18-P-1701 Appeals Court

THE EDGARTOWN FEDERATED CHURCH vs. SOCIETY FOR THE PRESERVATION OF NEW ENGLAND ANTIQUITIES, INC.,[1] & another.[2]

No. 18-P-1701.

Dukes County. October 2, 2019. - February 4, 2020.

Present: Milkey, Sullivan, & Ditkoff, JJ.

Charity. Church. Devise and Legacy, Real property, Rule against perpetuities. Real Property, Restrictions. Rule Against Perpetuities. Res Judicata.

Civil action commenced in the Superior Court Department on September 26, 2016.

The case was heard by Gary A. Nickerson, J., on motions for summary judgment, and a motion for reconsideration was considered by Robert C. Rufo, J.

Robert J. O'Regan for Society for the Preservation of New England Antiquities, Inc.
Marilyn H. Vukota for the plaintiff.

[1] Doing business as Historic New England.

[2] The Attorney General.

DITKOFF, J. In this case, decided on summary judgment, a church seeks to sell real estate restricted to church use by a bequest. Our resolution of this appeal requires us to consider the interplay between the terms of a testamentary gift of real property to a charitable entity, the applicable rule against perpetuities, and other provisions of the Massachusetts Uniform Probate Code. We also consider whether a 1989 decision of a judge of the Probate and Family Court has preclusive effect on the issues before us. For the reasons that follow, we affirm the judgment of the Superior Court, in which the judge concluded that a charity's fee simple subject to a right of entry for condition broken became a fee simple absolute as a result of changes to the statutory rule against perpetuities, G. L. c. 184A, § 3, as amended by St. 1961, c. 448, § 2.[3]

1. Background. Sara Joy Mayhew (decedent) died testate on March 12, 1956, having executed a will on January 2, 1956. The will provided in pertinent part:

> "I hereby give, devise and bequeath the family homestead property [75 South Water Street, Edgartown] in which I now live and all the land on which it stands and adjoining, which I own and the improvements thereon[4] . . . to the Congregational Church in . . . Edgartown so long as said homestead is used as a parsonage for the minister of said church or the Federated Church, or so long as said

[3] General Laws c. 184A, § 3, was recodified at G. L. c. 184A, § 7, in 1990. See St. 1989, c. 668, § 1. Its language was not changed.

[4] We refer hereafter to this as the homestead property.

> property is used for church purposes (rental being one of such purposes), but if said homestead property is not so used as a parsonage or for church purposes, I give, devise and bequeath the said homestead property to The Society for the Preservation of New England Antiquities, Inc., a corporation having a usual place of business in Boston."

The will also created a trust for the remainder of the decedent's property, naming, after deductions necessary to maintain the homestead property, the Congregational Church as the income beneficiary for so long as the homestead was used for church purposes. As this provision had no specific definition of church purposes, rental remained a permissible church purpose. If the homestead property ever ceased to be used for church purposes, then the remainder of the decedent's estate was to be gifted outright to the Society for the Preservation of New England Antiquities, Inc.[5] It is undisputed that since 1956 The Edgartown Federated Church[6] (church) has used the homestead property as a parsonage or for church purposes.

In 1988, the church petitioned the Probate and Family Court for a declaration that the church was entitled to all of the net income of the decedent's testamentary trust, without deduction

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[5] It is uncontested that the Society for the Preservation of New England Antiquities, Inc. does business as "Historic New England," and we refer to it as such.

[6] The parties do not contest that The Edgartown Federated Church has succeeded to the rights of the Congregational Church named in the decedent's will.

for the maintenance needs of the homestead property.[7] The church named as respondents Shawmut Bank, N.A., as the trustee of the decedent's testamentary trust, Historic New England, and the Attorney General. In the petition, the church alleged that the rights of Historic New England in the homestead property had expired pursuant to G. L. c. 184A, § 3, as then in effect. There was no allegation -- then or now -- that Historic New England's conditional interest in the testamentary trust had expired. A judge of the Probate and Family Court found that the trustee's administrative burden and expenses would be eliminated if all trust income were paid directly to the church and declared that payment of all of the trust income by the trustee directly to the church, so long as the property continued to be used in accordance with the terms of the will, would carry out the intent of the testator. Consistent with the church's requested relief,[8] the judgment solely addressed the testamentary

[7] According to the petition, the church had an active building and grounds committee that carefully vetted maintenance and repairs to the church properties, including the homestead property, and the trustee's additional oversight was expensive and unnecessary.

