CLASS OUTLINE 19 – ANSWERS

Ryan 2.
The court holds that the appointment of the executor or administrator may not happen within the perpetuities period; hence the interest in the executor or administrator is void. It is thus following the well-known Illinois precedent in *Johnson v. Preston*, which is one of the leading cases on voiding a future interest because is it dependent on an "administrative contingency."

Ryan 3.
Whether the remainder in the siblings is a vested remainder or a contingent one is critical for determining what do we do now. If it is a vested remainder subject to a void executory interest, then most courts will simply expand the remainder in fee simple subject to an executory interest to a remainder in fee simple absolute. If it is a remainder contingent on the sibling surviving and the alternative contingent remainder is void, most courts will hold that the gift to those siblings who did not survive will fail and that a reversionary interest was retained by the testator.

Ryan 4.
It was probably open to court to hold that "to go to his or her executor or administrator to be applied by such as if it formed a part of his or her estate" is the functional equivalent of saying "to whomever the deceased shall have appointed by his/her will and in default of such appointment to his/her heirs at law." So interpreted, the remainder would vest upon the death of the predeceased sibling and well within the perpetuities period.

Brown
The case holds that the executory interest in the legatees was void for remoteness. Since, however, the court interpreted the devise as a fee simple determinable, Sarah Converse retained a possibility of reverter which passed to her residuary devisees who happened to be the same set of legatees.

What happens next 1
The remainder in the grandchildren of a living person is void. The remainder for life in the children of a living person is good. Most courts, perhaps almost all, will not expand a life estate into a fee. Hence, there is a reversion in the devisor, which will pass, after the life estates, to the to the residuary devisees or the heirs at law of D.

Here is where the concept of "infectious invalidity" may play a role. A may be D's residuary devisee. It may also be that the will makes quite clear why D did not trust A's children with anything more than a life estate. It might be better to invalidate the devise entirely and give the property to A outright, and let him or her figure out how to deal with the children and their progeny. (Actual examples of the application of this doctrine are quite rare.)

What happens next 2
A strict application of the "administrative contingency" would say that this devise is void because we do not know whether a presidential election will be held within the lifetimes plus 21 years of any of the current members of the Club. A modern court, even one applying the common-law Rule, might balk at such an absurdity. If it did not, the devisee is void, and the property given by the devise would pass in accordance with the residuary clause of the will or in default to the devisor's heirs at law.

What happens next 3
The executory interest in B is void. Most courts in this situation will hold that the fee simple subject to a condition subsequent will be expanded to a fee simple absolute.

What happens next 4
This is *Brown* with a different condition. Most courts, though it is not unanimous, will, like *Brown*, imply a possibility of reverter in D, with the same result as in *Brown*.

What happens next 5

This one is trickier than it looks. At common law it would not have violated the Rule, because the condition would have to be fulfilled, if at all, no later than the death of the life tenant. (And there would, of course, be a reversion in the testator if the condition were not fulfilled.) Because we do not today have automatic destructibility if a condition is not fulfilled upon the expiration of the life estate, that result would not automatically follow today. But it is open today for a court to imply such a condition, and the temptation to do so in order to save the remainder might be strong. If, however, the condition is interpreted as meaning whenever a descendant becomes president, it will be void, and the property will go back to the devisor and his heirs upon the death of the life tenant.

What happens next 6

The fact that the executory interest following a gift to a non-charity is in a charity does not make it any less void than it was when it was in a private person.

What happens next 7

This is an exception to the Rule. It is possible to condition a gift to a charity with an executory interest over to another charity if the condition is not fulfilled. This executory interest is not subject to the Rule, and will be allowed to take effect when and if the condition happens. Such conditions were placed on the Gardner Museum in Isabella Stewart Gardner's will. The drafter of the will was John Chipman Gray; Harvard gets the property if the Museum violates the conditions. Such conditions are quite common today in charitable gifts, and that is a way to solve the problem raised by Sarah Coverse's gift..

Sample exam problem

This raises more issues than we have time for in class, but you should be ready to handle all of them now. For purposes of this class, there is one that is now pretty obvious. The alternative executory interest in the Eden Audubon Society is void under the Rule. The fact that the EAS is a charity does not help it in this context. If we apply the rule of *Brown* that leaves a possibility of reverter which passed, according to the terms of Andrew's will to Bartholomew and Clarissa. Moving a bit beyond the topic of this class, it would seem that the executory interest in Clarissa is good because it is limited to her lifetime. That obviously raises the question of when the condition in the devise is triggered. Is it when Bartholomew's heirs cease to farm or is it when anyone who holds the land ceases to farm? To put the question another way, who are "they" who are supposed to farm the land. There is no easy answer to this question. The best answers to the question worked out both possibilities, and then considered which was the better argument for our client.