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## Real Property -- Direct Restraints on Alienation

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most of his income, while *Sniadach* goes directly to the heart of the problem by requiring that a hearing precede garnishment. The degree of protection *Sniadach* will ultimately provide depends upon the administrative techniques the states choose to implement it, while the CCPA's mandate cannot be avoided.

CLINTON EUDY, JR.

### Real Property—Direct Restraints on Alienation

Owners who dispose of property frequently attempt to attach restrictions on its further sale or disposition. In *Wachovia Bank & Trust Co. v. John Thomasson Construction Co.*,<sup>1</sup> a case recently before the North Carolina Supreme Court, property had been conveyed in trust for the use of Alexander Children's Home, a non-profit charitable corporation, with the provision that the trustees should have no power to sell or convey it. The court upheld this restriction against sale by saying in part that it would be a strange deviation to permit creation of perpetual charitable trusts while preventing the donor from restraining the sale of the trust corpus. Since direct restraints on alienation are normally void, and this decision reversed the court of appeals and overturned strong dicta which had earlier been generally accepted as indicating such restraints would be void in North Carolina,<sup>2</sup> the decision suggests a review of the case law concerning direct restraints on alienation.<sup>3</sup>

Direct restraints, as discussed in this note, are terms incorporated in the devise or grant that would preclude or limit alienation or set up penalties for attempts to alienate. If the restraint is phrased so that the power to alienate is withheld or limited, as was the case in *Thomasson*, it is termed a disabling restraint. If the restraint calls for forfeiture of the interest to a third party or for reversion back to the grantor when the prohibition is violated, it is, quite naturally, termed a forfeiture restraint.<sup>4</sup> As will be seen, forfeiture restraints are sometimes valid where a similar disabling restraint is void.

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<sup>1</sup> 275 N.C. 399, 168 S.E.2d 358 (1969).

<sup>2</sup> *Hass v. Hass*, 195 N.C. 734, 741, 143 S.E. 541, 544 (1928).

<sup>3</sup> See generally 6 AMERICAN LAW OF PROPERTY pt. 26 (A. J. Casner ed. 1952) [hereinafter cited as A.L.P.]; J. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895) [hereinafter cited as GRAY]; 6 R. POWELL, THE LAW OF REAL PROPERTY §§ 839-48 (recomp. 1969) [hereinafter cited as POWELL]; IV RESTATEMENT OF PROPERTY §§ 404-38 (1944) [hereinafter cited as RESTATEMENT]; L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1111-71 (2d ed. 1956) [hereinafter cited as SIMES & SMITH].

<sup>4</sup> 6 A.L.P. § 26.1.

## LEGAL ESTATES

*Fee Simple*

If a devise or grant is expressed in terms serving to pass a legal fee simple, the courts normally will void any attempt to attach restrictions to the fee that would deny or limit the taker's right to alienate. In the early case of *Monroe v. Hall*,<sup>5</sup> land and slaves were conveyed "provided always, that neither [of the grantees] shall sell or dispose of any part of the above named land and negroes in any manner whatsoever."<sup>6</sup> The court held that such a *provisio* was "repugnant to the fee simple estate . . . and is therefore simply void."<sup>7</sup> Similar decisions have been reached on all attempts at absolute preclusion of sale of a fee simple,<sup>8</sup> even those in which the restraint is imposed for a limited time.<sup>9</sup> In *Latimer v. Waddell*<sup>10</sup> the grantor retained a life estate for himself and directed that the remaindermen not dispose of their interest during the grantor's life or for five years thereafter. The court held that a condition annexed to a conveyance in fee simple preventing alienation of an estate by the grantee within a certain period of time was void.

Where an attempt is made to limit the manner in which alienation of a fee may be made, the restraint is also void. Thus, if the grantor attempts to exempt the property from involuntary alienation to satisfy the claims of creditors of the grantee, the attempt is void.<sup>11</sup> Similarly, provisions dictating who will take upon death of the grantee are void if the words preceding the provision conveyed a fee simple.<sup>12</sup> The case of

<sup>5</sup> 97 N.C. 206, 1 S.E. 651 (1887).

