

STATE OF MICHIGAN  
COURT OF APPEALS

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In re DONALD MARTIN SMITH, JR. TRUST.

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STEVEN GREY SMITH,

Petitioner-Appellant,

v

STEPHANIE A. MORGAN, MAYNARD L.  
SMITH, and COMERICA BANK,

Respondents-Appellees,

and

GRETCHEN LAUREL SMITH,

Respondent.

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Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Petitioner received a life estate in half of the residue of his father's estate, with a remainder to petitioner's children. Petitioner challenged the conveyance on the ground that it violated the rule against perpetuities. Petitioner appeals as of right the probate court's order denying his petition to terminate the testamentary trust and awarding attorney fees to respondents. We affirm.

We review de novo both the language used in the will and issues involving the interpretation of a statute, and apply the clearly erroneous standard of review where an issue requires fact-finding. *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001). Because the instrument at issue was created before December 27, 1988, the date when the Uniform Statutory Rule Against Perpetuities Act became effective, we rely on the common law as determined by case law and as codified by statutes to determine whether the conveyance violated the rule against perpetuities. MCL 554.76.

The will granted petitioner a life estate in half of the residue of the testator's estate. The trial court failed to look to exactly what the remaindermen took. The language that granted the remainder of the life estate to the petitioner's children is as follows:

1. Upon the death of [petitioner], the Trustee shall divide the body or corpus of the trust property and estate into as many equal shares as there shall be children of his then living, and as there shall be then living issue by right of representation of any deceased children of his. The Trustee shall thereupon assign, transfer, convey and pay over (1) such equal share to the then living issue by right of representation of each deceased child of [petitioner], and shall therefore set aside one (1) such equal share in a separate trust for each child of [petitioner] who shall then be living.

Thus, the language of the conveyance indicates two classes of remaindermen. The first class consists of the issue of any of petitioner's deceased children. The use of the words "assign, transfer, convey and pay over" in the conveyance clearly indicates that the issue of any deceased child was to receive that share in fee simple absolute immediately upon the termination of petitioner's life estate.

It is the second class of remaindermen that is at issue on appeal. This class consists of the petitioner's children who are living at the time petitioner's life estate terminates. Their shares are to be placed in individual trusts, the net income of which is to be used for their support, maintenance, education, and medical expenses until they attained the age of twenty-one, after which the net income would be paid directly to them. Each remainderman is to receive in fee simple absolute one-third of the corpus of the trust upon attaining the age of thirty-five years, one-half of the balance upon attaining the age of forty, and the entire balance upon attaining the age of forty-five. Although the trial court failed to look to the language of Paragraph 5, we must do so to determine what exactly the second class of remaindermen received. Paragraph 5 of the instrument provides that if a remainderman dies without issue before receiving the corpus of the trust, the corpus of the trust will be distributed to the other remaindermen. If a remainderman dies with issue before receiving the corpus of the trust, then the corpus of the trust will be distributed to the issue by right of representation. Thus, the grantor retained no reversion in the property, but assigned the interest to third parties if a remainderman failed to attain a certain age to receive the corpus of the trust. Thus, under the general rules of the common law, the class of children then living at the time the life estate terminates were granted a fee simple subject to open and subject to an executory interest.

Because the rule against perpetuities applies only to nonvested property interests, "the first consideration is whether the character of the interest is vested." *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 483; 578 NW2d 701 (1998), citing *Toms v Williams*, 41 Mich 552, 562; 2 NW 814 (1879). A vested property interest is one that is capable of becoming possessory immediately upon the expiration of the preceding estate. *Hubscher, supra*. Generally, an executory interest is subject to the rule against perpetuity. At the time the instrument was created, Michigan's version of the common-law rule against perpetuities was codified at MCL 554.51. The rule "is violated if, at the time the instrument creating a future estate comes into operation, it is not certain that the estate will either vest or fail to vest within twenty-one years of the death of a person named in the instrument." *Id.*, at 482-483, citing *Stevens Mineral Co v*

*Michigan*, 164 Mich App 692, 695; 418 NW2d 130 (1987). See also *Stenke v Masland Dev Co*, 152 Mich App 562, 570; 394 NW2d 418 (1986).

While the distribution of the corpus of the trust may arguably violate the rule against perpetuities, we do not conclude that the conveyance was void because the common law in Michigan provides that future interests should be treated as vested where there is any present interest in the income of the property. *Toms, supra* at 565. See also *In re Estate of Jamieson*, 374 Mich 231, 237-238; 132 NW2d 1 (1965), and *Detroit Trust Co v Stoepel*, 312 Mich 172, 185-186; 20 NW2d 148 (1945).

In this case, the instrument provides that, upon the creation of the trusts for the benefit of the remaindermen, the net income of the trusts is to be used for support, maintenance, education and medical expenses of the remaindermen. Thus, the net income of the property is capable of becoming possessory immediately on the expiration of the preceding life estate. In addition, the will granted the trustee discretionary power to use part of the trust's principal if the net income was insufficient for the support, maintenance, education and medical expenses of a remainderman. Accordingly, the trial court properly ruled that the remaindermen's interest will vest at the time of preceding estate terminates. MCL 554.51; MCL 554.53.

Petitioner next argues that the trial court erred in concluding that the action was time-barred. A trial court's determination whether a cause of action is time-barred by a statute of limitations presents a question of law which we review de novo. *McKinney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). Petitioner does not brief this issue and offers no support for his position that the statute of limitations is inapplicable. Accordingly, petitioner has abandoned this claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Petitioner next argues that the trial court erred in concluding that the doctrine of laches barred the action. We review for clear error a trial court's ruling that a party is guilty of laches. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998). The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant. *Id.* The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Id.* at 369-370.

We agree with petitioner's argument that the trial court failed to determine whether respondents showed prejudice in this case. However, this error is harmless in light of the trial court's ruling that the claim was time-barred by the statute of limitations.

Finally, petitioner claims the trial court erred in awarding attorney fees to respondents. We review a trial court's award of sanctions based on a frivolous complaint for clear error. *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 532; 644 NW2d 765 (2002). A trial court's decision is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *Bynum v ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002).

MCR 2.625(A)(2) allows the award of attorney fees for filing a frivolous claim or defense, including where a party's legal position was devoid of arguable legal merit. MCL

600.2591. A determination whether a claim is frivolous depends on the particular circumstances of each case. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002).

Because petitioner's argument based on the rule against perpetuities was devoid of legal merit, based on the controlling case law and the will's language creating a vested interest in the remaindermen, we conclude that the trial court did not clearly err in awarding attorney fees to respondents.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot