

PROPERTY LAW & EQUITY REFORM COMMITTEE

WORKING PAPER

OBJECT To consider certain restrictions on the alienation of property.

I. RESTRAINT ON ALIENATION

INTRODUCTION

(a) Existing law in New Zealand

1. At common law where property is given absolutely and conditions are attached repugnant to the absolute nature of the gift, such conditions are void. This applies not only to cases where property is given outright but also to life interests. The power of alienation is considered as necessarily incident to the thing that is given whether it be property given outright or a gift for life. Any attempt to restrict the power of alienation is void as being inconsistent with the interest given. This position is conveniently summarised by Turner V.C. in Rochford v. Hackman (1852) 9 Hare 475 as follows:

"Property cannot be given for life any more than absolutely without the power of alienation being incident to the gift ... any mere attempt to restrict the power of alienation, whether applying to an absolute interest or to a life estate, is void, as being inconsistent with the interest given ..."

This situation differs from the case of an interest for life determinable upon an event such as bankruptcy.

2. In order to protect beneficiaries against the possibility of bankruptcy, or spendthrift tendencies, it was a common practice to draw lengthy clauses in wills and settlements giving interests, for life or until sooner determined by bankruptcy or other events, and thereafter providing that the income of the fund should be, at the discretion of the trustees, available for the former life tenant and members of his family. This conveyancing practice is recognised by s.42 of the Trustee Act

1956 which contains a statutory form of a protective trust. The provision follows similar provisions in s.33 of the Trustee Act 1925 (U.K.).

3. There is in addition in New Zealand a further provision relating to the protection of property contained in s.33 of the Property Law Act 1952 and which follows s.24 of the Property Law Act 1908 and thus was enacted before s.42 of the Trustee Act 1956. Section 33 of the Property Law Act 1952 provides that it shall be lawful by will or by settlement made on marriage to provide that any estate or interest in property comprised in the will or settlement, devised, bequeathed, settled or given to a beneficiary whether male or female shall not during the life of that beneficiary be alienated or pass by bankruptcy or be liable to be seized, sold, attached or taken in execution by a process of law. The beneficiaries are limited to children or grandchildren of the testator, or, in the case of a marriage settlement, of the husband and wife.

Criticism

4. The operation of the section is attendant with practical problems. In the first place it has been held in Re Kidd (1920) N.Z.L.R. 486 that the testator or settlor is not bound to use the whole protection afforded by the section but may use part only. Secondly, words such as "no power of anticipation" have been held sufficient in the case of a male to import the provisions of s.33: Palmer v. Wright (1929) N.Z.L.R. 53. Thirdly, and most important, the section gives no indication of what a trustee of a will is to do when all or part of s.33 of the Property Law Act 1952 applies. If a legacy of \$10,000 were left to a child with a proviso that it be not alienated, a question arises as to whether it is permissible for the trustee to hand the property over to the beneficiary or whether he should merely pay over the income. This type of problem is referred to in Re Wilson (1934) N.Z.L.R. 549. Where property is in fact handed over to beneficiaries difficulties

may arise when creditors, who will be unaware generally of the existence of the restraint, are concerned.

5. This section is open to the following further criticisms:

- (i) It is entirely contrary to the common law principles that an absolute gift once given cannot be fettered by restrictions.
- (ii) It is limited to gifts by will or to settlements made on marriage. Effectively therefore in the climate of New Zealand's social conditions it is unlikely to take effect save by will.
- (iii) It is also limited to children or grandchildren of the testator.

In addition to these matters modern conveyancing practice leans towards the use of general discretionary trusts.

6. The only other case where a restraint of this nature is imposed is under s.8 of the Family Protection Act 1955. This section provides that no mortgage, charge or assignment of any kind given in respect of any provision granted by the court out of an estate shall be of any validity unless made with the permission of the court. This particular restriction conforms to the general social purpose of the Family Protection Act 1955 and is justified on other grounds.

(b) Other Jurisdictions

7. The law of England has no corresponding provisions to s.33 of the Property Law Act 1952.

In Scotland, however, it has also been possible to create an alimentary inalienable life-rent, although the court now has power under s.4 of the Trusts (Scotland) Act 1961 to rearrange the trusts.

Recommendation

8. The committee is of opinion that s.33 of the Property Law Act 1952 should be repealed and that existing restraints should be abolished. Those who desire to protect the interests of the limited classes of beneficiaries referred to in s.33 may have resort to s.42 of the Trustee Act either in its there form or amended suitably, and may also have resort to other conveyancing devices including discretionary trusts.