<sup>6</sup> *Id.* at 207, 1 S.E. at 652.

<sup>7</sup> *Id.* at 210, 1 S.E. at 653.

<sup>8</sup> *Murdock v. Deal*, 208 N.C. 754, 182 S.E. 466 (1935); *Short v. Gurley*, 172 N.C. 866, 90 S.E. 891 (1916).

<sup>9</sup> Restraint for a specified period: *Johnson v. Gaines*, 230 N.C. 653, 55 S.E.2d 191 (1949) (thirty-five years after testator's death); *Douglas v. Stevens*, 214 N.C. 688, 200 S.E. 366 (1939) (forfeiture if sold within fifty years); *Williams v. Sealy*, 201 N.C. 372, 160 S.E. 452 (1931) (fifty years). Restraint for lifetime: *Buckner v. Hawkins*, 230 N.C. 99, 52 S.E.2d 16 (1949); *Welch v. Murdock*, 192 N.C. 709, 135 S.E. 611 (1926); *Combs v. Paul*, 191 N.C. 789, 133 S.E. 97 (1926); *Pilley v. Sullivan*, 182 N.C. 493, 109 S.E. 359 (1921); *Holloway v. Green*, 167 N.C. 91, 83 S.E. 243 (1914); *Foster v. Lee*, 150 N.C. 688, 64 S.E. 761 (1909); *Pritchard v. Bailey*, 113 N.C. 521, 18 S.E. 668 (1893). Restraint until a certain age is reached: *American Trust Co. v. Nicholson*, 162 N.C. 257, 78 S.E. 152 (1913) (until youngest child was twenty-one); *Twitty v. Camp*, 62 N.C. 61 (1866) (until age thirty-five reached).

<sup>10</sup> 119 N.C. 370, 26 S.E. 122 (1896).

<sup>11</sup> *Vaughan v. Wise*, 152 N.C. 31, 67 S.E. 33 (1910); *Ricks v. Pope*, 129 N.C. 52, 39 S.E. 638 (1901).

<sup>12</sup> *Croom v. Cornelius*, 219 N.C. 761, 14 S.E.2d 799 (1941); *Hambright v. Carroll*, 204 N.C. 496, 168 S.E. 817 (1933); *Daniel v. Bass*, 193 N.C. 294, 136 S.E. 733 (1927); *Carroll v. Herring*, 180 N.C. 369, 104 S.E. 892 (1920).

*Newland v. Newland*<sup>13</sup> aptly illustrate how a testator attempting to satisfy two desires violated this rule. In attempting to provide for his wife, the testator devised property to her to "have and hold and [dispose] of at her own discretion while she lives."<sup>14</sup> Then, in order to keep the property within the family, he added, "and at her death, so as not to be disposed of out of the family."<sup>15</sup> The court held that the first clause, giving an absolute power of disposal, was the equivalent of conveying the fee and that any subsequent restraints were therefore void. Problems such as this one may often be avoided, and the desires of the grantor fulfilled, by careful wording of the grant so as to convey a life estate with limited powers of disposition or appointment or a defeasible fee with a limitation over.<sup>16</sup> Faced with a statutory admonition to construe devises or grants as passing a fee simple whenever possible,<sup>17</sup> North Carolina courts require clear and technically correct wording to create any lesser estate.<sup>18</sup> While this situation apparently often leads to a court interpretation that does not precisely reflect the intent of the grantor,<sup>19</sup> it does further the policy of ensuring maximum alienability.<sup>20</sup>

It is a general rule that restrictions that would preclude sale without prior approval, or without giving the grantor or some third party an opportunity to repurchase, are void.<sup>21</sup> Following the decision in *Hardy Brothers v. Galloway*,<sup>22</sup> it appears that the North Carolina court also takes

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<sup>13</sup> 46 N.C. 463 (1854).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See generally 6 A.L.P. § 26.47, and cases cited therein. In *Foster v. Lee*, 150 N.C. 688, 64 S.E. 761 (1909), the testator willed land to his daughter in fee and added the condition that she should not dispose of it, but that it should descend to her children; and the court held the restraint void. By wording the device so as to give a life estate to the daughter with remainder to her children, it would appear that the testator could have effectively achieved his purpose.

