

## EPTL § 9-1.1: New York Court of Appeals Excludes Preemptive and Exclusive Consignment Rights in Commercial Settings from the Rule Against Perpetuities

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## ESTATES, POWERS AND TRUSTS LAW

### *EPTL § 9-1.1: New York Court of Appeals excludes preemptive and exclusive consignment rights in commercial settings from the Rule against Perpetuities*

New York's Rule against Perpetuities (the "Rule"), a common-law principle codified in EPTL section 9-1.1, prohibits remote vesting of interests in property by limiting the time period in which future interests may vest.<sup>1</sup> The Rule voids all contingent interests in property that do not vest within the time period specified;<sup>2</sup> its inflexibility can therefore operate to invalidate otherwise legitimate transactions.<sup>3</sup> In order to avoid its harshness, courts have created a number of qualified exceptions to the Rule.<sup>4</sup> New

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<sup>1</sup> See EPTL § 9-1.1 (McKinney 1992). Section 9-1.1(a)(2) provides that "[e]very present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years." *Id.* § 9-1.1(a)(2). Section 9-1.1(b) further provides that "[n]o estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved." *Id.* § 9-1.1(b).

The common-law Rule was judicially created in seventeenth century England to restrict the ability of royalty and landed gentry to control indefinitely the disposition of their property. See, e.g., *Duke of Norfolk's Case*, 22 Eng. Rep. 931 (High Ct. Ch. 1681). The Rule evolved to prevent property from being restricted by future interests so remote that its free alienability and marketability would be impaired, thus preventing its full utilization for the benefit of society and the current owners. See *Anderson v. 50 E. 72nd St. Condominium*, 119 A.D.2d 73, 76, 505 N.Y.S.2d 101, 103 (1st Dep't 1986), *appeal dismissed*, 69 N.Y.2d 743, 504 N.E.2d 700, 512 N.Y.S.2d 1032 (1987).

John Chipman Gray summarized the Rule best in a single sentence when he stated that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (Roland Gray ed., 4th ed. 1942). This formulation is considered by the courts to be the classic statement of the Rule. See Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1720-21 (1983).

The common-law Rule has been applied uniformly throughout the United States, except where modified by statute. See W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 639 (1938). Similar to most states which have codified the Rule, New York's Rule is substantially an application of common-law principles. *Id.* at 639.

<sup>2</sup> See EPTL § 9-1.1 (McKinney 1992).

<sup>3</sup> See *Metropolitan Transp. Auth. v. Bruken Realty Corp.*, 67 N.Y.2d 156, 165, 492 N.E.2d 379, 384, 501 N.Y.S.2d 306, 311 (1986) (creating exception to New York Rule for preemptive rights in commercial and governmental transactions).

<sup>4</sup> See *Wong v. DiGrazia*, 386 P.2d 817, 825 n.19 (Cal. 1963) (en banc). In *Wong*, the court noted several exceptions to the Rule, such as gifts to charity, rights of entry, possibilities of reverter, resulting trusts, and covenants running with the land. *Id.*

York recognizes a limited exception to the Rule for preemptive rights in connection with commercial and governmental property transactions.<sup>5</sup> Recently, in *Wildenstein & Co. v. Wallis*,<sup>6</sup> the New York Court of Appeals extended this exception when it held that preemptive and exclusive consignment rights that serve significant commercial interests are not subject to the Rule.<sup>7</sup>

The critical facts of *Wildenstein* are as follows. Without Wallis's knowledge, his wife gave two paintings from his collection to certain individuals in exchange for her receiving a loan of approximately one million dollars.<sup>8</sup> The lenders then sold the paintings to Wildenstein.<sup>9</sup> Upon discovering these events, Wallis sued to recover the paintings, but the controversy ultimately resulted in a settlement agreement ("the agreement").<sup>10</sup> Under the agreement, Wildenstein was required to return the two paintings to Wallis in

An exception to the Rule was first granted to preemptive rights in *Weber v. Texas Co.*, 83 F.2d 807 (5th Cir.), *cert. denied*, 299 U.S. 561 (1936). In *Weber*, a lessee attempted to exercise his preemptive right to purchase the lessor's royalty interests in an oil and gas lease. *Weber*, 83 F.2d at 807. The lessor refused to honor the lessee's preemptive right and argued that it violated the Rule. *Id.* at 808. In deciding to exempt the preemptive right from the Rule, the court looked to the policy reasons behind the Rule in the following analysis:

The rule against perpetuities springs from considerations of public policy.

The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.

The option under consideration is within neither the purpose of nor the reason for the rule . . . . The option is therefore not objectionable as a perpetuity.

*Id.* (citations omitted).

Several courts have adopted the reasoning set forth in *Weber*. See, e.g., *Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537 (Colo. 1985) (en banc); *Shiver v. Benton*, 304 S.E.2d 903, 906 (Ga. 1983); *Bruken*, 67 N.Y.2d at 166, 492 N.E.2d at 384, 501 N.Y.S.2d at 311; *Producers Oil Co. v. Gore*, 610 P.2d 772, 776 (Okla. 1980); *Robroy Land Co. v. Prather*, 622 P.2d 367, 370 (Wash. 1980); *Hartnett v. Jones*, 629 P.2d 1357, 1363 (Wyo. 1981).

Additionally, many states have attempted to reduce the Rule's harshness by adopting remedial statutes. See Verner F. Chaffin, *The Rule Against Perpetuities as Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 16 GA. L. REV. 235, 345 (1982). States adopt either the wait-and-see principle, where the interest is valid if it actually vests within the period of the rule, or the cy pres doctrine, where courts may modify a limitation so as to carry out the intention of the transferor within the bounds of the rule. *Id.* at 345-52.

<sup>5</sup> *Bruken*, 67 N.Y.2d at 156, 492 N.E.2d at 379, 501 N.Y.S.2d at 306.

<sup>6</sup> 79 N.Y.2d 641, 595 N.E.2d 828, 584 N.Y.S.2d 753 (1992).

<sup>7</sup> *Id.* at 651, 595 N.E.2d at 834, 584 N.Y.S.2d at 759.

<sup>8</sup> *Id.* at 645, 595 N.E.2d at 830, 584 N.Y.S.2d at 755.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

exchange for preemptive rights to purchase and exclusive consignment to auction fifteen other valuable paintings in Wallis's collection.<sup>11</sup> The suit was initiated in federal district court after Wallis's successors failed to honor the agreement.<sup>12</sup> The defendants invoked the Rule and the common-law rule against unreasonable restraints on alienation of property.<sup>13</sup> The district court dismissed the complaint, and Wildenstein appealed to the United States Court of Appeals for the Second Circuit,<sup>14</sup> which certified questions to the New York Court of Appeals. The Court of Appeals was requested to determine if either the New York statutory Rule or the common-law rule against unreasonable restraints on alienation of property applied to invalidate Wildenstein's preemptive and consignment rights.<sup>15</sup>

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<sup>11</sup> *Id.* at 644, 595 N.E.2d at 829, 584 N.Y.S.2d at 754. Without his knowledge, Wallis's wife gave a number of paintings from his collection to a group of confidence men as collateral for a loan. *Wildenstein & Co. v. Wallis*, 949 F.2d 632, 633 (2d Cir. 1991). The con-men took two paintings to Wildenstein's office and sold them to him for \$650,000. *Id.* Wallis eventually learned that Wildenstein had acquired the paintings and informed him that the paintings were sold without his permission and demanded their return. *Id.* at 634. Through counsel, the two parties negotiated a settlement agreement for the return of the paintings. *Id.* Under the terms of the agreement, Wildenstein was required to sell the paintings back to Wallis for \$665,000, which represented the original price plus expenses. *Id.* Additionally, Wildenstein was given a right of first refusal and an exclusive right of consignment with respect to all fifteen paintings in Wallis's collection. *Id.* The agreement provided that Wallis was required to give Wildenstein at least thirty days notice prior to any proposed sale of a painting in the collection and that Wildenstein would have the option to purchase the painting on the same terms as the proposed sale. *Id.* at 635. It was also agreed that if Wallis decided to sell any paintings at auction, they would first be consigned exclusively to Wildenstein for a six month period. *Id.* The rights of first refusal and exclusive consignment were also binding upon Wallis's executors, successors, and assigns and could be asserted by Wildenstein's successors and assigns. *Id.* The agreement excluded any painting given to any charitable organization formed pursuant to Internal Revenue Code § 501(c)(3). *Id.*

<sup>12</sup> *See Wildenstein & Co. v. Wallis*, 756 F. Supp. 158, 160 (S.D.N.Y. 1991). Hal Wallis died in October 1986. *Id.* Pursuant to the terms of the Hal B. Wallis Trust, most of the paintings in the Wallis collection went to the Hal B. Wallis Foundation. *Id.* One painting went to the decedent's son, Brent Wallis, subject to his guarantee not to sell the painting. *Id.* Brent Wallis nonetheless sold his painting, and the Hal B. Wallis Foundation made plans to sell the paintings it had in its possession. *Id.* Wildenstein then sued, naming Brent Wallis, the Wallis Trust, and the Wallis Foundation as defendants. *Id.*

<sup>13</sup> *Wildenstein*, 79 N.Y.2d at 645, 595 N.E.2d at 830, 584 N.Y.S.2d at 755.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* The Second Circuit decided that the New York Court of Appeals should decide the issues because there were no New York cases directly on point and because of New York's strong interest in having important questions of state law decided by New York courts "rather than having [a] potentially erroneous federal appeals court [supply] precedent on point." *Wildenstein & Co.*, 949 F.2d at 636.

The certified questions posed to the New York Court of Appeals were as follows:

(1) Does the New York Rule against Perpetuities apply to preemptive rights and

Writing for the New York Court of Appeals, Judge Bellacosa concluded that the common-law rule against unreasonable restraints on alienation of property did not apply because the agreement was reasonable in terms of price, duration, and purpose.<sup>16</sup> Additionally, relying on *Metropolitan Transportation Authority v. Bruken Realty Corp.*,<sup>17</sup> which created an exception to the Rule for

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future consignment interests in personal property?

(2) Does the New York common law rule against unreasonable restraints on alienation invalidate preemptive rights and future consignment interests in personal property?

(3) If either the Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights and interests assert a claim for unjust enrichment stemming from the loss of such rights and interests?

(4) If either the Rule Against Perpetuities or the common law rule against unreasonable restraints on alienation invalidates the preemptive rights and future consignment interests at issue here, can the beneficiary of those rights and interests nevertheless state a claim for fraudulent inducement and fraud arising from the transaction that gave it such rights and interests?

*Id.*

Because the first two questions were ultimately answered in the negative, it was unnecessary to answer the third and fourth questions. *See Wildenstein*, 79 N.Y.2d at 652-53, 595 N.E.2d at 835, 584 N.Y.S.2d at 760.