9. The committee recommends accordingly.

II. RESTRAINT UPON ANTICIPATION

INTRODUCTION

(a) Existing law in New Zealand

10. At common law it was possible to settle property upon a woman subject to restraint upon anticipation. Originally the property of a married woman belonged to her husband. Equity developed the separate use of a married woman's property, and the doctrine of restraint upon anticipation owed its origin to the desire to protect such separate estate from a husband and from creditors. This restraint operated during the marriage of the woman to prevent her from disposing of or charging the capital or future income in any way.

11. Section 13(2) of the Law Reform Act 1936 made it impossible in an instrument executed after 1 January 1937 to settle property subject to restraint upon anticipation. The section provides that any restriction upon anticipation or alienation by a woman which could not have been imposed upon a man and which is contained in an instrument executed after 1 January 1937 is void. A reservation was made in the case of wills. Where a testator died after 31 December 1946 the will was deemed to have been executed after 1 January 1937.

12. The present statutory provisions about restraint upon anticipation are contained in ss. 20-23 inclusive of the Married Woman's Property Act 1952. Section 20 states the general rule that no restraint can be attached to the property of a woman which could not have been attached to the property of a man. Section 21 provides that, subject to s.20, nothing in the Act is to interfere with or render invalid any restraint at present attached or to be hereafter attached to the enjoyment of property held by a woman. This section also provides that no restraint in any settlement of a woman's own property made by her shall have any validity against debts contracted by her before marriage, and no settlement shall have any greater force or validity against creditors of such a woman than a like settlement entered into by a man would have against creditors. Section 22 provides that the Supreme Court may, where it appears to be for the benefit of a married woman, with her consent bind her interest in any property. Section 23 provides costs may be paid out of property subject to restraint in any proceedings instituted by a woman.

The court has in addition a power to remove restraints upon anticipation wholly or in part where this is for the benefit of the married woman.

(b) The position in the United Kingdom

13. In the United Kingdom any instrument creating a restraint upon anticipation executed after 1 January 1936 was rendered void by s.2 of the Law Reform (Married Women and Tortfeasors) Act 1935 but existing restraints upon anticipation remained effective. The will imposing such a restraint of a testator who died after 31 December 1945, was deemed, so far as it related to the restraint, to have been executed after 1 January 1936.

14. All restraints upon anticipation were removed by the Married Woman (Restraint upon Anticipation) Act 1949.

CRITICISM OF EXISTING LAW

15. The committee considers that the existence of restraints upon anticipation is inconvenient. They are capable of removal by the court, but it must be shown that the removal is for the benefit of the person restrained: e.g. B. v P.T. [1936] N.Z.L.R. 796. They have been totally abolished in the United Kingdom. They do not accord with the present view of the equality of sexes and seem in modern circumstances unnecessary.

RECOMMENDATION

16. It is recommended that restraints be abolished and for that purpose an enactment be passed along the lines of the English statute. Appendix A sets out the provisions of s.1 of the United Kingdom Act. The passing of such legislation in New Zealand would involve repeal of the sections of the Married Women's Property Act 1952 and other consequential amendments.

SUBMISSIONS

The committee would be grateful for any criticisms of its suggestions and would welcome alternative suggestions. It requests that submissions be sent to the following address:

The Secretary,
Property Law & Equity Reform Committee,
Private Bag 1,
Government Buildings,
Wellington,

on or before the 1st day of October 1970.

APPENDIX A.

1. Abolition of restraint upon anticipation, and consequential amendments and repeals -

- (1) No restriction upon anticipation or alienation attached, or purported to be attached, to the enjoyment of any property by a woman which could not have been attached to the enjoyment of that property by a man shall be of any effect after the passing of this Act.
- (2) The preceding subsection shall have effect whatever is the date of the passing, execution or coming into operation of the Act or instrument containing the provision by virtue of which the restriction was attached or purported to be attached, and accordingly in section two of the Law Reform (Married Women and Tortfeasors) Act 1935, the proviso to subsection (1) and subsections (2) and (3) (which make provision differentiating as to the operation of such a restriction between an Act passed before the passing of that Act or an instrument executed before the date mentioned in the said proviso on the one hand and an instrument executed on or after that date on the other hand) are hereby repealed.
- (3) The enactments mentioned in the first column of the First Schedule to this Act shall have effect subject to the amendments specified in the second column of that Schedule.
- (4) The enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.