<sup>17</sup> N.C. GEN. STAT. § 39-1 (1966).

<sup>18</sup> See *Taylor v. Taylor*, 228 N.C. 275, 45 S.E.2d 368 (1947); *Holloway v. Green*, 167 N.C. 91, 83 S.E. 243 (1914). *But cf.* *Hampton v. West*, 212 N.C. 315, 193 S.E. 290 (1937); *Bryan v. Dunn*, 120 N.C. 36, 27 S.E. 37 (1897) (dictum); *Hall v. Robinson*, 56 N.C. 348 (1857) (dictum).

<sup>19</sup> The intent of the grantor is uniformly stated to be the primary object of consideration in the interpretation of grants and wills. See, e.g., *Carroll v. Herring*, 180 N.C. 369, 104 S.E. 892 (1920); *Newland v. Newland*, 46 N.C. 463 (1854).

<sup>20</sup> See, e.g., *Taylor v. Taylor*, 228 N.C. 275, 45 S.E.2d 368 (1947); *Hambright v. Carroll*, 204 N.C. 496, 168 S.E. 817 (1933); *Foster v. Lee*, 150 N.C. 688, 64 S.E. 761 (1909).

<sup>21</sup> 6 POWELL § 842 n.11; RESTATEMENT § 406, comment *h* at 2404.

<sup>22</sup> 111 N.C. 519, 15 S.E. 890 (1892). The deed involved in this case purported to retain for the grantors the right to repurchase the land whenever sold and to render void the deed if the grantee attempted to convey or mortgage without giv-

this position although the court had some difficulty in reaching such a result. There have been some convincing arguments given by the commentators that this is an area of restraints in which the courts should avoid an arbitrary declaration of invalidity and instead look at the utility of the restraint to uphold those serving a valid interest.<sup>23</sup> The Illinois Supreme Court has recently recognized this argument by enforcing reconveyance to a cooperative housing association when deeds had been given to association members to enable them to obtain mortgages.<sup>24</sup> There is some doubt that the decision in *Hardy Brothers* would be binding precedent to void such a restraint in North Carolina if it were worded in terms of a first-refusal option at ascertainable terms.<sup>25</sup> Indeed, the decision in *Hardy Brothers* may be read as lending support to the validity of this type term since the court treated the provision for repurchase as a restraint on alienation only after declaring it to be void as a contract to reconvey because of the uncertainty of the terms.<sup>26</sup>

For one reason or another attempts are often made to limit the persons to whom alienation is permitted, either by specification of a small group to whom alienation is allowed or by the exclusion of certain groups. Attempts to exclude all but a small group most often occur when the grantor wishes to have property retained within the family. This situation occurs in *Langston v. Wooten*,<sup>27</sup> where the testator directed that land be divided among his children and that they should have the right to sell it only to each other. The court held that attempted restraints permitting alienation among only a limited group are void.<sup>28</sup> Although there are no cases specifically on the point in North Carolina, many

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ing the grantors the privilege of repurchasing. The court held that the provision was too uncertain to be effective as either a conditional sale or a contract to reconvey since it was for an unlimited time and no terms were fixed; and since the deed had already recited words passing the fee simple, it was void as a restraint if considered a condition subsequent.

<sup>23</sup> See, e.g., 6 A.L.P. § 26.29.

<sup>24</sup> *Gale v. York Center Community Cooperative*, 21 Ill. 2d 86, 171 N.E.2d 30 (1960), noted in 14 VAND. L. REV. 1535 (1961).

