and Nicholas Wolfe brought suit in the county assizes against Henry for ejectment. The matter then found its way to the Court of King's Bench, where it was argued. The case was apparently of such importance that Queen Elizabeth had the Lord Chancellor, Sir Thomas Bromley, intervene to assemble a judicial conference to resolve the question.[10]

While the case had many facets, the issue that is important for the ultimate rule was, to greatly simplify a complex issue involving entails, whether the action by Edward vested a present contingent estate in Richard or instead merely provided for the inheritance by Edward's male heirs, both the then-living Richard and the posthumous Henry. While counsel for both sides made many arguments, and the Lord Chief Justice, Sir Christopher Wray, was pressed to articulate

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3. As a living person cannot have heirs during her life but only upon her death. Simes and Smith, Future Interests, § 154 at 187.

4. Words of purchase are words in an instrument that, taken by themselves, without any reference to any other words in the instrument, first attach an estate to a person or group of people.

5. Words of limitation are words that by referring to some other words in the instrument describe the extent or type of estate that has already attached to some person.

6. *See* Challis's Law of Real Property, 154.

7. *See* Challis's Law of Real Property, 154.

8. The intricacies of the entail are beyond the scope of this article and not directly germane to this discussion of the rule.

9. Tiffany Law of Real Property §46. For an early explanation of the common recovery used to convert a fee tail to a fee simple, *see Toltarum's Case*, discussed in Challis's Law of Real Property, 309.

10. This was a common practice for important cases. *See* J.M. Baker, *English Law and the Renaissance*, The Cambridge Law Journal, 44:1 (1985), 46.

clearly the reasons for the decision of the judges, the court held that Richard's rights were those of inheritance only, along with his nephew Henry. As Sir Edward Coke, counsel for the defense, articulated what has become the Rule in Shelley's Case, "it is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance, an estate is limited … to his heirs in fee or in tail, that always in such case (the heirs) are words of limitation of the estate and not words of purchase."[11]

So what is the actual rule of law established by the Rule in Shelley's Case? First, the so-called ancestor or prior estate, the estate of the named grantee, must be freehold. Second, the limitation must be to the heirs of that named grantee. Third, both the grant of the prior estate and the limitation must be in the same instrument. Fourth, both estates must be legal or both must be equitable. When these conditions are met, the named grantee is vested in a fee estate, and the heirs succeed by inheritance and do not have a present or contingent remainder. Why is the rule important? Put simply, the rule deprives the heirs of a separate estate; therefore, the actions of the named grantee to sell, to lease, to mortgage can impair or even extinguish the heirs' expectations.

It is not clear if the rule predated Shelley's Case or was first described in that case. Certainly, Sir Edward Coke suggests that the rule was of long standing before this case,[12] and such statements are consistent with pleading in English jurisprudence of the time, as precedent of antiquity was persuasive.[13] Earlier cases can be found along similar lines.[14] Although many commentators have advanced theories of why the rule was established, there is no single, definitive explanation. The explanation that seems most likely is that the rule was adopted as a means to prevent landowners from avoiding the various dues that, under the feudal system of land tenures, were owed to the overlord at the time of the owner's death and the succession by the deceased's heirs.[15] If the grant to the named grantee and then to the heir of that person were construed as separate, present grants, with the heir now holding a contingent remainder, the estate of the named grantee would escape any payment of "relief" to the feudal lord for the succession by the heir.[16] However, it also seems likely that

11. Quoted in Challis's Law of Real Property, 160. Some commentators have construed this statement to mean that the rule predated Shelley's Case, but that is not clear. *See* Challis's Law of Real Property, 162n*?. There is an interesting case to be made that in fact the judges in Shelley's Case never enunciated a "rule" but that Sir Edward Coke in his later reports established as a rule of law the judicial findings on a collateral issue. D. Smith, *Was There a Rule in Shelley's Case*, The Journal of Legal History, 30:1 (2009), 53, 66. Such a view is consistent with the thesis of Richard J. Ross on the late-Tudor and early-Stuart changes in legal learning toward the elucidation of rules and principles. R. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword Shelter and Identity, 1560-1640*, Yale Journal of Law and the Humanities, 10 (1998), 229, at 268.

12. Challis's Law of Real Property, 160.

13. Ross, *Memorial Culture*, *supra*.

14. *See, e.g.*, *Provost of Beverley's Case*, (1366) discussed in Simes and Smith § 1543 at 524. *See also* W. Holdsworth, 3 History of English Law, 107 (5th ed. 1942). Holdsworth's view seems more that, first, the rule naturally arose from the then longstanding rule that in a grant including " and heirs", the term " and heirs" were words of limitation, and, second, that there was in this period a general struggle against efforts to create perpetuities and restrain alienation. *Id.* 108. *See also* A. W. B. Simpson, An Introduction to the History of the Land Law (1961), 94.

15. The practice also caused the passage of the statute annulling feoffments made to those who would be the heirs of the feoffer. 52 Hen III c.6 (1267) (the so-called Wardship Act of 1267).

16. Challis's Law of Real Property, 166 n.8. Note that feudal tenure was abolished in 1660. Statute of Tenures, 12 Car. 2, c. 24 (1660), discussed in Challis's Law of Real Property, 23-24.

the justification for the rule changed over time, away from a means of enforcing feudal dues to one supporting the free alienability of real property against methods of tying up title. In other words, the attempt to create both the right of the named grantee and the contingent remainder in the heir would limit the rights of the named grantee to dispose of the property as that person saw fit.[17]

Certainly, whatever may have been the reason for the adoption of the principle embedded in the rule, the main policy behind the rule was to maintain the clearly defined distinction that the common law had always drawn between descent and purchase. One of the most effective ways the courts could accomplish this was to prevent by judicial decision the creation of new types of estates that would allow the grantee to take as purchaser without any of the obligations of descent. Correspondingly, there is a strong policy to preserve the nature of the estates that the law recognized at that time. With the development of the concept of fee simple, life estate, remainder and reversion, there grew a rule of law that if a person gave away the entire fee, that grantor could not restrict its subsequent alienation. The very nature of fee title was the right to alienate it; in order to preserve these rules of law intact, the judges firmly established the rule that one could not transfer the entire fee yet restrict its alienation. The limitation in Shelley's Case is a concrete example of an attempt by the owner of the fee to give the entire fee and at the same time restrict its alienation. If that grant could be held to mean that the remainder was given to the heirs of the named grantee as a separate estate, such interpretation would allow evasion of the policy that one cannot convey the fee and at the same time restrict its alienation.

Finally, the Rule in Shelley's Case is a rule of law and not a rule of construction. Its effect must be carried out in the grant, regardless of the intent of the testator or grantor with respect to the remainder. The words of the grantor control over the will of the grantor.[18] This reinforces the important principle in contract construction that technical words (like "heirs" or "heirs of the body") are presumed to have their technical meaning unless there is strong evidence in the context to rebut the presumption.[19]

Consider a similar rule that developed to promote alienability at the expense of a grantor's intent, the rule against perpetuities. Starting in 1682 with the *Duke of Norfolk's Case*,[20] the rule against perpetuities has operated to defeat the intention to tie up property over a long or potentially infinite duration. As a matter of policy, the common law determined that there could be such a thing as too long for a property to be unalienable.[21]

1. The Rule In Shelley's Case In Other States

Because the rule imposes the form of the devise or grant over the probable intent of the testator or grantor, a court wishing to carry out what that court believes to have been the grantor's intent has had to apply tools of construction to

17. This is the theory advanced by Justice Blackstone in *Perrin v. Blake*, 1.W.Bl. 672 (1769), quoted in W. B. Leach and J. K. Logan, Cases and Text on Future Interests (1961), 120. *See also* Charles Fearne, An Essay on Contingent Remainders and Executory Devises, (10th ed. 1844) § 85. *See* J.V. Orth, *Requiem for the Rule in Shelley's Case*, N. Car. L. Rev., 67:3 (1989) 681, at 686. Apparently, the Perrin case was the impetus for Charles Fearne's "Essay" in 1772. Simes and Smith, § 1542 n.4; *see also* Leach and Logan on Future Interests, 116.

