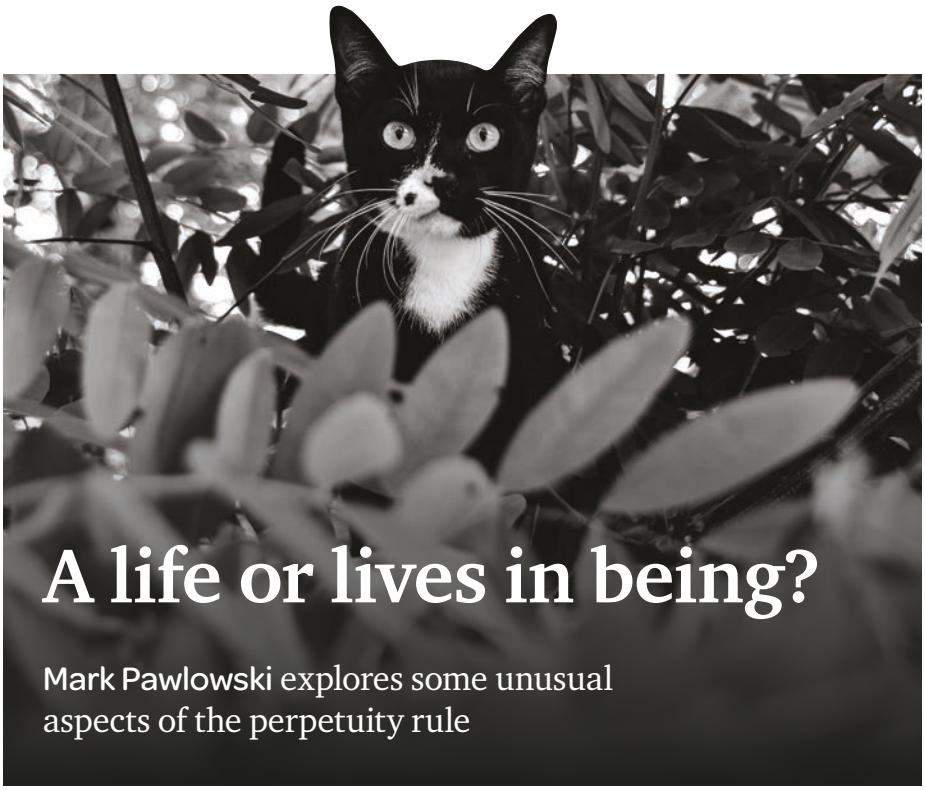

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A life or lives in being?

Mark Pawlowski explores some unusual aspects of the perpetuity rule

Most law students (even legal practitioners) approach the rule against perpetuities with a sense of intense unease and even foreboding. The subject is perceived as a labyrinth of technicality, complexity and difficult concepts. Much of the difficulty, however, in seeking to understand the subject lies in the fact that the rule against perpetuities is, in a sense, misnamed. It is this which causes confusion.

In reality, there are two separate rules. First, there is the rule against remoteness of vesting, which is aimed at preventing contingent interests vesting too late or at too remote a date. Secondly, there is the rule against perpetual duration (sometimes also referred to as the rule against inalienability), which is concerned with non-charitable (ie, private) purpose trusts which last too long. Here, the aim is to prevent trust assets being tied up for ever without any benefit to human individuals.

It should be noted that the Perpetuities and Accumulations Act 2009, which introduced a single perpetuity period of 125 years, does not affect the rule of law which limits the duration of non-charitable purpose trusts: see s 18. The common law rule on the duration of such trusts still applies—namely, that such a trust cannot continue for longer than the life of an identified person in being plus 21 years. If no person is identified, the trust will last for only 21 years.

Rule against perpetual duration

A trust for a non-charitable purpose is void if it can last longer than the perpetuity period (ie, life or lives in being plus 21 years). However, the trust need not be expressly confined to a definite period since it is sufficient to use formulas such as 'so far as the trustees can legally do so' or 'so far as the law allows': *Re Hooper* [1932] 1 Ch 38, [1931] All ER Rep 129. The courts are not, however, willing to read into such trusts an implied limitation of time, although judicial notice has been taken of the shortness of an animal's life so as to validate a gift. In *Re Haines* (1952) *The Times*, November 7, Danckwerts J was able to uphold a gift for the maintenance of two cats by accepting the shortness of a cat's life. The decision is questionable, however, given the assumption that cats cannot live for more than 21 years.

> *"In Re Haines, the judge was able to uphold a gift for the maintenance of two cats by accepting the shortness of a cat's life"*

In some cases, the smallness of the sum given and the amount to be spent in compliance with trust combine to make it clear that the rule cannot be infringed. Thus, if the trust takes the form of a direction to make specified annual payments out of the income, it may be possible to treat the annual payments as severable and to uphold the trust for 21 years. In the Irish case of *Re Kelly* [1932] IR 255, the testator gave £100 to his trustees for the purpose of spending £4 on the support of each of his four dogs per year. It was held that the gift could be split into a series of annual payments, the first 21 of which were valid. Similarly, let us suppose a testator directs the trustee to deposit the sum of £1,000 and to pay £10 per week to maintain his pet dog. Since the deposit and interest will inevitably be exhausted in less than two years, the trust is valid. In the New Zealand case of *Re Budge* [1942] NZLR 350, the testatrix gave a sum of money on trust to apply the income in keeping her grave in a neat and tidy state. This was held to be valid for 21 years because the testatrix did not say 'forever'. Such reasoning, however, has not been followed in the English courts.

Meaning of 'life or lives in being'

It is apparent that a 'life' in this context means a human life and not animals or trees. In *Re Kelly*, mentioned earlier, Meredith J had occasion to observe that '"lives" means human lives', 'not animals or trees in California'. In *Re Dean* (1889) 41 Ch D 552, at 557, on the other hand, North J appears to have assumed that an animal could be a life in being for the purposes of the perpetuity rule and, therefore, a trust for the maintenance of specified horses and hounds could not infringe the rule. Not surprisingly, the decision has been disapproved and would not be followed today.

A 'royal lives' clause has been commonly used for the purpose of the rule because the monarchy tends to have larger families and lives longer. In *Re Villar* [1929] 1 Ch 243, [1928] All ER Rep 535, for example, the testator directed that property should be divided among such of his descendants as should be living 20 years after the death of the survivor of the descendants of Queen Victoria living at the testator's death. The gift was clearly valid as being expressly confined to the perpetuity period. In this case, the relevant lives comprised the descendants of Queen Victoria living at the testator's death. However, it has been held that such a gift would fail if the specified lives in being were so numerous (or so obscure) as to be unworkable. In *Re Moore* [1901] 1 Ch 936, [1900-3] All ER Rep 140, the gift was held void for uncertainty where vesting was postponed 'for the longest period allowed by law, that is to say, until the period of 21 years from the death of the last survivor of all persons who shall be living at my death'. **NLJ**

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