<sup>25</sup> See P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 10.03[1] (1968).

<sup>26</sup> The courts have no difficulty in upholding options which in effect preclude alienation to all except the optionee until he has had an opportunity to refuse to purchase, and they are seemingly unconcerned with the restraint aspect when it is a contract right. *Pure Oil Co. v. Baars*, 224 N.C. 612, 31 S.E.2d 854 (1944); *Chadwick v. Blades*, 210 N.C. 609, 188 S.E. 198 (1936).

<sup>27</sup> 232 N.C. 124, 59 S.E.2d 605 (1950).

<sup>28</sup> *Accord*, *Early v. Tayloe*, 219 N.C. 363, 13 S.E.2d 609 (1941); *Williams v. McPherson*, 216 N.C. 565, 5 S.E.2d 830 (1939); *Norwood v. Crowder*, 177 N.C. 469, 99 S.E. 345 (1919); *Brooks v. Griffen*, 177 N.C. 7, 97 S.E. 730 (1919).

writers have expressed the view that restraints specifically excluding one person or a limited few from purchasing may be valid.<sup>29</sup> It can be inferred from the court's approval, prior to the decision in *Shelley v. Kramer*,<sup>30</sup> of covenants restricting alienation to racial and social groups<sup>31</sup> that this view is accepted in North Carolina.

### *Life Estates*

The courts have been more willing to tolerate restrictions on the alienation of life estates, primarily due to the presence of a third party who has a very legitimate interest in how the property in question will be maintained and preserved and hence an interest in who possesses the life estate.<sup>32</sup> Where the restraints are disabling, however, the courts refuse to allow them to stand.<sup>33</sup> Disabling restraints would often permit continued enjoyment of the estate by the life tenant while he refused payment to creditors with legitimate claims, a situation that obviously offends the court's sense of fairness. When the restraint is a valid forfeiture over for attempted alienation, it should be upheld since continued denial of creditors is no longer a factor. There is much support for this view in dicta in the North Carolina cases<sup>34</sup> although the court has never specifically decided the point. In *Mizell v. Bazemore*,<sup>35</sup> a life estate was given with the provision that if any creditors of the life tenant should seek to subject the land to payment of his debts, the life estate would end and the remainderman take at that instant. But it also was provided that the life tenant would continue to have the use of the lands for life with no rent. The court said that there was in fact no limitation over because of the continued use by the life tenant and declared the restraint void since it was disabling in fact, if not in form.<sup>36</sup>

### *Estate for Years*

A term in a lease that would preclude or limit the alienation of the lessee's interest by assignment or subleasing is valid if it results in a

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<sup>29</sup> 6 A.L.P. § 26.33; GRAY §§ 40-44; 6 POWELL § 843; RESTATEMENT § 406, comment j.

<sup>30</sup> 334 U.S. 1 (1948), noted in 27 N.C.L. REV. 224 (1949).

<sup>31</sup> *Vernon v. R.J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E.2d 710 (1946).

*See Phillips v. Wearn*, 226 N.C. 290, 37 S.E.2d 895 (1946).

<sup>32</sup> *See* 6 A.L.P. § 26.48.

<sup>33</sup> *Beam v. Gilkey*, 225 N.C. 520, 35 S.E.2d 641 (1945); *Stokes v. Dixon*, 182 N.C. 323, 108 S.E. 913 (1921); *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916).

<sup>34</sup> *See Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916); *Bryan v. Dunn*, 120 N.C. 36, 27 S.E. 37 (1897); *Pace v. Pace*, 73 N.C. 119 (1875).

<sup>35</sup> 194 N.C. 324, 139 S.E. 453 (1927).