18. *See* discussion in H. Carson, *The Rule in Shelley's Case in Pennsylvania*, U. Pa. L. Rev. 141.

19. Leach and Logan on Future Interests, 114.

20. 3 Ch. Cas. 1 (1682) discussed in J. C. Gray, The Rule Against Perpetuities (4th ed. 1942), §169; *see also* Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. Pa. L. Rev. 19, 20 (1977).

21. 2 Tiffany Law of Real Property § 392. For the rule against perpetuities in Delaware, see 25 Del. C. § 501 et seq.

the words of the grant in order to avoid the effects of the rule. In the United States, the rule has been wholly or partially abolished or abrogated, expressly or effectively, in forty-three states (plus or minus depending on how one counts partial abrogation) and the District of Columbia.[22] The last to do so was North Carolina in 1987.[23] In most instances, statutory abrogation would only apply prospectively, so cases in those jurisdictions have still wrestled with the rule as it applied prior to abolition.[24]

2. The Rule In Shelley's Case In Delaware

The Rule in Shelley's Case is alive and well in Delaware. There have been a number of cases over the years in which the Delaware courts have considered, and sometimes enforced, the application of the rule. In *Roach v. Martin*,[25] the court construed a devise to A "and her heirs forever except she should die without an heir born of her own body," and then over to B. The Court noted that "heir born of her own body" referred to all the lineal descendants proceeding from the body, not just children, and held that by rule, this was an estate tail in A with a vested remainder in B, and not a contingent fee with an executory devise. As late as 1946, the Delaware Supreme Court applied the rule in a devise. In *Springbitt v. Monaghan*,[26] the testator devised real and personal property to his wife for life, on her death to the testator's adopted son for life, and on his death to the "heirs of his body" lawfully begotten. The court concluded that the testator's use of "heirs of his body" was to denote those who would take by descent from the son, and therefore the rule applied, making the devise to the son an estate in fee tail. The court noted that the rule applied despite the fact that limitations in the will related to both real and personal property.[27] Delaware courts, like those in many other jurisdictions, approach the applicability of the rule very carefully, seeming to construe the language of the devise or the grant to the greatest extent

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22. 99 ALR 2d 1161.

23. J.V. Orth, *Requiem for the Rule in Shelley's Case*. N. Car. L. Rev. 67:3 (1989), 681. Even England abolished the Rule in 1925. 15 & 16 Geo. 5, ch. 20 § 131. For a broader discussion of statutory abrogation of the rule, see *The Rule in Shelley's Case has been Abolished*, Fordham Law Review 4:2 (1935), 316. It is surprising that it took so long for North Carolina to abolish the rule given the abuse of the rule by some of its judges. For example, the North Carolina court wrote in 1897 that the rule is "the Don Quixote of the law, which, like the last knight errant of chivalry, has long survived every cause that gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally unclear and dangerous." Stamper v. Stamper, 28 S.E. 20 (court? 1897); *see also* Leach and Logan on Future Interests, 116. *See* arguments for abolition in the other jurisdictions in, e.g., Note, *The Rule in Shelley's Case as Applied to Contingent Remainders*, U. Chi. L. Rev. 20:1 (1941), 50; "*The Rule in Shelley's Case has been Abolished*," *supra*.

24. *See, e.g.*, In re Estate of Hendrickson, 736 A.2d 540 (N.J. Super. 1999).

25. Roach v. Martin, 1 Del. 548 (Del. Ct. Err. App. 1835). The opinion in *Roach v. Martin* does not expressly name the Rule in Shelley's Case but applies the rule nonetheless. Interestingly, in a subsequent case, *Griffith v. Derringer*, 5 Harr. 284 (Ct. Err & App. 1850), counsel for the defendant expressed his uncertainty whether, as in England, Delaware had adopted the rule and directed the court's attention not to *Roach v. Martin* but to a New York case, *Anderson v. Eden*, 16 Johns. 382 (NY Supr. 1819), stating that it was important for the court to settle whether the rule was a rule of law in Delaware. In any event, the court held that a devise to the son for life and then to the oldest male heir of the body had vested a fee tail, meaning that the Rule applied to the devise.

26. Springbitt v. Monaghan, 50 A.2d 612 (Del. 1946).

27. Delaware courts have consistently held that the rule does not apply to personal property. *See* Gross v. Sheeler, 31 A. 812 (Del. 1885); Jones v. Rees, 69 A. 785 (Del. 1908); Mason v. Baily, 6 Del. Ch. 129 (1888).

possible to avoid the application of the rule. For example, in *Farrell v. Faries*,[28] a will gave land to the testator's niece for life and provided that after the niece's death, if she left lawful "issue of her body," the land should go to the niece's child or children, their heirs or assigns forever, and that if the niece died "without leaving lawful heirs of her body" the land should go to a named person. The court concluded that the quoted language was used by the testator in a restricted sense of "child or children." Therefore the rule did not apply; accordingly, the niece took a life estate under the will.[29] The court noted that if the quoted language had been "heir of her body," the court would have been more likely to apply the rule.

Similarly, in *Wright v. Gooden*,[30] the testator left four sons and seven daughters. He divided his realty between three of his sons, giving to each a particular portion "during his natural life and no longer," and, upon the death of such sons, gave the land devised to them to his seven daughters "during their natural lives, and no longer, and, at the death of my said daughters, I give the before-mentioned lands to my heirs, forever." The court concluded that the rule did not apply because the realty was not left ultimately to the heirs of either the sons or the daughters, but to the testator's heirs. The court held that the limitation of the remainder at the death of his daughters to the testator's heirs constituted a vested remainder in fee simple, which on the death of the testator immediately vested in his heirs at law.

3. Is It Time To Abolish The Rule In Delaware?

It may be time for Delaware to abolish the Rule in Shelley's Case.[31] As the New Jersey Court wrote in *In re Estate of Hendrickson*, "[t]he Rule in Shelley's Case is not only an anachronism — what one commentator referred to as 'exhibit A' in the museum of legal antiquities [citation omitted]' — but a doctrine which runs contrary to all modern thought on the interpretation of wills. It unabashedly causes a transfer of an interest in property greater than what may have been the actual or probable intent of the testator."[32] Delaware remains one of few states where, for better or worse, the rule remains law and that enforces the form of certain words to control over the substance of the devise or grant. For how much longer should Delaware hold onto a rule that evolved out of a desire to protect the incidents of federal tenures and that has been abrogated in almost every state?

II. THE RULE AGAINST PERPETUITIES: A RELIC READY FOR CHANGE?

A. Introduction

The common law rule against perpetuities applies in Delaware subject only to limited statutory exceptions and a few exceptions under Delaware case law. Greater clarity and closer adherence to the parties' intent in commercial transactions would likely be achieved if express statutory exceptions were adopted in Delaware.

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28. Farrell v. Faries, 17 A.2d 17 (Del. Ch. 1940); *affirm'd* 22 A.2d 380 (Del. 1941).

29. Jamison v. McWorter, 7 Houst. 242 (Ct. Err & App. 1885) (where the terms "child" and "children" were found not to require the application of the rule).

30. Wright v. Gooden, 11 Del. 397 (1881).

31. Currently, because Delaware has effectively abolished fee tail, the rule would only apply in Delaware to create an estate in fee simple from a purported grant of a life estate together with a remainder in that person's heirs. *See* 25 Del. C. §§301, 302.

32. *In re* Estate of Hendrickson, at 543.