[8] The petition requested "that this Court interpret and construe the trust provisions of the will of Sara Joy Mayhew and determine that the Petitioner, until such time as it ceases to use the [homestead property] as a residence for its Minister or for other church purposes, is entitled to all current income from said trust, without deduction for the maintenance needs of the [homestead property]."

trust and did not consider whether Historic New England's contingent future rights in the homestead property remained enforceable.

On September 26, 2016, the church commenced this action in the Superior Court seeking declarations that (1) it owned the homestead property in fee simple absolute and Historic New England had no enforceable right to the homestead property; (2) Historic New England had no right to impose preservation restrictions on the homestead property; and (3) the church was authorized to sell the homestead property and devote the funds to "church purposes" either under the terms of the will or by application of the doctrine of deviation or cy pres pursuant to G. L. c. 214, § 10B. A Superior Court judge declared that, pursuant to G. L. c. 184A, § 7, inserted by St. 1989, c. 668, § 1,[9] the church owned the homestead property in fee simple absolute, and he dismissed the remaining requests for relief as moot.

Judgment entered on April 5, 2018, and Historic New England filed a notice of appeal on May 2, 2018. Over four months later, on August 23, 2018, Historic New England sought reconsideration of the judgment contending that it had made a "mistake" as that term is used in Mass. R. Civ. P. 60 (b) (1),

[9] As noted supra, G. L. c. 184A, § 3, was recodified at G. L. c. 184A, § 7, in 1990. See St. 1989, c. 668, § 1.

365 Mass. 828 (1974), in failing to bring to the judge's attention a view easement signed by both the church and Historic New England in 2003.[10] A different judge denied the motion for reconsideration, and Historic New England separately appealed from that order. We consolidated the two appeals.

2. Applicable statute. "[T]he common law rule against perpetuities would normally strike down a contingent interest if there were a possibility, at the date of the creation of the contingent interest, that it could vest after the expiration of the perpetuities period." Thomas v. Kiendzior, 27 Mass. App. Ct. 370, 373 (1989). Under the common-law rule, future interests that were not "certain to take effect within twenty-one years from the death" of a life in being at the time of creation generally were "considered as stricken out, leaving the prior disposition to operate as if a limitation over had never been made." Amerige v. Attorney Gen., 324 Mass. 648, 656 (1949), quoting Greenough v. Osgood, 235 Mass. 235, 242 (1920). Gifts for charitable purposes, however, were usually exempted from the common-law rule. See Odell v. Odell, 92 Mass. 1, 6-9 (1865). Effective January 1, 1955, the Legislature statutorily modified the common-law rule "to ease the harshness of the

[10] This court stayed the appeal and granted Historic New England leave to file its rule 60 (b) motion with the trial court.

traditional rule against perpetuities." Hochberg v. Proctor, 441 Mass. 403, 407 n.10 (2004). See St. 1954, c. 641.

When the decedent executed her will on January 2, 1956, and when she died on March 12, 1956, the statutory rule against perpetuities, G. L. c. 184A, § 3 (1955 statute), essentially provided that a fee simple determinable or a fee simple subject to a right of entry for condition broken became a fee simple absolute if the specified contingency did not occur within thirty years of the creation of the interest -- except where both interests were for charitable or public purposes.[11] The legislation provided that the statutory rule was to be applicable to wills where the testator died after January 1, 1955. St. 1954, c. 641, § 2.

When considering the law applicable to a particular will, "[w]e generally apply the law at the time of death, with the understanding that testators have kept abreast of the changes in the law and would make appropriate revisions in their

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[11] "A fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the date when such fee simple determinable or such fee simple subject to a right of entry becomes possessory. . . . This section shall not apply where both such fee simple determinable and such succeeding interest, or both such fee simple and such right of entry are for public, charitable or religious purposes; nor shall it apply to a deed, gift or grant of the commonwealth or any political subdivision thereof." G. L. c. 184A, § 3, inserted by St. 1954, c. 641, § 1.

instruments if these changes contravened their original expectations." Callan v. Winters, 404 Mass. 198, 202 (1989). Because both the present interest and the future contingent interest were held by charities, the statutory rule against perpetuities set forth in the 1955 statute did not apply, and Historic New England's contingent interest was enforceable indefinitely.

Notwithstanding that in 1956 Historic New England acquired a contingent future interest in the homestead property which was enforceable indefinitely, subsequent legislation has modified the duration of that interest. By way of a statute entitled, "An Act to protect land titles from uncertain and obsolete restrictions and to provide proceedings in equity with respect thereto," the Legislature amended the statutory rule against perpetuities in 1961, eliminating the exception for charitable entities from the thirty-year limitation for vesting of contingent future interests. St. 1961, c. 448, § 2 (1961 statute).[12] In an apparent effort to avoid an unconstitutional

[12] In addition to eliminating the exception for charities with regard to defeasible fees, the 1961 legislation also imposed term limitations on restrictions on property that previously had been unlimited in time. St. 1961, c. 448, § 1. See Stop & Shop Supermkt. Co. v. Urstadt Biddle Props., Inc., 433 Mass. 285, 288-290 (2001) (describing thirty-year limitation on restrictions unlimited in time and other provisions contained in G. L. c. 184, §§ 26-30).

destruction of a contingent future right, see Mulvey v. Boston, 197 Mass. 178, 182 (1908), the Legislature provided that

> "any person having a right of entry or possibility of reverter which would have been valid under the provisions of said section three of said chapter one hundred and eighty-four A, as in effect prior to the effective date of this act, may bring a proceeding based on such right or possibility; provided, that a statement with respect to such right or possibility sufficient to satisfy the provisions of section thirty-one A of chapter two hundred and sixty of the General Laws is recorded or registered,[13] as therein provided, prior to January first, nineteen hundred and sixty-four."

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[13] General Laws c. 260, § 31A, as amended by St. 1961, c. 448, § 5, provided in relevant part:

> "No proceeding based upon any right of entry for condition broken or possibility of reverter, to which a fee simple or a fee simple determinable in land is subject, created before [January 2, 1955], shall be maintained either at law or in equity in any court after [January 1, 1964], unless on or before [January 1, 1964], . . . a person . . . having the right of entry, or who . . . would be entitled if the reverter occurred, . . . shall . . . have filed in the registry of deeds, or . . . in the registry of the land court, . . . a statement in writing, duly sworn to, describing the land and the nature of the right and the deed or other instrument creating it . . . .
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> ". . .
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> "This section shall apply to all such rights whether or not the owner thereof is . . . a charity . . . and it shall apply notwithstanding any recitals in deeds or other instruments heretofore or hereafter recorded unless a statement is filed as above provided."

This language was later amended to delete the words "either at law or in equity." St. 1975, C. 377, § 158.

St. 1961, c. 448, § 4 (1961 savings clause). Thus, under the 1961 statute and 1961 savings clause, Historic New England could have preserved its contingent future interest in the homestead property by recording the appropriate statement by 1964.[14] It is uncontested that Historic New England did not do so.

"The Legislature . . . may by statute limit private rights in land provided that a reasonable time for enforcing those rights after the enactment of the statute is provided." Opinion of the Justices, 369 Mass. 979, 986 (1975). Accord Brookline v. Carey, 355 Mass. 424, 427 (1969). Having failed to record a statement that complies with the requirements of the 1961 savings clause making G. L. c. 260, § 31A, applicable to G. L. c. 184, § 3, Historic New England's contingent interest in the property became unenforceable on March 12, 1986, thirty years after the decedent's death.