<sup>36</sup> *Id.* at 327, 139 S.E. at 454.

forfeiture or termination of the lease.<sup>37</sup> There is some disagreement among the writers as to the validity of disabling restraints on leases<sup>38</sup> and the point apparently has not been decided in North Carolina. Drawing an analogy to life estates, where there is the same balancing of the interest of the fee holder as to who occupies against the desire for freedom of alienation, it would seem that disabling restraints in leases are void. As a practical matter, the point is not likely to arise since restrictions in leases are nearly always worded so as to give a right of re-entry or termination to the lessor upon breach by the lessee.

The courts, while accepting restrictions in leases, have confined them as closely as possible by declaring waivers of the restraints wherever possible<sup>39</sup> and by strictly construing any restraints within the technical meaning of the language used.<sup>40</sup> A clause precluding subleasing will not prevent assignment<sup>41</sup> and a clause precluding assignment will not prevent subleasing.<sup>42</sup> As leases are used more and more in strictly commercial transactions, it would seem that where the lessor does not intend to personally re-occupy, the courts could take a stricter view and void restraints extending for long periods of time and not essential to the protection of the lessor. Such a rule would be hard to apply, however, and the courts have not indicated any trend in this direction.

### *Rights of Partition of Concurrent Estates*<sup>43</sup>

Restrictions are often used that require tenants in common to occupy property while specifying that there will be no partition. Such restraints are often determined by the courts to serve a valid and worthwhile purpose, such as maintenance of a home until the youngest child is of age; and where they are limited in time, the courts generally accept

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<sup>37</sup> *Carson v. Imperial '400' National, Inc.*, 267 N.C. 229, 147 S.E.2d 898 (1966); *Rogers v. Hall*, 227 N.C. 363, 42 S.E.2d 347 (1947); *Hargrave v. King*, 40 N.C. 430 (1848).

<sup>38</sup> Compare GRAY § 278 and RESTATEMENT § 410 with A.L.P. § 26.51.

<sup>39</sup> *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E.2d 871 (1957), where a lessor was held to have waived the right to declare forfeiture for assignment by continuing to accept rent from the original lessee after an assignment had been made even though he refused to accept rent from the assignee and notified the lessee that he did not consent to the assignment.

<sup>40</sup> *Rogers v. Hall*, 227 N.C. 363, 42 S.E.2d 347 (1947).

<sup>41</sup> *Id.*

<sup>42</sup> *J. D. Cornell Millinery Co. v. Little-Long Co.*, 197 N.C. 168, 148 S.E. 26 (1929).

<sup>43</sup> Technically speaking, partition is not a form of alienation. The practical effect, however, of prohibiting partition is so much like a restraint on alienation that they are usually considered together.

them.<sup>44</sup> However, where partition is perpetually or unreasonably restrained, the restraint is void.<sup>45</sup>

The North Carolina court's treatment of these attempts may be seen by considering three cases. In *Anderson v. Edwards*,<sup>46</sup> the court, taking notice of an outstanding ten-year farm mortgage and other factors, upheld a provision that there should be no partition of the farm for ten years although this restraint also essentially precluded alienation for that period. In *Mangum v. Wilson*,<sup>47</sup> the court held that a direction by the testator that property devised to his five children should "stand as it is altogether,"<sup>48</sup> with no limit as to time, was void if considered a restraint on either alienation or partition even though the children could sell parts of the property by mutual agreement under the terms of the will. *American Trust Co. v. Nicholson*<sup>49</sup> involved a provision in a will that the property devised should not be partitioned or sold until the youngest child reached the age of twenty-one. The court in this case, while recognizing the valid purpose of the restraints, in a decision consistent with the accepted rules held that the property could be sold since the attempted restraint on alienation was void. But the court effectively enforced the restraint on partition by upholding the lower court's order that the proceeds of the sale be re-invested in other property to be held in common by the beneficiaries.<sup>50</sup>

In condominiums restraints on partition actions are essential because the occupants rely on free access to common area stairs, halls, and entry ways. The North Carolina Unit Housing Act, in recognition of this need, makes a specific statutory exception to the judicial rules against restraints by declaring that common areas of condominiums may not be partitioned or divided and that any covenant to do so is void.<sup>51</sup>

### *Future Interests*

The North Carolina cases on restraints on future interests appear to follow the rule expressed in the *Restatement of Property* that a restraint

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<sup>44</sup> *Greene v. Stadiem*, 198 N.C. 445, 152 S.E. 398 (1930); *Ex parte Watts*, 130 N.C. 237, 41 S.E. 289 (1902); cases cited notes 45-47 *infra*.

<sup>45</sup> *Mangum v. Wilson*, 235 N.C. 353, 70 S.E.2d 19 (1952); *Pardue v. Givens*, 54 N.C. 306 (1854).

<sup>46</sup> 239 N.C. 510, 80 S.E.2d 260 (1954).

<sup>47</sup> 235 N.C. 353, 70 S.E.2d 19 (1952).

<sup>48</sup> *Id.* at 356, 70 S.E.2d at 20.

<sup>49</sup> 162 N.C. 257, 78 S.E. 152 (1913). Although this case involved a trust, which made the court's decision easier to implement, the comparison is valid.

<sup>50</sup> *Id.* at 262, 78 S.E. at 155.

<sup>51</sup> N.C. GEN. STAT. § 47A-7 (1966).

on future interests will be valid only if a similar restraint on a legal possessory estate of the same duration would be valid.<sup>52</sup> There has been no express indorsement of this rule by the court; however, previous decisions have been consistent with it.<sup>53</sup>

### TRUST INTERESTS

#### *Private Trusts*<sup>54</sup>

The general rule in North Carolina seems to be that restraints against alienation of equitable interests in private trusts are treated the same as legal interests. That is, if the beneficiary has the equitable interest that would enable him to claim, by right, the property or income therefrom, he is treated as the legal owner and is entitled to the common law power of alienation of his interest, and the property is subject to actions by his creditors.<sup>55</sup> In *Pace v. Pace*,<sup>56</sup> property was placed in trust with the restriction that none of it should be subject to the disposal or debts of the grantees; the court, holding the restraint void, said that "by no form of words, can property be given to a man, or to another in trust for him, so that he shall not have a right to dispose of his estate in it. . . ."<sup>57</sup> To the same effect is the statement in *Lee v. Oates*<sup>58</sup> that "this court has for many years consistently held that the doctrine as to restraints on alienation applies . . . to equitable estates as well as to legal estates."<sup>59</sup>

However, there are instances in which property held in trust cannot be reached either by the beneficiary or his creditors, as where the interest will not vest until the happening of a certain event,<sup>60</sup> where there is a

<sup>52</sup> RESTATEMENT § 411.

<sup>53</sup> Restraints were held void in: *Johnson v. Gaines*, 230 N.C. 653, 55 S.E.2d 191 (1949) (remainder after life estate not to be sold for thirty-five years); *Douglass v. Stevens*, 214 N.C. 688, 200 S.E. 366 (1939) (same, for fifty years); *Wool v. Fleetwood*, 136 N.C. 460, 48 S.E. 785 (1904) (life estate and remainder not to be sold during tenant's life). SIMES & SMITH § 1159 n.79 cites *Latimer v. Waddell*, 119 N.C. 370, 26 S.E. 122 (1896) (remainder not to be sold during life estate or for five years thereafter held void) and *Pardue v. Givens*, 54 N.C. 306 (1854) (remainder in fee never to be sold held void).

<sup>54</sup> See generally Christopher, *Spendthrift and Other Restraints in Trusts: North Carolina*, 41 N.C.L. REV. 49 (1962).