<sup>16</sup> *Id.* at 652, 595 N.E.2d at 835, 584 N.Y.S.2d at 760. The court noted that the common-law rule against unreasonable restraints on alienation was designed to condemn prohibitions against transferability of property. *Id.* at 651-52, 595 N.E.2d at 834, 584 N.Y.S.2d at 759 (citing *Allen v. Biltmore Tissue Corp.*, 2 N.Y.2d 534, 542, 141 N.E.2d 812, 818, 161 N.Y.S.2d 418, 423 (1957)). The rights in question were tested under a reasonableness standard in view of their duration, price, and purpose. *See Metropolitan Transp. Auth. v. Bruken Realty Corp.*, 67 N.Y.2d 156, 167, 492 N.E.2d 379, 385, 501 N.Y.S.2d 306, 312 (1986). The *Wildenstein* court found that the thirty day period during which Wildenstein could exercise his preemptive right and the six month period in which he could have exclusive consignment rights were of reasonable duration. *Wildenstein*, 79 N.Y.2d at 652, 595 N.E.2d at 834, 584 N.Y.S.2d at 759. Also, preemptive rights conditioned upon payment equal to a third party offer were reasonable. *Id.* Finally, the parties' arm's length agreement was considered to be a reasonable settlement of a commercial dispute. *Id.* at 652, 595 N.E.2d at 835, 584 N.Y.S.2d at 760 ("It ill behooves a court to substitute its sense of unreasonableness for the parties' arm's length agreement in the circumstances of a settlement of an essentially commercial dispute like the one in this case.").

<sup>17</sup> 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986) (holding New York's Rule not applicable to preemptive rights in commercial and governmental transactions). In *Bruken*, the Delbay Corporation, a subsidiary of Pennsylvania Railroad, purchased air rights over certain real property from the Metropolitan Transportation Authority (MTA) in 1966. *Id.* at 160, 492 N.E.2d at 380, 501 N.Y.S.2d at 307. The air rights came with an option to purchase the underlying property if the MTA subsequently determined that the property was no longer needed for railroad operations. *Id.* In 1982, the MTA notified Delbay that it no longer needed some of the property and that Delbay could purchase it. *Id.* Delbay then assigned its right to purchase the property to Bruken Realty Corp. *Id.* When Bruken tried to exercise the option, the MTA instituted an action to have the option declared void as

preemptive rights in commercial and governmental real property transactions, Judge Bellacosa concluded that Wildenstein's first refusal and consignment rights did not violate the New York Rule.<sup>18</sup> Although a subsequent New York Court of Appeals decision, *Morrison v. Piper*,<sup>19</sup> stated that in general the Rule was applicable to a right of first refusal in residential property, Judge Bellacosa concluded that the *Morrison* decision did not limit the scope of *Bruken* when applied to contemporary commercial settings.<sup>20</sup>

In his concurring opinion, Judge Hancock stated that, although he agreed with the court's determination that the New York Rule did not invalidate Wildenstein's preemptive and consignment rights, it was unnecessary to determine whether the agreement should be excepted from the Rule because such an agreement was not violative of the Rule.<sup>21</sup> Noting that the Rule

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violative of the New York Rule. *Id.* The court, in finding the option not in violation of the Rule, noted:

[A]lthough preemptive rights unlimited in duration violate the rule against remote vesting they do so only marginally and that application of the rule, because of its inflexibility, may operate to invalidate legitimate transactions. This is so particularly in commercial and governmental activities because neither "lives in being" nor "twenty one years" are periods which are relevant to business or governmental affairs.

*Id.* at 165-66, 492 N.E.2d at 384, 501 N.Y.S.2d at 311.

<sup>18</sup> *Wildenstein*, 79 N.Y.2d at 650, 595 N.E.2d at 833, 584 N.Y.S.2d at 758.

<sup>19</sup> 77 N.Y.2d 165, 566 N.E.2d 643, 565 N.Y.S.2d 444 (1990) (applying New York's Rule to first refusal right to noncommercial property between private parties). In *Morrison*, Maier conveyed a parcel of residential land to her nephew, Morrison, and retained a contiguous parcel. *Id.* at 168, 566 N.E.2d at 644, 565 N.Y.S.2d at 445. "The parcels were part of 38 acres of lakefront property . . . which had been family owned since 1904." *Id.* The deed to Morrison's parcel created mutual rights of first refusal in each party. *Id.* Two years later Maier died, leaving her parcel to her sisters, two of whom sold the parcel without giving Morrison the opportunity to exercise his preemptive right. *Id.* at 169, 566 N.E.2d at 645, 565 N.Y.S.2d at 446. In a suit by Morrison to enforce his preemptive right, the court, on appeal, was faced with two issues: (1) whether New York's rule against remote vesting applied to the type of right present in the case; and (2) whether the specific provision found in the deed violated the rule. *Id.* at 167-68, 566 N.E.2d at 644, 565 N.Y.S.2d at 445. The *Morrison* court declined to exclude preemptive rights in noncommercial transactions from the rule for two reasons. *Id.* at 171, 566 N.E.2d at 646, 565 N.Y.S.2d at 447. First, the transaction did not affect governmental interests, and second, unlike in *Bruken*, the time limits on vesting in EPTL § 9-1.1(b)—"twenty-one years" and "lives in being"—were relevant. *Id.* The court, however, concluded that the specific provision in the deed did not violate the rule. *Id.*

<sup>20</sup> *Wildenstein*, 79 N.Y.2d at 650, 595 N.E.2d at 833, 584 N.Y.S.2d at 758. "The parties' agreement, although factually in the borderland between the transactions considered in *Bruken* and *Morrison*, is plainly closer to that in *Bruken* and qualifies for the commercial escape route from the rule expounded as part of *Bruken's* rationale." *Id.* at 650-51, 595 N.E.2d at 833-34, 584 N.Y.S.2d at 758-59.

<sup>21</sup> *Id.* at 653, 595 N.E.2d at 835, 584 N.Y.S.2d at 760 (Hancock, J., concurring).

contains rules of construction which require a presumption that the drafter of the agreement intended it to be valid,<sup>22</sup> Judge Hancock concluded that the fact that the agreement was binding on the Wallises' executors, successors, and assigns, but not their heirs, suggested they did not intend to bind future generations.<sup>23</sup> Accordingly, Judge Hancock concluded that this statutory presumption saved the agreement from invalidity.<sup>24</sup>

It is submitted that the *Wildenstein* court correctly excepted the agreement from the New York Rule. In prior decisions, the court had stated that options to purchase property and preemptive rights were covered by the rule;<sup>25</sup> however, the *Wildenstein* agreement "qualifie[d] for the commercial escape route from the rule expounded as part of *Bruken's* rationale."<sup>26</sup> The Court of Appeals stated that although the *Wildenstein* agreement fell factually between *Bruken* and *Morrison*, it was closer to *Bruken*.<sup>27</sup> The court found no reason to treat future consignment rights differently from preemptive rights in commercial settings,<sup>28</sup> which are not subject to the rule against remote vesting when application of the rule would defeat its underlying policies.<sup>29</sup> Such policy considerations

<sup>22</sup> *Id.*; see EPTL § 9-1.3(b) (McKinney 1992) ("It shall be presumed that the creator intended the estate to be valid.")

<sup>23</sup> *Wildenstein*, 79 N.Y.2d at 653, 595 N.E.2d at 835, 584 N.Y.S.2d at 760 (Hancock, J., concurring).

<sup>24</sup> *Id.*

<sup>25</sup> See *Morrison v. Piper*, 77 N.Y.2d 165, 169, 566 N.E.2d 643, 645, 565 N.Y.S.2d 444, 446 (1990) (refusing to exempt preemptive rights in land transactions between private parties from Rule).

Options differ from preemptive rights in that:

An option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership. A pre-emption does not give to the pre-emptioner the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption, at the stipulated price.

6 THOMAS E. ATKINSON ET. AL., AMERICAN LAW OF PROPERTY § 26.64, at 507 (A. James Casner ed., 1952).

<sup>26</sup> *Wildenstein*, 79 N.Y.2d at 651, 595 N.E.2d at 834, 584 N.Y.S.2d at 759. In *Bruken*, the New York Court of Appeals left open the question of whether a preemptive right not granted within the governmental or commercial context runs afoul of the Rule. 9B PATRICK J. ROHAN, NEW YORK CIVIL PRACTICE ¶ 9-1.1[12][b], at 9-186 (1992).

<sup>27</sup> *Wildenstein*, 79 N.Y.2d at 650-51, 595 N.E.2d at 833-34, 584 N.Y.S.2d at 758-59.

<sup>28</sup> *Id.* at 649, 595 N.E.2d at 832, 584 N.Y.S.2d at 757. Because preemptive rights and future assignment interests both constitute future contingent interests in property which can only be triggered by the party's decision to sell, the court saw "no distinction to justify treating [future consignment] rights differently from preemptive rights." *Id.*

<sup>29</sup> See *Bruken*, 67 N.Y.2d at 165, 492 N.E.2d at 383, 501 N.Y.S.2d at 310. The policies

are similarly used in other jurisdictions where the Rule is enforced only when the purposes of the Rule are served.<sup>30</sup> The purpose of the Rule was properly served in the noncommercial family transaction in *Morrison*, but this decision should not be read to limit the application of exceptions to the Rule in “contemporary commercial settings.”<sup>31</sup>

Although not explicitly stated, there were two factors that may have swayed the *Wildenstein* court to rule as it did. First, the agreement was at “arm’s length” between two sophisticated parties.<sup>32</sup> Second, there was no specific intent on the part of the testator to control future generations’ use of the property.<sup>33</sup> The court reasoned that upholding *Wildenstein*’s preemptive and consignment rights furthered the significant commercial interests of “facilitating broader marketing of world-renowned art treasures”<sup>34</sup> while

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underlying the Rule would be defeated when application of the Rule would invalidate an agreement which promoted the use and development of property while imposing only a minor limitation on the alienability of property. *Id.* at 166, 492 N.E.2d at 384, 501 N.Y.S.2d at 311. The *Wildenstein* court employed the same rationale when it noted that preemptive rights “serve significant commercial interests by facilitating broader marketing of world-renowned art treasures while posing, at the most, only a minimal limitation on the alienability of the works.” *Wildenstein*, 79 N.Y.2d at 651, 595 N.E.2d at 834, 584 N.Y.S.2d at 759.

<sup>30</sup> See, e.g., *Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537 (Colo. 1985) (en banc) (holding right of preemption contained in condominium declaration did not violate Rule). In *Cambridge*, the preemption right was binding on condominium unit owners and “their grantees, successors, heirs, executors, administrators, devisees or assigns.” *Id.* at 539. The court noted that a technical application of the Rule would void such an agreement, but refused to apply the Rule mechanically when the preemptive right posed no threat to free alienability. *Id.* at 542; see also *Singer Co. v. Makad, Inc.*, 518 P.2d 493 (Kan. 1974) (holding commercial leases did not violate Rule). The Kansas Supreme Court elected to follow the “modern tendency . . . to temper the rule if possible where its harsh application would obstruct or do violence to an intended scheme of property disposition.” *Id.* at 494. This decision is analogous to *Bruken* and *Wildenstein* in that an exception was created because “[t]he rule against perpetuities generally bears little relation to contemporary business practices or to the everyday world of commercial affairs.” *Id.*

<sup>31</sup> *Wildenstein*, 79 N.Y.2d at 650, 595 N.E.2d at 833, 584 N.Y.S.2d at 758 (emphasis added).

<sup>32</sup> *Id.* at 646-47, 595 N.E.2d at 830-31, 584 N.Y.S.2d at 755-56. It was only after lengthy settlement negotiations that the agreement was signed. *Id.* *Wildenstein* was a commercial art dealer and Wallis was an avid art collector. *Id.* at 647, 595 N.E.2d at 831, 584 N.Y.S.2d at 756.

<sup>33</sup> *Id.* at 651, 595 N.E.2d at 834, 584 N.Y.S.2d at 759. “The agreement le[ft] the Wallises, and their executors, successors and assigns, free to maintain the paintings in the private collection or transfer them to a tax-exempt charitable organization . . . .” *Id.* *Wildenstein*’s right only originated if the Wallises chose to sell the paintings. *Id.* Under the agreement, “*Wildenstein* [had to] . . . meet a third party’s offer if it elect[ed] to exercise its preemptive right . . . .” *Id.* Thus, the Wallises would realize the highest possible price if they decided to sell. *Id.*

<sup>34</sup> *Id.*

posing only minimal effects on alienability. This policy clearly outweighs the purpose underlying the rule against remote vesting.<sup>35</sup>

Additionally, even though the time limits for vesting, namely "twenty-one years" and "lives in being"<sup>36</sup> are relevant, the "commercial and precedential context" of the agreement qualified it for the *Bruken* exception to the Rule.<sup>37</sup> Exceptions to the rigid Rule are permitted because EPTL section 9-1.1 grants the court authority to avoid invalidation of a transfer when the court deems it necessary.<sup>38</sup> Justified exceptions are the only way to mitigate the adverse effects of the Rule since the New York statutory scheme does not adopt other traditional remedies such as the wait-and-see approach or the cy pres doctrine.<sup>39</sup> Ultimately, *Wildenstein* has expanded the list of qualified exceptions to the Rule. The practitioner, however, is faced with the difficult task of determining what may or may not fit under this new exception. Even so, this policy of weighing the underlying purpose of the Rule with the actual effect on alienability of property should continue to be applied

<sup>35</sup> *Id.* at 650, 595 N.E.2d at 833, 584 N.Y.S.2d at 758. A case such as this presents a balancing test question. See 9B ROHAN, *supra* note 26, ¶ 9-1.1[12][a], at 9-174. The question is whether the option "serve[s] business ends sufficiently to outweigh the social policy implemented by the rule against perpetuities." *Id.*

<sup>36</sup> See EPTL § 9-1.1(b) (McKinney 1992).

<sup>37</sup> *Wildenstein*, 79 N.Y.2d at 650-51, 595 N.E.2d at 833-34, 584 N.Y.S.2d at 758.

<sup>38</sup> *Id.* (citing *Morrison v. Piper*, 77 N.Y.2d 165, 171-74, 566 N.E.2d 643, 646-48, 565 N.Y.S.2d 444, 447-49 (1990)). The *Morrison* court read EPTL § 9-1.3(b) to allow exceptions to the Rule if possible and when necessary to avoid constructions which frustrate the intended purpose of an agreement. *Morrison*, 77 N.Y.2d at 173, 566 N.E.2d at 648, 565 N.Y.S.2d at 449.

<sup>39</sup> See Chaffin, *supra* note 4, at 345-52. The wait-and-see approach and cy pres doctrine have been legislated in several states as remedial devices to reform the Rule. *Id.* at 345. Under the wait-and-see approach, a court is permitted "to consider the actual sequence of events occurring after the creation of the interest." *Id.* Therefore, if the interest actually vests within the period of the Rule, there is no violation, and the interest is not voided. *Id.* Wait-and-see legislation can be either limited wait-and-see, where the validity of the interest is determined by the events existing at the end of any preceding life estates, or unlimited wait-and-see, where all future interests are based on facts as they actually occur. *Id.* at 346; see, e.g., *Merchants Nat'l Bank v. Curtis*, 97 A.2d 207 (N.H. 1953) (judicially adopting wait-and-see approach).

Under the cy pres doctrine, the judicial power to reform is given in order to "mitigate the destructive impact of the Rule against Perpetuities." Chaffin, *supra* note 4, at 350. Statutes allowing cy pres either authorize full judicial power to reform or limited power such as allowing reduction of age contingencies only. *Id.* at 350-51. Other statutes combine wait-and-see with cy pres. *Id.* at 351; see, e.g., *Carter v. Berry*, 140 So. 2d 843 (Miss. 1962) (applying cy pres technique).

to modern transactions which do not contradict the historical purpose of the Rule.

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