Historic New England points to a provision of the Massachusetts Uniform Statutory Rule Against Perpetuities,

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[14] Historic New England argues that the 1961 savings clause, making applicable the provisions of G. L. c. 260, § 31A, to certain cases otherwise covered by the statutory rule against perpetuities, does not apply to this case because, by its terms, § 31A applies only to interests created before January 2, 1955, and here, the will was executed and death occurred in 1956. We disagree. The 1961 savings clause made the recording requirements contained in G. L. c. 260, § 31A, applicable to the holder of any unvested contingent interest that was enforceable when the 1961 statute became effective. Historic New England's exceedingly narrow reading, therefore, is unavailing.

enacted by the Legislature in 2008, which provides that, if a "nonvested property interest" created before the effective date of the uniform rule (March 31, 2012, see St. 2011, c. 224) is determined in a judicial proceeding to violate the rule against perpetuities that existed before the effective date of the Massachusetts Uniform Statutory Rule Against Perpetuities, "a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution . . . ." G. L. c. 190B, § 2-905 (b). When the Legislature enacted this modified rule against perpetuities, however, the provisions of the 1961 statute (then codified at G. L. c. 184A, § 7), were not repealed. See St. 2008, c. 521. Moreover, to the extent there exists a conflict between G. L. c. 190B, § 2-905 (b), and the 1961 statute, the latter is tailored specifically to apply to the unique interest in land at issue here,[15] rather than the general "nonvested property interests" addressed by § 2-905 (b).

[15] The judge found that the will "created a fee simple to the church subject to [Historic New England's] right of entry for condition broken," and Historic New England does not argue otherwise on appeal. See generally Queler v. Skowron, 438 Mass. 304, 310-311 (2002) (discussing difference between fee simple determinable and fee simple subject to condition subsequent); Selectmen of Provincetown v. Attorney Gen., 15 Mass. App. Ct. 639, 644-645 (1983) (same). As in Skye v. Hession, 91 Mass. App. Ct. 423, 427 n.9 (2017), we need not dwell on the precise type of defeasible fee as both are addressed by the 1961 statute.

Generally, the more specific statute controls, and we see no reason to deviate from that principle here. See Wing v. Commissioner of Probation, 473 Mass. 368, 373-374 (2015). Finally, even if it were open to Historic New England to seek relief under § 2-905 in the instant litigation, it failed to file a counterclaim seeking reformation of the disposition.

3. Res judicata. Historic New England argues that the church is precluded by res judicata from revisiting the issue of ownership of the homestead property as that issue was raised and decided in the 1988 Probate and Family Court action regarding the testamentary trust. We disagree. The 1988 action raised the issue whether the church was entitled to the income from the decedent's testamentary trust and concluded, pursuant to the terms of the decedent's will applicable to the creation of the trust, that the church was so entitled while the homestead property was being used for church purposes. The judge's analysis was limited to the church's right to receive the trust income. Although it is true that the church made an assertion in its probate petition that Historic New England had no enforceable interest in the homestead property, nothing in this record suggests the issue was actually litigated, and the church in fact prevailed in the sole issue actually litigated: whether the church was entitled to the income from the trust. In these circumstances, principles of res judicata do not prevent the

church from litigating the land ownership issue now. See Kobrin v. Board of Registration in Med., 444 Mass. 837, 844 (2005). Contrary to Historic New England's argument, the result in this case does not effectively overrule the judgment in the 1988 action.

4. Motion for reconsideration. On appeal, Historic New England focuses its argument with respect to the denial of its motion for reconsideration on general principles of equity and a view easement the parties signed in 2003 to benefit the town of Edgartown (town). In denying Historic New England's motion for reconsideration, the judge noted that the "view easement" had been produced in discovery and Historic New England had not identified any reason it had failed to include the view easement in the summary judgment record or develop an argument based on the view easement. For this reason alone, we discern no abuse of discretion in denying the motion for reconsideration. See Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc., 82 Mass. App. Ct. 461, 470-471 (2012). Cf. Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 312-313 (2009) (motion for reconsideration not appropriate place to raise new legal theories); Olsson v. Waite, 373 Mass. 517, 531-532 (1977) (in absence of fraud, petitioner's failure to introduce available evidence not cause to vacate decree). Moreover, the fact that the church signed a view easement in

2003 in favor of the town that was also signed by Historic New England shows at most that the parties were willing to accommodate the town's desire that any potential loose ends regarding the view easement were addressed. Nothing in the view easement shows the church's "acknowledgement of [Historic New England's] status in 2003 as having a continuing ownership interest" in the homestead property, as Historic New England asserts.

Judgment affirmed.

Order denying motion for reconsideration affirmed.