<sup>55</sup> *Bank of Union v. Heath*, 187 N.C. 54, 121 S.E. 24 (1924); *Smith v. Witter*, 174 N.C. 616, 94 S.E. 402 (1917); *American Trust Co. v. Nicholson*, 162 N.C. 257, 78 S.E. 152 (1913); *Christmas v. Winston*, 152 N.C. 48, 67 S.E. 58 (1910); *Wool v. Fleetwood*, 136 N.C. 460, 48 S.E. 785 (1904); *Mebane v. Mebane*, 39 N.C. 131 (1845); *Dick v. Pitchford*, 21 N.C. 480 (1837).

<sup>56</sup> 73 N.C. 119 (1875).

<sup>57</sup> *Id.* at 125.

<sup>58</sup> 171 N.C. 717, 88 S.E. 889 (1916).

<sup>59</sup> *Id.* at 721, 88 S.E. at 891.

<sup>60</sup> *Ashe v. Hale*, 40 N.C. 55 (1847) (property in trust for the use of *W* to vest

valid restriction on partition or division of the property,<sup>61</sup> or where there are contingent trust interests outstanding that may affect the beneficiary's share.<sup>62</sup> By analogy to legal life estates and the cases cited in note 34 *supra*, it would appear that forfeiture restraints on an equitable life estate or estate for years would be valid, and this reasoning is borne out by dicta in several cases.<sup>63</sup>

Despite the absolute terms used in *Pace* and *Lee*, North Carolina provides a very limited exception to the general rule by a statute<sup>64</sup> permitting spendthrift trusts for the support and maintenance of certain relations of the settlor with maximum annual incomes of five hundred dollars at the time established. The courts require strict compliance with the terms of the statute in order for the settlor to establish a spendthrift trust;<sup>65</sup> but once it is established, there is a disabling restraint in effect: The beneficiary may not alienate his interest by voluntary action, and it cannot be reached by action of his creditors.<sup>66</sup> The trustee is to disburse the money as required for the support of the grantee and may not pay the money directly to him.<sup>67</sup> As would be expected, a settlor may not put property in trust for his own support under this statute.<sup>68</sup> Spendthrift trusts have received much more lenient treatment in other jurisdictions; indeed, a majority of the states' courts accepted them without legislation.<sup>69</sup>

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in *H* only when *H* was free of debt); *Bank of the State v. Forney*, 37 N.C. 181 (1842) (devise to executors to hold property until testator's sons were out of debt and then to divide the estate). See also *Green v. Green*, 86 N.C. 546 (1882).

<sup>61</sup> *Hill v. Jones*, 123 N.C. 201, 31 S.E. 474 (1898); *Blake v. Blake*, 118 N.C. 575, 24 S.E. 424 (1896). In both of these cases there was a provision in the trust instrument that the property was not to be partitioned or divided until the youngest beneficiary was of age, and the court refused to order partition either for the parties or for their creditors.

<sup>62</sup> *Dick v. Pitchford*, 21 N.C. 480 (1837). Here the *cestui qui trust* was permitted to assign his interest, but the assignee could not get possession since the property was still subject to the trust and the contingent interests created thereby.

<sup>63</sup> *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916); *Pace v. Pace*, 73 N.C. 119 (1875); *Bank of the State v. Forney*, 37 N.C. 181 (1842).

<sup>64</sup> N.C. GEN. STAT. § 41-9 (1966). See Stephenson, *The North Carolina Spendthrift Trust Statute*, 31 N.C.L. Rev. 175 (1953) for recommendations on changing the statute.

<sup>65</sup> See, e.g., *Vaughan v. Wise*, 152 N.C. 31, 67 S.E. 33 (1910), in which the court stated that the statute is to be strictly construed and *Gray v. Hawkins*, 133 N.C. 1, 45 S.E. 363 (1903), in which the will specifically stated that its purpose was to establish a trust under the provisions of the statute, but the court disallowed the trust on technicalities.

<sup>66</sup> *Chinnis v. Cobb*, 210 N.C. 104, 185 S.E. 638 (1936); *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

<sup>67</sup> *Fowler v. Webster*, 173 N.C. 442, 92 S.E. 157 (1917).