The common law rule against perpetuities was developed to encourage the alienability of property. The classic rule states that "[n]o 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."[33] Developed over the course of the seventeenth century in England by judicial decisions, the rule has been said to be "one of the most striking instances of a purely judge-made rule of law of comparatively modern origin."[34] This rule, adopted by the Delaware courts in *Kingston v. Home Life Ins. Co. of America*,[35] is "grounded in the public policy against restricting the alienability of land and interests in land."[36] In effect, a future interest in a property is only valid if that interest must vest within the time limitation of the rule.[37] "If there is any possibility that the interest will vest beyond the period of the rule, then it is void *ab initio*."[38]

While the rule is easily stated, it is complex in its application. As a result, efforts have been made by various state legislatures over the years to modify the common law rule against perpetuities in order to simplify its application and, in some cases, to abolish it all together. A culmination of these reform efforts resulted in the approval in 1986 of the Uniform Statutory Rule Against Perpetuities, which was later amended in 1990 (the "USRAP").[39] Thirty-one jurisdictions (thirty states and the District of Columbia, but not Delaware) have adopted the USRAP. The USRAP, among other things, excludes nondonative interests from the rule against perpetuities.[40] As commercial transactions generally create nondonative property interests, the USRAP largely excludes commercial transactions from the scope of the rule against perpetuities.

In addition, the Restatement of Property takes the position that the rule against perpetuities does not void certain other interests such as a purchase option in a lease. In particular, section 395 of the Restatement of Property provides:

> When a lease limits in favor of the lessee an option exercisable at a time not more remote than the end of the lessee's term
>
> (a) to purchase the whole or any part of the leased premises; or
>
> (b) to obtain a new lease or an extension of his former lease, then such option is effective, in accordance with the terms of the limitation, even when it may continue for longer than the maximum period [of the rule against perpetuities].[41]

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33. J. Gray, The Rule Against Perpetuities, §201 (4th Ed. 1942). *See also* Simes and Smith on Future Interests, §1201-1298; Frederick R. Schneider, *A Rule against Perpetuities for the Twenty-First Century*, 41 Real Prop. Prob. & Tr. J. 743 (Winter, 2007).

34 Kales on future interests, §113 at 110 (1920).

35. 101 A. 898, 901 (Del. Ch. 1917).

36. Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1383 (Del. 1991).

37. *Id*.

38. *Id*.

39. https://www.uniformlaws.org/viewdocument/final-act-with-comments-85?CommunityKey=addf3263-af92-4421-a83c-2ef7bc9a1b94&tab=librarydocuments. (link last tested Dec. 18, 2018).

40. USRAP Sec. 4: "statutory rule against perpetuities does not apply to: (1) a nonvested property interest or a power of appointment arising out of a nondonative transfer …."

41. Restatement of Property §395 (1944).

Therefore, the Restatement suggests that an option to purchase contained in a long-term lease, as long as the option is only exercisable within the term of that lease, does not violate the rule against perpetuities. Comment a to section 395 of the Restatement explains the drafters' rationale in adopting such an approach:

> A lessee in possession of lands, especially when the term is sufficiently long to make a question as to the rule against perpetuities possible, needs to be able so to plan for the future as to get the benefit of the full utilization of the land during his lease-term. This makes it important for such a lessee and for society in general, that extensions or renewals of the term and purchase of the lessor's ownership be facilitated rather than prohibited.[42]

Likewise, many state courts have held that an option in a lease does not violate the rule against perpetuities.[43] For example, in *Grove Corp. v. Tinty*,[44] the court found that the rule against perpetuities should not apply to an option in a commercial lease exercisable within the term of the lease. In *Grove*, the defendant leased a parcel of real property to the plaintiff for a period of twenty years. The lease contained two five-year options to renew the lease, as well as an option to purchase the property at any time within the lease term. After exercising both renewal options, the plaintiff attempted to exercise its option to purchase the lease. The defendant contested this action, alleging that the lease option violated the rule against perpetuities because it could be exercised more than twenty-one years after its inception. The court, however, relied on earlier precedent in concluding that when an option to purchase included in a commercial lease can only be exercised within the term of that lease, there is no violation of the rule against perpetuities, even when it exceeds the applicable time period of that rule.[45]

In *St. Regis Paper Company v. Brown*,[46] the court dealt with a similar situation. In *Brown*, the lease at issue, which was a commercial lease for a term of sixty years, included an option for the lessee to purchase the property at any time during the term of the lease. The court held that "an option to purchase written into a lease and exercisable within the period of the lease does not violate the rule against perpetuities even though the period within which it may be exercised extends beyond the period specified in the rule."[47] In reaching this conclusion, the court recognized that the original purpose of the rule against perpetuities was to maintain the free alienability of land. The court wrote:

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42. Restatement of Property §395 cmt. a (1944).

43. *See* Coomler v. Shell Oil Co., 814 P.2d 184, 185 (Or. Ct. App. 1991) (finding that ""[i]n most American jurisdictions… lease-option provisions that allow the lessee to purchase the premises during the life of the lease are excepted from the rule" against perpetuities); Citgo Petroleum Corp. v. Hopper, 429 S.E.2d 6, 8 (Va. 1993) (citing a number of cases in support of the proposition that "a majority of ... jurisdictions have held that the rule [against perpetuities] does not apply to" an option "appendant to a long-term commercial lease and exercisable during the term of the lease"); *St. Regis Paper Co. v. Brown*, 276 S.E.2d 24, 26 (Ga. 1981) (finding that "[w]hen the option is part of the lease and exercisable beyond the period of the rule against perpetuities, most American jurisdictions have found it to be valid").

44. 1991 WL 27782 (Conn. Super. Ct. Jan 4, 1991).

45. *Id*. at *2.

46. 276 S.E.2d 24 (Ga. 1981).

47. *Id*. at 26.

> "Neither lives in being nor twenty-one years has any relevance to the commercial setting. This is particularly true when the holder of the beneficial interest in the property is able to utilize and develop his interest to its fullest, as is the case of the lessee who holds an option to purchase a leasehold."[48]

Other cases have also found similar policy reasons for supporting the recognition of this exception to the rule against perpetuities. For example, the court in *Texaco Refining and Marketing, Inc. v. Samowitz*[49] also stated that the underlying policy reason behind the rule against perpetuities is the maintenance of free alienability and marketability of land. "An option coupled with a long-term commercial lease is consistent with these policy objectives because it stimulates improvement of the property and thus renders it more rather than less marketable."[50]

1. The Rule Against Perpetuities In Delaware

The rule against perpetuities is deeply rooted in Delaware jurisprudence as a principle of public policy against restricting the alienability of real estate.[51] The rule against perpetuities is not a principle of construction but a rule of law.[52] And the rule is absolute. If there is a possibility the interest might vest beyond the period of the rule against perpetuities, the interest is void *ab initio*.[53]

Under Delaware law, the common law rule against perpetuities applies to various types of contracts that create a future interest, including options[54] and rights of first refusal.[55] Delaware law, however, modifies the common law rule against perpetuities for interests created in real property or personal property that are held in trust.[56] Real property held in trust must be distributed not later than 110 years from the later of its purchase or other acquisition by the trust.[57] Note, too, that interests in limited liability companies or most other business entities are not subject to this rule.[58] Aside

48. *Id*.

49. 570 A.2d 170 (Conn. 1990).

50. *Id*. at 174.

51. Kingston v. Home Life Ins. Co. of America, 101 A. 898, 901 (Del. Ch. 1917). The Delaware Supreme Court has articulated the distinction between the rule against perpetuities and the rule against restraints on alienation: "Both rules have the same fundamental purpose, namely, to keep property freely alienable or stated differently, each stems from a general policy which focuses upon the withdrawal of property from commerce. The rule against perpetuities invalidates interests which ***vest*** too remotely. The rule against restraints or alienation relates to other reasonable restraints" (emphasis in the original). *Stuart Kingston*, *infra* at 1383 n.3 (quoting Atkinson v. Englewood, 170 Colo. 295, 463 P.2d 297, 301 (1969) (*en banc*).

52. Emerson v. Campbell, 84 A 2d. 148, 155 (Del. Ch. 1951).

53. Taylor v. Crossan, 98 A. 375, 377 (Del. Ch. 1916).

54. Emerson v. Campbell, 84 A.2d 148, 153 (Del. Ch. 1951).

55. Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378 (Del. 1991).

56. *See* 25 Del. C. §503.

57. 25 Del. C. §503(b).

58. 25 Del. C. §503(e).

from the foregoing, Delaware does not otherwise have a statutory exception to the common law rule against perpetuities similar to Maryland's statute, which contains a list of express exceptions to the common law rule against perpetuities.[59]

Although Delaware has not adopted statutory exemptions (aside from the exemption for property held in trust), Delaware courts have developed certain exceptions to the common law rule against perpetuities through case law.[60] In particular, parties to commercial real estate transactions are permitted to negotiate a mutually acceptable time period within which rights under an agreement may be exercised without violating the common law rule against perpetuities.[61] Under Delaware law, "an agreement creating a future interest which exists for a fixed period of time does not violate the rule against perpetuities."[62]

In *Cornell*, the Supreme Court denied a motion to dismiss on grounds of violation of the rule against perpetuities. The plaintiff had entered into a contract with the defendant for the right to build, market and sell residences in a community being developed by the defendant. The plaintiff claimed that the developer had defaulted under the contract, seeking relief for damages and other remedies. The defendant claimed that the contract was void *ab initio* as it violated the rule against perpetuities. The court relied on *Pathmark* for its holding that the parties to a commercial real estate transaction can negotiate a mutually acceptable time period within which vesting can occur that is unrelated to the vesting period in the rule against perpetuities.[63] Because the court found that the contract between the parties provided a definite period for vesting, it applied the *Pathmark* analysis and dismissed the defendant's motion.

If no time is specified or an indefinite time period is specified within which rights under an agreement may be exercised, such a purported grant would violate the common law rule against perpetuities and be void *ab initio*.[64] For example, an option granted to a corporation is void under the rule against perpetuities because a corporation can have perpetual existence.[65] Accordingly, an option exercisable during the life of the option holder where that is a natural person does not violate the rule against perpetuities.[66]

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59. Md Code Et § 11-102. The Maryland statute expressly carves out certain types of arrangements or transactions from the common law rule against perpetuities in Maryland. In addition to excepting trusts, Maryland statute specifically lists exceptions to the common law rule against perpetuities, including options in leases, rights to acquire land from the state, and preemptive rights.

60. *See* Pathmark Stores, Inc. v. 3821 Assoc., L.P., 663 A.2d 1189, 1193 (Del. Ch. 1995) (ruling that an option agreement did not violate the common aw rule against perpetuities because it existed for a set number of years); Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378 (Del. 1991) (finding that if an option may only be exercised for a term of years, then the option will not violate the rule).

61. Cornell Glasgow, LLC v. LaGrange Properties, LLC, 2012 WL 3157124 (Del. Super. Aug. 1, 2012)

62. *Pathmark*, *supra* at 1192. *See also Stuart Kingston, supra* at 1384 ("where the agreement does not purport to measure the exercise of the right by the life or lives of the parties but limits its exercise to a term of years, the rule is not offended").

63. *Cornell* at *3.

64. *See* Welsh v. Heritage Homes of DeLaWarr, Inc., 2008 WL 442549 (Del. Ch. Feb. 19, 2008) (voiding a buyback provision of unlimited duration and vested in a corporation). Heritage Homes of De La Warr, Inc. v. Alexander, C.A. No. , 2005 WL 2173992, at *2 (Del. Ch. Sept. 1, 2005) (same); *aff'd*, 900 A.2d 100 (2006) (Table).

65. *See Emerson v. Campbell*, *supra*; *Stuart Kingston*, *supra*.

66. *Stuart Kingston*, *supra* at 1384. *See also* McInerney v. Slights, 1988 WL 34528, at *4 (Del.Ch. April 13, 1988).

Nonetheless, Delaware case law has not provided a clear standard for the outer limits of the time period for exercising rights under an agreement that would be sufficient for purposes of exclusion from the common law rule against perpetuities. In other words, can a definite period for vesting be so long that it violates the policy underlying the rule against perpetuities? For example, Delaware case law has upheld a thirty-year option in real estate as not violating the common law rule against perpetuities;[67] however it is unclear whether a longer period would be valid and, if so, how much more time a court would permit. The court in *Stuart Kingston* appears to have stated an unequivocal test that so long as there is a definite period for vesting, the rule is not violated. But aside from an option to be exercised during the term of a lease, is this statement of the rule intended to have no temporal limits? As a result, there is no bright line test for applying bargained-for exceptions to the common law rule against perpetuities in commercial transactions in Delaware.

This lack of clarity is illustrated by *Welsh v. Heritage Homes of DeLaWarr, Inc.*[68] In *Welsh*, the Court of Chancery undertook a detailed analysis of *Pathmark*. In this case the court found a buyback provision (of unlimited duration and vested in a corporation) to be an option in real estate[69] and considered whether that option violated the rule against perpetuities. The court first noted the common law rule that if it is possible that an option might not be exercised within the limits of the time allowed by the common law rule against perpetuities, the option is void. However, the court, referring to *Pathmark's* upholding of a thirty-year option held by a corporation, noted that the "once well-settled [common law] principle" regarding options and the rule against perpetuities have not withstood the test of time.[70] The court next turned to the *Pathmark* holding. The court noted that Pathmark "emphasized the limited duration of the option" when sustaining the option as a reasonable commercial agreement between sophisticated parties, notwithstanding that it was not required to be exercised within the rule against perpetuities period.[71] *Pathmark*, the *Welsh* court said, "reflected this Court's effort to apply the [rule against perpetuities] to options in a nuanced fashion in circumstances in which the parties had agreed to a reasonable exercise period that otherwise would have violated the rule."[72] The court continued: "Consistent with the modern view eschewing the draconian application of the [rule against perpetuities] to options in real estate, Pathmark signals this Court's willingness, in certain situations, to adopt a pragmatic approach."[73] Finally, the court noted that the Delaware Supreme Court has not adopted the "view that the [rule against perpetuities] never applies to options in real estate; as the *Pathmark* Court noted, an option of unlimited duration necessarily violates the rule under Delaware law, even under a more modern and flexible application."[74] Thus, "although parties are free to negotiate for an option in real

67. *Pathmark*, *supra at* 1193.

68. 2008 WL 442549 (Del. Ch. Feb. 19, 2008).

69. As in *Welsh*, the court in *Midland Grange No. 27 Patrons of Husbandry v. Walls*, cited *Pathmark* for the proposition that "[r]ights of first refusal in real property are subject to the [rule against perpetuities], and one of unlimited duration necessarily violates the rule." In so finding, the court also noted that the right of first refusal at issue would have rested in a corporation, an entity with a perpetual existence (rather than a person who would qualify as a "life in being" for rule against perpetuities purposes). 2008 WL 616239 (Del. Ch. Feb. 28, 2008).

70. *Welsh* at *29.

71. *Welsh* at *30.

72. *Welsh* at *30.

73. *Welsh* at *31 n.38.

74. *Welsh* at *31-*32 n.38.

estate that would endure for a period of time longer than that prescribed by the [rule against perpetuities] and although Delaware courts may uphold such options in certain circumstances," courts will not craft a reasonable duration for an option where the parties have failed to establish a duration in their agreement.[75] Accordingly, the court in *Welsh* held that the option of unlimited duration violated the rule against perpetuities. What is noteworthy in *Welsh* is the court's observation that *Pathmark* allows the parties to craft "a *reasonable* exercise period that would otherwise have violated the rule."[76]

Options in real estate of unlimited duration clearly violate the rule against perpetuities under Delaware law. As for options having a fixed term of years, even certain options having terms of greater than twenty-one years will not violate the rule against perpetuities (such as the thirty-year term in *Pathmark*). That said, Delaware courts have not yet addressed how long a term beyond thirty years would be permitted without constituting a violation of the rule against perpetuities.

The question, therefore, is whether there is merit for a statutory change in Delaware to clarify how long might be too long. Indeed, Maryland took that approach in 2012.

2. Maryland: An Example Of Statutory Change

Rather than adopting the USRAP, Maryland sought to carve out nondonative property interests and supersede the common law rule against perpetuities for commercial transactions through the adoption in 2012 of legislation providing that the common law rule against perpetuities does not apply to a nondonative property interest (i.e., a contract, lease, option, right of first refusal or other preemptive right to the use, possession, transfer or ownership of real or personal property that is given for consideration other than nominal consideration) other than a nondonative property interest created by, *inter alia*, a separation/divorce settlement, a marital arrangement, a contract not to revoke a will or trust, or a reciprocal transfer.[77] While the Maryland legislation continues to adhere in some respects to the common law rule against perpetuities,[78] the Maryland legislation is substantively identical to the USRAP's exception for some transfers. As such, the rationale behind adopting the USRAP is equally applicable to the Maryland legislation. Comment A to the USRAP provision for this exception states that "the Rule Against Perpetuities is a wholly inappropriate instrument of social policy to use as a control over [nondonative transfers]. The period of the rule a life in being plus 21 years is not suitable for nondonative transfers."[79] That rationale is in accord with similar statements in Delaware cases.

Unlike USRAP, however, subsection (d) of the Maryland legislation provides limitations on the commercial transaction carve-out to the rule against perpetuities, stating that: (1) a document creating a nondonative property interest will be void unless exercised or vested within seven years of the effective date of the property interest if such document does not state a date or make reference to lives in being by which the property interest must be exercised or vested; (2) a document creating a nondonative property interest, if expressly stating either a date by which the property interest will be

75. *Welsh* at *32 n.38.

76. *Welsh* at *30 (emphasis added). The court did not say that any definite period, regardless of length, will satisfy the rule.

77. Md Code ET §11-102.1

78. Unlike the jurisdictions that have adopted USRAP, Maryland still adheres to the Common Law RAP. Although the Fiscal and Policy Note to House Bill 188, which came into law as the Maryland Provision, makes specific reference to USRAP, that note emphasizes that Maryland has not gone so far as to adopt the entire statutory model of USRAP. *See* Department of Legislative Services - Maryland General Assembly - 2007 Session, "Fiscal and Policy Note (Rev.) (Delegate Rosenberg) - House Bill 188," http://mlis.state.md.us/2007RS/fnotes/bil_0008/hb0188.pdf. (link lasted tested Dec. 18, 2018).

79. USRAP §4(1) cmt. A. at 64.

exercised or vested or one from which the date may be determined, will be void on the earlier of the expressed or determined date or sixty years after the effective date of the property interest; and (3) a document creating a nondonative property interest that refers to one or more lives in being for determining the date by which the property interest will be exercised or vested will be void (i) if the reference is to the duration of not more than ten identified lives in being and not more than twenty-one years, at the expiration of the period of time referenced, or (ii), if the reference is to the duration of more than ten identified lives in being or to identified lives in being and more than twenty-one years, at the expiration of sixty years.[80]

In practical terms, the Maryland legislation (as limited by its subsection (d)) operates to provide a commercial transaction that otherwise would have violated the common law rule against perpetuities with a seven-year "savings clause" so that the document evidencing such transaction will not be void *ab initio*.[81] To avoid the statutory default, however the parties may include in their documents another time period of up to sixty years. Alternatively, drafters may use the standard rule against perpetuities clause (with slight refinement) that the interests under the contract or right must vest before the death of the last to die of ten identified people plus up to twenty-one years. If a contract provides for too long a period of time, say 150 years, or too many lives in being, say twenty, the Maryland legislation operates to make the savings period sixty years.[82] The Maryland legislation was thus designed to respect the intentions of parties to commercial transactions while, by way of its subsection (d), supporting the traditional policy consideration behind the common law rule against perpetuities of "keeping property from being tied up for too long."[83]

3. Is It Time To Amend The Rule In Delaware?

Given the widespread adoption in other jurisdictions of exceptions to the rule against perpetuities for commercial transactions (primarily through adoption of USRAP) and the worthwhile policy objective to avoid frustrating the intent of parties to such transactions, especially in sophisticated commercial transactions, and given the lack of clarity of the common law exception to the common law rule against perpetuities in Delaware, Delaware could benefit from the adoption of legislative exceptions to the common law rule against perpetuities. This would serve to clarify the boundaries of the commercial exception that Delaware courts have applied in certain circumstances. If Delaware is reluctant to except commercial transactions from the common law rule against perpetuities entirely, the restrictions contained in subsection (d) of the Maryland legislation serve to allow for freedom of contract while maintaining, in part, the spirit of the common law rule against perpetuities.

III. CONCLUSIONS

The author hopes that this article promotes interest in revisiting these two relics of Anglo-American common law, dusting off the cobwebs, and bringing them into the current century. This will take legislative change for each of these old rules, but the legislative changes are not complex. It just takes the will to modernize the law.

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80. Md. Code Et §11-201.1(d).

81. *See* Edward J. Levin, "*Prescription for a Good Night's Sleep - The Rule Against Perpetuities No Longer Applies to Commercial Transactions*," in Ground Rules (Real Property Section of the Maryland State Bar Association), Fall 2007; revised and reprinted in ACREL News, Vol. 26, No.1, February 2008, a publication of the American College of Real Estate Lawyers.

82. *Id*.

83. *Id*.

RIGHTS TO TENANT PROPERTY UPON TERMINATION OF A COMMERCIAL LEASE

Robert J. Krapf*

What follows is a discussion of landlord and tenant rights under Delaware law regarding improvements, trade fixtures, equipment, and other personal property at leased premises upon termination of a commercial lease. In particular, this article addresses how the law deals differently with property in the leased premises that is defined as improvements or fixtures, in contrast to that defined as trade fixtures or the tenant's other personal property (sometimes referred to as chattels). Of course, this article also assumes that the lease is silent on the issue, as the language of the lease could ultimately control the outcome.

I. TENANT'S RIGHT OF REMOVAL

The threshold issue to address in determining the tenant's right to remove property is whether the property constitutes fixtures or non-fixture personal property. The law concerning fixtures (sometimes identified as improvements, which are usually, though not always, fixtures) is a wonderfully complicated topic that returns us to the earliest days of Anglo-America common law. Ultimately, the law turns on the legal definition of fixtures, as that will largely determine whether the property belongs to and can be removed by the tenant or belongs to and must stay with the leased premises as the landlord's property. We start with the rule that *quicquid plantatur*, *solo*, *solo cedit*, or all things next to realty become part of it. But were it that simple.

Under the common law, a "fixture" is an article that, though originally a chattel, is by reason of annexation to land regarded as part of the land itself, having the character of realty and, ordinarily, belonging to the owner of the land.[1] Whether an item of personal property becomes a fixture is dependent on several elements.[2] The leading Delaware case in this regard is *Warrington v. Hignutt*,[3] which identifies the following factors for determining whether a chattel installed on the real estate becomes a fixture or remains a chattel with the right of subsequent removal: (1) the intention of the party making the annexation (which is stated to be the paramount consideration); (2) whether the item can be removed without substantial damage to the realty; and (3) whether the item can be removed without substantial damage to the item itself. The second and third factors are, in essence, also factors that bear on the intention of the installing party. Note, too, that

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1. 2 Tiffany Law of Real Property § 606 (3d ed. 1939).

2. Annot. *What constitutes improvements, alterations, or additions within provisions of lease permitting or prohibiting tenant's removal thereof at termination of lease*, 30 A.L.R.3d 998; A. M. Squillante, *The Law of Fixtures: Common Law and the Uniform Commercial Code*, 15 Hofstra L. Rev. 191 (Winter 1987). An early leading case on the law of fixtures in the United States is Teaff v. Hewitt, 1 Ohio St. 511 (Oh. 1853).

3. 31 A.2d 480 (Del. 1943). *See also* Martindale v. Bowers Beach Corp., 117 A. 299 (Del. Ch. 1922).

the analysis may differ based on the context—whether landlord and tenant, life estate and remainderman, mortgagor and mortgagee, and the like. The court wrote in *Warrington v. Hignutt*:

> The great weight of authority today regards the intention of the party making the annexation, as disclosed by the surrounding circumstances, the controlling test. It requires some positive act on the part of the annexor to change the nature and legal qualities of a chattel into those of a fixture, and it is reasonable to hold that the intention to make the article a permanent accession to the realty must plainly appear. The test of intention as discoverable in the facts and circumstances of the particular case is one of general and uniform application by which, in most instances, the essential qualities of a fixture can be determined, and by which the apparent conflict in the authorities may be reconciled. Under this doctrine, the nature of the chattel, the mode of its annexation, the purpose or use for which the annexation has been made, and the relationship of the annexor to the property are considered and weighed in determining the question of intention. The mode of annexation may have little or no significance; but where the chattel has been so affixed that it cannot be removed without serious damage to the realty or to the chattel itself, the mode of annexation alone may, as a matter of law, be conclusive of the annexor's intention. The character of the article as adapted to the use of the realty and the appropriation of the article to that use may be considerations of weight in disclosing the annexor's intention; but it may well be that the article itself may be removed and as well utilized elsewhere, and, in such case, the intention is but dimly revealed. [4]

As an example of personal property that may or may not be a fixture, overhead lights installed by the tenant might be stock lights that were not specifically designed for the leased premises and could be removed with minimal injury to the realty and in a manner that permits the lights to be used elsewhere. Installation of these lights with brackets, rather than mounting them into the ceiling or by some other more permanent method, might support an intent that the lights are easily removable and thus intended to remain tenant's personal property. However, carpeting and paneling cut to the irregular shape of the demised premises or fence posts installed using concrete can be indicative of the intent to install permanent fixtures.[5] In *Warrington v. Hignutt*, for example, the fact that oil pipes ran from an outside source, through a building, and to a stove was insufficient to find that the stove was intended to be a permanent fixture where the stove was fastened to the building using small clamps and was easily removed.

Further complicating this law is an early and long-standing exception to the rule of fixtures—that is, the tenant has the right to remove trade fixtures.[6] Trade fixtures are generally recognized as property used by a tenant in the conduct of its business that, although having the characteristics of fixtures under the common law, retain the definition of personal property.[7] Thus, fixtures generally cannot be removed by the tenant because, once determined to be fixtures, by definition they were intended to become part of the realty; but trade fixtures, although fixtures, can be removed by the tenant. On the other hand, removability is not an essential element in determining whether certain property is a trade fixture rather than a fixture or personal property.[8]

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4. *Warrington v. Hignutt,* 31 A.2d at 482.

5. *See* Squillante, *supra* n. 3, at 226.

6. A. R. Berman, ed., 2 Friedman on Leases § 25:3 at 25-16 (6th ed. 2017).

7. Squillante, *supra* n.3, at 239.

8. M. Rikon, *Condemnation of Machinery and Equipment: A Case Study*, The Practical Real Estate Lawyer, Sept. 2011, at 46. Note that in the context of eminent domain, trade fixtures may be viewed differently. *Id*.

Because the law of fixtures and trade fixtures is one of intention, what is important is the expressed intention of the parties, usually determined by interpreting the words of the lease. Thus, even the tenant's right to remove trade fixtures can be waived by the tenant. In other words, in what can seem to be a circular analysis, a tenant may remove fixtures that the tenant has installed if they are trade fixtures or if the removal can be accomplished without substantial injury to the landlord's property because, in the latter case, the fact that the removal can be accomplished without substantial injury to the landlord's property goes to the determination of the party's original intention that the improvement was not a fixture because it can be removed without substantial injury to the landlord's property, and so on and so forth. The issue is further complicated in that there are certain situations in which the improvement, although removable under ordinary circumstances, cannot be removed, such as where the tenant's installation is in substitution of property already in place and owned by the landlord (that is, the tenant cannot leave the leased premises in worse condition than when the tenant took possession of the leased premises), or where the lease requires the tenant to make certain improvements (that is, the tenant's obligation to make improvements is consideration).[9]

Of course, once the lease expires, the tenant no longer has a right to remove the fixtures. If the tenant wishes to retain the right to remove trade fixtures after the lease expires, that right must be included in the lease. For example:

> It is specifically agreed that any and all fixtures, buildings, machinery, and improvements of every description erected or installed on the leased premises by lessee during the term of this lease shall be removed by lessee within [*number of days*] days after the termination of this lease.[10]

Following from this analysis of the tenant's right to remove certain property, a tenant has no affirmative duty to remove improvements (provided that the improvements were made in a manner permitted by the lease). However, the tenant appears to have the duty to remove tenant's personal property based on the implied covenant to return the leased premises in the same condition as received.[11] Accordingly, if the landlord wishes the tenant to remove improvements prior to the expiration of the lease, the lease must contain this affirmative duty by express language. For example:

> On the expiration of the term of this lease agreement, or earlier termination of this lease agreement, lessee shall, at lessee's own expense, remove all property belonging to lessee and all additions, alterations, or other improvements that, by the terms of this lease agreement, lessee is permitted to remove, repair all damage to the demised premises caused by such removal, and restore the demised premises to the condition they were in prior to the making or installation of the improvements and other property so removed.[12]

The following is an example of a provision in a commercial lease form in use in Delaware:

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9. 2 Tiffany Law of Real Property § 621 (3d ed. 1939).

10. 8A Am. Jur. *Legal Forms* § 119:12.

11. 2 Friedman on Leases § 18:1 at 18-3 (6th ed. 2017); *but see* 49 Am. Jur. 2d *Landlord & Tenant* § 696.

12. 11A Am. Jur. *Legal Forms* § 161:546.

> All alterations, improvements, additions or fixtures, whether installed before or after the execution of this Lease, shall, immediately upon completion, become the property of Landlord and shall remain upon the Premises at the expiration or sooner termination of this Lease unless Landlord shall, prior to the expiration or termination of this Lease, have given written notice to Tenant to remove any of the same which were installed by or for Tenant, in which event Tenant will remove such alterations, improvements and additions and restore the Premises to the same good order and condition in which they existed prior to the installation of such alterations, improvements, additions or fixtures.[13]

Note that all of the improvements will remain, which may not be in the best interests of the landlord who may need to demolish and remove improvements made by the tenant in order to relet the space to a replacement tenant. From the landlord's standpoint, a better approach may be to reserve to the landlord the flexibility of requiring the tenant to remove improvements at the end of the lease term unless the landlord allows the improvements to remain.

II. TENANT'S ABANDONMENT OF PROPERTY.

The characterization of the property will also determine what happens to the property upon the termination of the lease and surrender of the leased premises. The landlord should keep in mind that, absent express language in the lease, personal property remaining in the leased premises after the expiration of the lease remains the property of the tenant, whereas fixtures (and, in most jurisdictions, trade fixtures) are deemed to have been abandoned by the tenant.[14] A few jurisdictions allow the tenant a reasonable time after the termination of the lease to remove fixtures, although the tenant will be liable for damages in trespass arising from the removal.[15] At some point, the tenant will be considered to have abandoned the personal property; however, there is no bright-line test for when that occurs. Moreover, the landlord could be held liable to the tenant for wrongfully disposing of the tenant's personal property.[16]

As a general rule, a tenant does not forfeit or lose title to its personal property by failing to remove it from the leased premises after termination of the lease, even if that failure continues for a reasonable time after the lease termination.[17] Abandonment at common law requires the intent to relinquish a known right or interest.[18] It is therefore important for the landlord to investigate the ownership and lien status of the tenant's personal property and trade fixtures before asserting claims against them and certainly before claiming abandonment by the tenant. This investigation should include at a minimum a search of the applicable financing statement records of the jurisdiction. Treating a tenant's personal property as abandoned without affording the tenant its legal rights over that property can constitute a conversion by the landlord and expose the landlord to various damages, including, in some instances, punitive damages.[19]

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13. Commercial-Industrial Realty Council of New Castle County, Delaware Retail Lease Form.

14. 51C C.J.S. *Landlord & Tenant* § 397; 49 Am. Jur. 2d *Landlord & Tenant* § 205.

15. *E.g.*, *see* Adams Outdoor Advertising L.P. v. Long, 483 S.E.2d 224 (Va. 1997); Towne v. Sautter, 326 N.W.2d 694 (N.D. 1982); Ilderton Oil Co. v. Riggs, 186 S.E.2d 691 (N.C. Ct. App. 1972).

16. *See* Mombro v. Louis Capano & Sons, 526 F. Supp. 1237 (D. Del. 1981).

17. *Id*. at 1240. *See also* 51C C.J.S. *Landlord & Tenant* § 790.

18. *Mombro*, 526 F. Supp. at 1239. *See also* 1 C.J.S. *Abandonment* § 4.

19. Affordable Autos, Inc. v. Dietert, 2016 WL 1169244 (Del. Super. March 24, 2016).

A Pennsylvania case provides a useful analysis of these issues, particularly as they involve issues arising under Articles 2 and 9 of the Uniform Commercial Code (the "UCC"). In *Hoyt v. Christoforou*,[20] the landlord of a shopping center restaurant recovered possession of the restaurant space from the defaulting assignee of the original tenant. The original tenant had sold the restaurant equipment to the assignee on an installment basis, retaining a security interest in the equipment. After terminating the lease, the landlord refused to allow the original tenant entry onto the premises to recover her claimed equipment and re-rented the premises to a new restaurant operator. The landlord also purported to sell the equipment to this new tenant by bill of sale, retaining a security interest and filing a financing statement.

When the original tenant pursued her debt claim against her assignee, the landlord and the new tenant intervened. The sheriff determined, without a hearing, that the equipment belonged to the landlord and new tenant. The original tenant objected, and, at a hearing on the objection, the trial judge sustained the objection and set aside the sheriff's decision, allowing the original tenant execution of her judgment. The landlord and new tenant appealed. The landlord's claim to the equipment was based first on the alleged terms of the lease with the original tenant's assignee that, the landlord argued, allowed the landlord to retain property of the tenant not removed from the premises by tenant upon termination and, second, on the alleged abandonment of the equipment by the original tenant's assignee, upon which event title vested in the landlord. The new tenant's claim to the property was based on the argument that it was a good faith purchaser for value whose interest was superior to that of the holder of an unperfected security interest (*i.e.*, the original tenant).

On appeal, the court found, first, that the lease provision identified by the landlord only governed the removal of trade fixtures and deemed as abandoned to the landlord only those fixtures remaining in the premises upon termination of the lease, which did not apply to the restaurant equipment. The court viewed this as a UCC issue and found that high chairs, cash registers, ice chests, fax machines, broilers, step ladders, and the like were not fixtures as that term was defined in the Pennsylvania UCC. Second, the court dismissed the abandonment argument, holding that a landlord cannot infer abandonment of the equipment by the cessation of business and failure to pay rent or by the subsequent failure to remove the equipment once the lease was terminated by the landlord. The court noted that the landlord made little effort to ascertain the status of the equipment and simply padlocked the premises, which constituted an unlawful conversion of the tenant's property. The court observed that the landlord had lawful remedies available to it and could have obtained a landlord's lien or executed a distraint remedy under applicable Pennsylvania law. Either remedy would have allowed an exercise of jurisdiction over the equipment. The landlord compounded its error by proceeding to sell the equipment to the new tenant even though the landlord had actual notice of the original tenant's ownership claims. Finally, the court held that the new tenant could not have the status of a good faith purchaser for value, as the seller did not have title to the goods. As provided in Article 2-403 of the UCC, a purchaser of goods can only acquire the title held by the transferor.[21] A good faith purchaser from a converter acquires no interest in the goods bought.[22] Consequently, the original tenant, as the holder of an unperfected security interest, had a superior interest to a converter and the third-party purchaser of converted goods.[23]

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20. 692 A.2d 217 (Pa. Super. 1997).

21. U.C.C. § 2-403.

22. *Id.*

23. *Hoyt*, 692 A.2d 217. Note, too, that generally, a creditor or other person whose claims to the property arise from the tenant will have the same rights of removal as the tenant and must exercise those rights within the same period. 35 Am. Jur. 2d *Fixtures* § 96; *but see* Gibson v. Exchange Nat. Bank, 42 P.2d 511 (Okla. 1935) (mortgagee retains reasonable removal rights even though tenant's removal right extinguished).

A lesson for landlords that can be drawn from *Hoyt v. Christoforou* is a warning against self-help remedies. The landlord could have utilized lawful remedies (*e.g.*, pursuing an action for distraint) to obtain control over the disposition of the equipment, and thus obtain priority over the original tenant's unperfected security interest. Instead, the landlord chose to assert self-help remedies that proved to be unlawful.

The common law provided a corollary to the general concept that failure to remove does not constitute abandonment by giving rights to the landlord to deal with personal property remaining in the premises. Because property left behind by the tenant may interfere with the landlord's use of the leased premises, the landlord has the right under the common law to recover from the tenant the cost of removing and storing such property.[24] The question then arises of how long the landlord must store the personal property before it can claim that the tenant has abandoned the property, allowing the landlord to dispose of it once and for all. The general statement of the courts has been that abandonment will have occurred if the personal property has not been removed within a reasonable time after the lease termination.[25] Again, it is important to keep in mind that trade fixtures not removed once the lease term ends and the tenant has surrendered the leased premises are deemed abandoned and become the property of the landlord.[26] That is, trade fixtures become treated like fixtures and are abandoned, absent contractual provisions to the contrary.

Some states have adopted statutory limitations whereby after a certain number of days, the tenant is deemed to have abandoned its personal property. For example, the Delaware Code provides:

> If, at the time of the execution of the writ of possession, the tenant fails to remove tenant's property, the landlord shall have the right to and may immediately remove and store such property for a period of 7 days, at tenant's expense …. If, at the end of such period, the tenant has failed to claim said property and to reimburse the landlord for the expense of removal and storage in a reasonable amount, such property and possessions shall be deemed abandoned and may be disposed of by the landlord without further notice or obligation to the tenant.[27]

These statutes often have limitations. As in Delaware, the statutory provision may relate only to property remaining after the tenant's dispossession under a possessory proceeding and might not apply if the tenant simply disappears and

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24. *Mombro* 526 F. Supp. at 1239. *See also* Restatement (Second) of Property, Landlord and Tenant § 12.3 (Am. Law Inst. Year); 49 Am. Jur. 2 d *Landlord & Tenant* § 696.

25. 49 Am. Jur. 2d *Landlord & Tenant* § 205.

26. Annot. *Time Within Which Tenant's Right to Remove Trade Fixtures Must Be Exercised*, 109 A.L.R. 5th 421 (2003).

27. 25 Del. C. § 5715(e). A Delaware court has held that this statutory remedy is the only means by which the landlord may remove and dispose of the tenant's property. Although the case involved a residential lease, the court did not distinguish what might be the result under a commercial lease. Drylie v. Woods, 1991 WL 53434, at *3 (Del. Super. March 18, 1991). *See also* 25 Del. C. § 4001(a) (personal property deemed abandoned after one year). Delaware courts do not seem to have addressed the possible inconsistency between abandonment under 25 Del. C. §5715(e) and under 25 Del. C. § 4001(a). One possible reconciliation is that 25 Del. C. § 5715(e) applies to dealing with the tenant's personal property after the landlord has lawfully evicted the tenant and received a writ of possession, and 25 Del. C. § 4001(a) applies to dealing with that property in any other situation (e.g., tenant's abandonment of the leased property). Such an approach, however, would seem to place a significant burden on the landlord in the latter situation for safekeeping the tenant's property.

fails to pay rent.[28] The statutory remedies may also have constitutional defects. In *Mombro v. Louis Capano & Sons*,[29] the District Court for the District of Delaware pursued a lengthy analysis of the statutory predecessor to the above-referenced abandonment statute and found that it was likely to be deficient on due process grounds as a pre-hearing deprivation. However, the court found that it could resolve the dispute without reaching the constitutionality of the statute, leaving the constitutionality question open.

For these reasons, careful landlords should draft clear and complete leases relating to the disposition of the tenant's property upon the termination of the lease. As seen in the decision in *Holt v. Christoforou*, it is important to provide for disposition of all types of tenant property and not simply improvements or even trade fixtures. The following is an example of a provision in a commercial lease form in use in Delaware:

> Any personal property which shall remain on the Premises for more than five (5) days after the expiration or earlier termination of this Lease or Tenant's right to possess the Premises may, at the option of Landlord, be deemed to have been abandoned by Tenant and may be retained by Landlord as Landlord's property or be disposed of, without liability of Landlord, in such manner as Landlord may see fit or Landlord, at its option, may require Tenant to remove the same at Tenant's expense. In case of such removal, all costs of removal and of repairing any damage to the Premises arising from such removal shall be paid by Tenant within ten (10) days after Landlord's demand. Tenant shall pay to Landlord within ten (10) days after Landlord's demand (i) a reasonable fee for storing and disposing of any such personal property, and (ii) all costs and expenses incurred by Landlord in storing and disposing of any such personal property (including, without limitation, reasonable attorney's fees relating to claims against Landlord by any and all parties claiming interests in such personal property).[30]

Such contractual dispositions of property are generally enforceable.[31]

III. VISUAL ARTISTS RIGHTS ACT OF 1990

Finally, landlords should be aware of the Visual Artists Rights Act of 1990 (VARA) granting rights to artists to prevent the removal or destruction of certain works of art incorporated into buildings.[32] Even though the art installed by the tenant may be a fixture and therefore the landlord's property upon the termination of the lease, the landlord's right to

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28. This leads to a different discussion, beyond the scope of this article, of how best to perfect the landlord's repossession of the leased premises in light of an apparent abandonment of the leased premises by the tenant. *See* Lempke v. Hospitality Inv. of Rehoboth, Inc., 1994 WL 89359 (Del. Super. Feb. 24, 1994).

29. 526 F. Supp. 1237 (D. Del. 1981).

30. *See* n. 12 *supra*. It is not clear whether the seven-day period for holding the tenant's payments under 25 Del. C. § 5715(e) can be shortened by agreement. Certainly, if the tenant appeals the possession judgment, the property is to be held pending that appeal and until seven days after the resolution of the appeal. 25 Del. C. § 5715(f)(1).

31. 51C C.J.S. *Landlord & Tenant* § 317(a). Of course, abandonment can cut both ways. For example, in *Kulkowitz v. 122 124 Duane Realty Corp.*, , a landlord was held liable for injuries caused by a fallen sign that had been left on the premises by the former tenant. 583 N.Y.S. 2.d 388 (N.Y. App. Div. 1992).

32. 17 U.S.C. § 106A.

dispose of that property may be qualified in certain circumstances where the removal of the work will cause the destruction or mutilation of the work.[33]

VARA applies to a "work of visual art," which is defined as:

> (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
>
> (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.[34]

Certain pictorial materials are not included in this definition of a "work of visual art," such as posters, motion pictures, technical drawings, databases, merchandising or advertising items, or, importantly, any "work made for hire."[35]

The statute provides that the author of a work of visual art has certain rights. These include the right:

> (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
>
> (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.[36]

There have been a number of cases dealing with substantive claims under VARA for alleged damage to works of visual art. In *Martin v. City of Indianapolis*,[37] the artist who had created an outdoor sculpture for the City of Indianapolis was entitled to damages for the complete destruction of that work when the sculpture was demolished by the city. On the other hand, a New York court has held that an artist is not entitled to relief under VARA where the work of art has been illegally placed on property.[38]

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33. *See* Carter v. Helmsley-Spear, Inc., 852 F. Supp. 228 (S.D.N.Y. 1994), Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303 (S.D.N.Y. 1994), rev'd on other grounds, 71 F.3d 77 (2d Cir. 1995), cert. denied, 517 U.S. 1208 (1996); Boorstyn on Copyrights § 5.07[3][b]; Nimmer on Copyrights § 8D.06[C][3]. Interestingly, most of the decisions under VARA have gone against the artists, whether on procedural grounds or for substantive reasons, often because the work in question was found not to be protected by VARA..

34. 17 U.S.C. § 101 (Definitions).

35. *Id*.

36. 17 U.S.C. § 106A(a)(3).

37. 982 F. Supp. 625 (S.D. Ind. 1997).

38. English v. BFC&R East 11th Street, LLC, 1997 WL 746444 (S.D.N.Y Dec. 3, 1997). *See also* Cheffins v. Stewart, 825 F. 3d 588 (9th Cir. 2016) (the work in question was found to be a work of applied art and not protected by VARA). On the other hand, the New York District Court has ordered a landlord to pay $6.75 million in damages for his willful demolition of a so-called "graffiti mecca" in order to build condominiums. Cohen v. G & M Realty, L.P., 320 F. Supp. 3d 421 (E.D.N.Y. 2018).

Perhaps one of the most significant cases has been *Carter v. Helmsley-Spear, Inc.*[39] As part of the renovations of an office building, the landlord had removed certain lobby sculptures that the landlord felt were out of keeping with the desired look of the renovated office building. The artists brought an action under VARA to enjoin the landlord from removing the sculptures. The trial court held that the sculptures were a work of visual art protected by VARA and the artists were entitled to an injunction for their lifetime. The Second Circuit, however, reversed the lower court and held that sculptures were a "work for hire" and exempt from VARA.

Finally, it is worth noting that the author of a work of visual art can waive its rights under VARA, allowing a landlord who secures a work of visual art for a lobby space, for example, to obtain a waiver. A waiver for this purpose must be express, in writing, specifically identifying the work, and specifically identifying the uses to which the waiver applies.[40]

IV. CONCLUSION

The fate of equipment, improvements, and other property upon lease termination will depend on the character of that property under the law. Although fixtures are only removable to the extent permitted by the lease and will automatically vest in the landlord upon the lease termination, trade fixtures remain removable by the tenant, except to the extent otherwise provided under the terms of the lease, but are deemed to have been surrendered to the landlord if not removed by the tenant before the termination of the lease. On the other hand, personal property always remains removable by the tenant—except if the tenant has agreed to limit its rights under the lease and except to the extent of any statutory limitations—and as it remains the tenant's property, it remains recoverable by the tenant from the leased premises even after the lease has terminated. Finally, a work of visual art may be statutorily protected from the landlord's desire to remove it from the premises.

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39. *See* n. 30 *supra*.

40. 17 U.S.C. § 106A(e)(1).