<sup>68</sup> *Pilkington v. West*, 246 N.C. 575, 99 S.E.2d 798 (1957); GRAY §§ 90-99.

<sup>69</sup> 6 A.L.P. §§ 26.94-95.

*Public Charitable Trusts*

The courts have quite naturally sought to validate gifts to charity and this fact has had an effect on the treatment of restraints on alienation attached to such gifts. Aided by an early recognition that it was in the public interest for charities to be allowed perpetual existence, the majority of jurisdictions in the United States have decided that the donor should be permitted to restrict the use of his gift to the one purpose that he wished to benefit. Restraints on alienation in support of that desire have been upheld<sup>70</sup> in these states. With the decision in *Wachovia Bank & Trust Co. v. John Thomasson Construction Co.*,<sup>71</sup> North Carolina also has clearly adopted this position and will permit grantors to forbid sale or disposition of property by the trustee holding for a public charity.

It does not appear, however, that acceptance of the restraints will have any great effect on the way that courts will decide cases in which a trustee is seeking to obtain court approval of a sale of trust property. Even without valid restraints, sales will normally only be approved when they are required to affect the intent of the settlor or to preserve the trust;<sup>72</sup> and when there are restraints, the court may still authorize a sale if the circumstances warrant it.<sup>73</sup>

## CONCLUSION

While it is acknowledged that restraints on alienation of property sometime serve a valid purpose, they quite often reflect only the grantor's personal whims or doubts about the future. In *Brooks v. Griffin*<sup>74</sup> the judicial attitude toward restraints on alienation was expressed as follows:

It is a singular commentary upon human nature that, knowing the difficulty of managing to the best advantage one's own estate while living, with full knowledge of changing conditions, that any man should wish, or think himself competent, to restrict by deed or will the control of property in the hands of a grantee or devisee after the grantor shall have passed hence. No one can foresee the changing conditions which may arise and which will require a change in the investment or

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<sup>70</sup> 70 C.J.S. *Perpetuities* § 68 (1951); Annot., 100 A.L.R.2d 1208 (1965).

<sup>71</sup> 275 N.C. 399, 168 S.E.2d 358 (1969).

<sup>72</sup> *But see id.* at 409, 168 S.E.2d at 365 (concurring opinion), where it is suggested that different criteria be used when there is a term of restraint in the trust instrument.

<sup>73</sup> *Id.* at 408, 168 S.E.2d at 364 and cases cited therein.

<sup>74</sup> 177 N.C. 7, 97 S.E. 730 (1919).

in the management of property in the always uncertain future. . . . It is the vanity of human nature that one out of whose hands property is passing should seek to control it after it has ceased to be his.<sup>75</sup>

DONALD W. HARPER

### Trade Regulation—Price Discrimination under Section 2(a) of the Robinson-Patman Act

In the recent case of *Perkins v. Standard Oil Co.*,<sup>1</sup> the United States Supreme Court examined an aspect of section 2(a) of the Robinson-Patman Act<sup>2</sup> to which it had never before affixed a decisive interpretation. The Court considered the issue of whether the protection afforded by section 2(a) extends to competitors on the fourth, and by necessity, the third functional level. The narrow questions presented by the *Perkins* decision are whether that section logically dictated the Court's holding and what the possible ramifications of the decision may be.

The Robinson-Patman Act<sup>3</sup> was born of a Depression fear that the small-scale merchant was on the verge of obliteration by the newly-arisen chain-store giants. Section 2 of the original Clayton Act of 1914<sup>4</sup> had

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<sup>75</sup> *Id.* at 9-10, 97 S.E. at 732.

<sup>1</sup> 395 U.S. 642 (1969).

<sup>2</sup> 15 U.S.C. § 13(a) (1964), which provides in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market . . . .

<sup>3</sup> 15 U.S.C. §§ 13, 13a-c, 21a (1964).

<sup>4</sup> The previous section 2, 38 Stat. 730 (1914) read in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling