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PRIVATE PURPOSE TRUSTS AND THE RULE AGAINST PERPETUITIES

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I. INTRODUCTION

The rule against perpetuities was reformed in Singapore by sections 32 to 34 of the *Civil Law Act* for dispositions taking effect on or after 15 December 2004.[1] The new provisions clearly apply to the rule against remoteness of vesting, but there is some doubt whether they apply also to the rule against inalienability, which governs private purpose trusts.

The private purpose trust plays the role of the ugly duckling in the modern law of trusts. Unlike the private trust for persons and the public purpose (or charitable) trust, the private purpose trust is of limited validity and enforceability. Only certain types of purpose are recognised. The modern law was set out by the English Court of Appeal in the case of *Re Endacott*,[2] where the question arose whether a trust "for the purpose of providing some useful memorial for myself" was valid. It was held that as the objects of this trust were not exclusively charitable, the trust failed. The attention of the court was directed to the fact that there were numerous cases where the courts had in fact recognised trusts for private purposes. Most of these fell into one of the following categories: (1) trusts for the erection or maintenance of monuments or graves; (2) trusts for the saying of private masses in jurisdictions where such trusts are not regarded as charitable; and (3) trusts for the maintenance of particular animals.

Although there is nothing in the judgment in *Re Endacott* to challenge the continuing validity of such trusts, it was said by Lord Evershed M.R., that:

> the scope of these (anomalous) cases … ought not to be extended … No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective,

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1 This is the date when the *Trustees (Amendment) Act 2004* (No. 45 of 2004) came into effect. See *Civil Law Act* (Cap. 43, 1999 Rev. Ed. Sing.), s. 32 (3)(b) [*Civil Law Act*].

2 [1960] Ch. 232 [*Endacott*].

must have ascertained or ascertainable beneficiaries. These cases constitute an exception to that general rule.[3]

The Singapore courts follow *Re Endacott*,[4] but have extended the anomalous cases to cover trusts for Sin Chew,[5] Chin Shong[6] and certain Muslim rites.[7] The reason, of course, why trusts for private masses in England or Sin Chew ceremonies in Singapore are not valid as charities is because of the absence of public benefit.[8] Although these are religious trusts, the public do not take part in them and therefore they cannot qualify for charitable status.

These trusts are sometimes called trusts of imperfect obligation,[9] since the trustees are not obliged to carry out the trust in the absence of a beneficiary or anyone else able to apply to the court to enforce the trust.[10] The trustees will be acting perfectly legitimately if they carry out the terms of the trust, but if they fail to do so, the person entitled to the trust property on failure of the purpose trust will be able to claim it. In practice, the purpose trust will usually take the form of a specific gift in a will, in which case the residuary legatees will be able to claim the property, if the trustees choose not to carry out the terms of the trust.[11] In fact, therefore, these trusts of imperfect obligation are really powers and they have to be seen as an exception to the rule that words purporting to create a trust should not be treated as if only creating a power.[12]

These trusts of imperfect obligation tend not to be treated seriously. In law schools they are often taught to students almost as a form of light relief after the intellectual

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3 *Ibid.* at 246.

4 See *Re Chionh Ke Hu* [1964] M.L.J. 270; *Hongkong Bank Trustee (Singapore) Ltd v. Tan Farrer* [1988] S.L.R. 227.

5 *Re Khoo Cheng Teow* [1933] 2 M.L.J. 119.

6 *Phan Kin Thin v. Phan Kuon Yung* [1940] 9 M.L.J. 44: "[T]hese ceremonies are carried out for the purposes of ancestral worship". See also: Then Bee Lian, "The Meaning Of 'Charity' In Malaya—A Comparative Study" (1969) 11 M.L.R. 222 at 224, note 18; article continued at (1970) 12 M.L.R. 1.

7 *Re Alsagoff Trusts* [1956] 22 M.L.J. 244 (trust for reading the Koran at the testator's grave). These extensions can be justified on the basis of an analogy with the English cases which permit trusts for private masses for the dead or perhaps by analogy with trusts for the maintenance of graves. See *Yeap Cheah Neo v. Ong Cheng Neo* (1875) L.R. 6 P.C. 381 at 396 [*Yeap Cheah Neo*]; *Re Wan Eng Kiat* [1931] S.S.L.R. 57.

8 *Yeap Cheah Neo, ibid.* at 396; *Gilmour v. Coats* [1949] A.C. 426; *Re Hetherington* [1990] 1 Ch. 1.

9 John McGhee, Gen. Ed., *Snell's Equity*, 31st ed. (London: Sweet & Maxwell, 2005), Part II, Chap. 1, sec. 3.3.

10 Charitable trusts are, of course, enforceable by the Attorney-General on behalf of the Government. It is possible to argue that in Singapore at least some private purpose trusts are also enforceable by the Attorney General, since s. 9 of the *Government Proceedings Act* (Cap. 121, 1985 Rev. Ed. Sing.) gives the Attorney-General standing to enforce trusts "for public, religious, social or charitable purposes". A consideration of the history of this provision leads, however, to the conclusion that it is not intended to do more than codify the rule of English law that charitable trusts are enforceable by the Attorney-General on behalf of the Crown, which is *parens patriae*. See O.P. Wylie, *Comment on s. 9, Government Proceedings Act* (unpublished paper available at the C.J. Koh Law Library of the National University of Singapore).

11 Where the entire residue of the estate is given to trustees for the performance of a private purpose trust, then a partial intestacy will arise on failure of the trust.

12 *I.R.C. v. Broadway Cottage Trust* [1955] Ch. 20 at 36; *Re Shaw* [1957] 1 W.L.R. 729 at 746; *Re Endacott*, *supra* note 2 at 246. Contrast the position under the American Restatement of the Law of Trusts (Restatement 2d of Trusts, § 124).

rigours of *McPhail v. Doulton.*[13] Underhill referred to these cases as being based on "concessions to human weakness or sentiment".[14] Romer L.J. commented in *Re Endacott*[15] that these were "perhaps merely occasions when Homer has nodded". However, such cynicism is misplaced. Putting a more positive spin on Underhill's words, what is really being said here is that these cases meet a genuine human need.

Empirical research was conducted recently to ascertain the level of demand for trusts of this nature in England and Wales. An anonymous random national survey was sent to probate departments in solicitors' firms in April 2006. Solicitors were asked whether clients had ever come to them wishing to make provision in their wills to leave money or property on trust(s) to maintain a particular animal. 53 per cent stated that such a request had been made to them. Solicitors were also asked whether clients had approached them wishing to leave money by will and on trust for the erection of tombs, gravestones and/or sepulchral monuments (and for the maintenance of the same). 37.25 per cent stated that such a request had been made. As to requests for leaving a gift for saying of prayers or other religious ceremony or ritual in private, 7.8 per cent of respondents indicated that such a request had been made.[16]

In the circumstances, it is not surprising that, whatever the theoretical objections, the law has striven to validate such trusts. There is no shame in the law meeting the requirements of ordinary human beings. Surely, that is exactly what any modern legal system should be designed to achieve. Indeed, examples can be found in legislation across the common law world of statutes designed to facilitate the setting up and operation of trusts in these "anomalous" cases. In the United Kingdom, section 1 of the *Parish Council and Burial Authorities (Miscellaneous Provisions) Act 1970*[17] permits the maintenance of private graves for 99 years. As will be seen shortly, at common law the maximum period is usually only twenty-one years. In many jurisdictions in the United States, specific legislation has been enacted to ensure the validity and enforceability of trusts for the maintenance of pets, given the difficulties in creating and enforcing such trusts at common law.[18]

II. Rule Against Perpetuities

Even where otherwise valid, non-charitable purpose trusts must comply with that aspect of the rule against perpetuities known as the rule against inalienability.[19] This rule makes non-charitable purpose trusts void unless it is certain from the outset that

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13 [1971] A.C. 424.

14 Underhill, *Law of Trusts and Trustees*, 8th ed., (London: Butterworths, 1926) at 79.

15 *Supra* note 2 at 250-51.

16 James Brown, "What are we to do with Testamentary Trusts of Imperfect Obligation" [2007] Conv. 148 at 155.

17 Act No. 29 of 1970.

18 In some instances, states have enacted limited provisions to authorise animal trusts. See, e.g., *California Probate Code* §15212; *New York Estate, Powers and Trusts Law* § 7-8.1; *Iowa Code Ann.* § 633A.2105. Other states have updated their wills and trusts statutes by enacting provisions of the *Uniform Trust Code 2005*. Under s. 408 of the Uniform Trust Code, a trust for the care of an animal is specifically allowed along with authorisation for the courts to appoint someone to enforce the trust. See, e.g., *New Hampshire Rev. Stat. Ann.* § 564-B:4-408; *Virginia Code* § 55-544.08; *Maine Rev. Stat. Ann. tit.* 18-B, 408.

19 Also known as the rule against excessive duration of trusts or the rule against perpetual purpose trusts.

human beings will become absolutely entitled to the trust property by the end of the perpetuity period.[20] The rule only applies to endowment trusts. In other words, the rule only applies where the trustees are under an obligation to keep the capital of the trust fund intact and use only the income derived from the capital for the specified purposes. If the trustees are free to use capital for the specified purposes, the rule does not apply.[21] The reason for this distinction is obviously because if trustees are required to keep the capital of the fund intact and use only the income for the stated purposes, the trust could conceivably last forever. This is why it makes no difference that the trustees have the power to change investments and therefore particular items of property contained in the gift are alienable.[22] If the trustees are under an obligation to maintain the trust *fund* intact and use only the income for the specified purposes, then the trust is subject to the rule against inalienability. Whether or not the trustees are under an obligation to keep the capital of the trust fund intact is clearly a question of the true construction of the instrument setting up the trust.

The relevant perpetuity period under the rule against inalienability is the same as that which obtains under the rule against remoteness of vesting, which governs trusts for persons—as opposed to trusts for purposes. The period is therefore twenty-one years from the death of the last survivor of any causally relevant lives in being.[23] The rule against remoteness of vesting and the rule against inalienability have exactly the same object. They are designed to prevent property from being tied up under the restrictions of a trust for too lengthy a period. There would therefore be no sense in having different time periods for the two rules. This point is worth stressing because, as will be seen, on one possible interpretation of the new Singapore legislation, Singapore law now mandates different time periods for the two rules.

If T provides in his will for a sum of money to be held on trust to use the income therefrom to maintain his grave, the trust will be invalid for infringing the rule against perpetuities. The courts construe the language of the gift literally and it will be read as a direction to use the income in perpetuity for the maintenance of the grave.[24] To avoid this, one must state explicitly an acceptable perpetuity period.

Although the courts have been strict in requiring some form of time limit to the trust, they have been quite liberal in construing the language of the time limit. Thus, if trustees are directed to maintain a grave "for so long as the law allows" or "so long as they can legally do so", this will be understood as a direction to maintain the grave for twenty-one years, with the result that it will create a valid purpose trust.[25] Professor Sheridan expressed the view that if a magic formula of this kind can transform an otherwise void gift into a valid one, it would seem more sensible for the law to uphold all purpose trusts for twenty-one years rather than invalidate

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20 *Leahy v. Attorney-General for New South Wales* [1959] A.C. 457.

21 *Re Lipinski's Will Trusts* [1976] Ch. 235 at 245; *Re Drummond* [1943] Ch. 422. See Ronald H. Maudsley, *The Modern Law of Perpetuities* (London: Butterworth, 1979) at 173.

22 See *Trustees Act* (Cap. 337, 2005 Rev. Ed. Sing), s. 4.

23 *Re Astor's Settlement Trusts* [1952] Ch. 534; *Re Khoo Cheng Teow*, *supra* note 5.

24 *Lloyd v. Lloyd* (1852) 2 Sim. (N.S.) 255; *Rickard* v. *Robson* (1862) 31 Beav. 244; *Re Vaughan* (1886) 33 Ch.D. 277; *Re Porter* [1925] Ch. 746; *Re Dalziel* [1943] Ch. 277; *Re Elliott* [1952] Ch. 217.

25 *Pirbright v. Salwey* [1896] W.N. 86; *Re Hooper* [1932] 1 Ch. 38.

them altogether, at least in cases where the duration of the trust is not expressed to be perpetual.[26]

While the suggestion to place an automatic twenty-one year limit on purpose trusts has merit, it is difficult to see how this can be achieved other than by statute. As the law stands, the question is what did the testator intend when he directed that income from a fund should be used to maintain his grave. The courts have taken the view in the absence of any stated time limit, the testator wanted the grave to be maintained for an indefinite period. One cannot therefore imply a twenty-one year time limit as a matter of construction of the will, and there is no other basis for a time limit. Indeed, in at least two reported cases, the courts expressly refused to read into the trust an implied limitation to twenty-one years or "for so long as the law allows".[27] The construction adopted by the courts is open to criticism as it goes against the maxim, *Ut res magis valeat quam pereat*. The courts construe the trust, so as to make it ineffective, rather than implying the addition of a phrase, such as "so long as the law allows", which would validate it. However, this approach is too well established now to be overturned other than by legislation.

In *Re Dean*[28] the testator devised certain estates subject to and charged with the payment of £750 per annum to his trustees for fifty years, if any of his horses and hounds should so long live, on trust to apply that annual sum to the maintenance of the horses and hounds, any part thereof remaining unapplied to be dealt with at their discretion. The main question which arose was whether such a trust could be valid in the absence of a *cestui que trust* to enforce it. North J. accepted that a trust like this for the maintenance of specified animals was valid, even though it was not a charity. North J. was clearly aware of the need to comply with the rule against perpetuities, as he said: "The testator must be careful to limit the time for which [the trust] is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the Rule against Perpetuities, it would be illegal".[29] In this case, however, the time limit placed on the duration of the trust by the testator was fifty years, which exceeds the maximum laid down by the rule, which is a life in being plus twenty-one years. Curiously, there is no discussion in the judgment as to whether or not the rule against perpetuities had been complied with on the facts of the case. Perhaps North J. assumed that the horses and hounds could be lives in being for the purpose of the rule,[30] but if so, it is submitted that the case was incorrectly decided. There is no authority to support the view that the lives in being for the purposes of

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[26] Sheridan, "Trusts for Non-Charitable Purposes" (1953) 17 Conv. (N.S.) 46 at 54—55. See also John H.C. Morris and Barton Leach, *The Rule against Perpetuities* (London: Steven & Sons Ltd, 1962) at 322. This approach has the support of only one reported decision from New Zealand (*Re Budge* [1942] N.Z.L.R 350). The testatrix left £150 on trust to apply the income in keeping her grave in a neat and tidy state. This was held valid for twenty-one years because the testatrix did not say "forever". This decision is inconsistent with numerous cases in which trusts for the indefinite maintenance of graves have been held void for perpetuity.

[27] *Re Kelly* [1932] I.R. 255 at 261; *Re Compton* [1946] 1 All E.R. 117.

[28] (1889) 41 Ch.D. 552.

[29] *Ibid.* at 557.

[30] Maudsley suggests that North J. may have assumed that the animals would die within twenty-one years, but this seems an unlikely explanation of the case, given that he expressly referred to the need for the testator to be careful to limit the time during which the trust is to last. See Maudsley, *supra* note 21 at 170.

the rule against perpetuities can be anything other than human. In the Irish case of *Re Kelly,*[31] Meredith J. said:

> [T]here can be no doubt that 'lives' means lives of human beings, not of animals or trees in California.

In *Re Haines*[32] there was a trust for the maintenance of two cats without any stated time limit. Danckwerts J. took judicial notice of the fact that the cats could not live longer than the perpetuity period of twenty-one years and upheld the trust on this basis. This goes against the statement of Meredith J. in *Re Kelly*[33] that "[t]he court does not enter into the question of a dog's expectation of life". It is submitted that *Re Haines* was incorrectly decided. Although such cases are obviously unusual, it is not unknown for cats to live longer than twenty-one years.[34] In any case, the common law rule against perpetuities deals with possibilities, not probabilities. Thus, if property is given to "the first son of A to marry", the gift would fail at common law if A is alive and has no married son at the time of the gift. The reason is because all the existing sons of A may die unmarried, then A may have another son (not a life in being at the time of the gift), then A may die, and finally the last-born son may marry more than twenty-one years after the death of A, the last surviving life in being. It makes no difference that the possibility of this happening may be remote in the extreme, as where A is a woman past the age of child-bearing at the date of the gift.[35]

As the lives of animals are not lives in being for the purposes of the rule against perpetuities and as there is generally no causally relevant human life in being in a trust to maintain a grave, the result is that non-charitable purpose trusts can usually only last for twenty-one years. As has been noted above, even this period is only possible if some form of time limitation is expressly inserted in the instrument setting up the trust. A twenty-one year time limit is probably sufficient in the case of most trusts for the maintenance of domestic animals. However, testators who wish to make provision for the maintenance of their graves may well feel that a twenty-one year limitation is insufficient. The solution is to provide for an artificial life in being for the purposes of the trust. This is usually done by means of a "royal lives clause". The leading case is *Re Khoo Cheng Teow*,[36] decided in the Supreme Court of the Straits Settlements, where Mr Khoo left 56 Church Street, Singapore, in his will to trustees with the direction to let the premises "during the lives of Her Majesty Queen Victoria and her descendants now in being and during the lives and life of the survivors and survivor of them and during the period of twenty-one years after the death of such survivor" and "to apply the balance of such rents from time to time in the performance of the religious ceremonies according to the custom of the Chinese called Sin Chew to perpetuate my memory". Terrell J. held that the trust was valid as a private purpose trust and did not infringe the rule against perpetuities. *Re Khoo Cheng Teow* is cited in the English textbooks as authority for the proposition that a

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31 *Supra* note 27 at 261.

32 *The Times*, 7 November 1952 at 11.

33 *Supra* note 27 at 260.

34 According to Guinness World Records (2007 ed. at 127), the oldest cat ever was Creme Puff. She was born on 3 August 1967 and died on 6 August 2005, at the amazing age of 38 years and three days! Creme Puff was owned by Jake Perry of Austin, Texas, U.S.A.

35 *Jee v. Audley* (1787) 1 Cox Eq. Cas. 324; *Re Deloitte* [1926] Ch. 56.

36 *Supra* note 5.

royal lives clause can be used not only for the purposes of the rule against remoteness of vesting, but also for the purposes of the rule against inalienability.[37] The case perhaps deserves greater recognition in the local legal community as a rare example of a Singapore case cited by the English books as authority on a question of English law.

There is no particular magic in a royal lives clause. Royalty are used for practical purposes because it should be easy to find out the date of the death of the last of the relevant descendants of the named royal person. In theory, one could use any famous person, so long as one can be sure that his or her descendants will be easy to trace.[38]

III. Reform of the Rule Against Perpetuities

The rule against perpetuities was reformed in Singapore by sections 32 to 34 of the *Civil Law Act*.[39] It may be helpful to set out the relevant portions of the new provisions:

> **Fixed perpetuity period of 100 years**
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> **32.**—(1) In the rule against perpetuities as is applicable to any settlement or disposition of property, the perpetuity period shall be 100 years or such shorter period as may be specified in the instrument by which the settlement or disposition is made.
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> (2) Where any instrument making any settlement or disposition of property refers to lives in being or specifies a perpetuity period that exceeds 100 years, the perpetuity period shall be deemed to be a period of 100 years.
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> …
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> **Necessity to wait and see**
>
> **34.**—(1) Where, apart from the provisions of this section, a disposition would be invalid as infringing the rule against perpetuities, the disposition shall be treated, until such time (if any) as it becomes certain that the vesting will occur, if at all, after the end of the perpetuity period, as if the disposition were not invalid as infringing the rule against perpetuities, and its becoming so certain shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income, or otherwise.

To summarise, the new rules substitute a fixed perpetuity period of 100 years for the previous period of a life in being plus twenty-one years. Any attempt to specify lives in being for the purpose of calculating the perpetuity period—for example, by

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[37] Underhill and Hayton, *Law of Trusts and Trustees*, 17th ed. (London: LexisNexis Butterworths, 2006), para. 11.42; Maudsley, *supra* note 21 at 170. In *Re Astor's Settlement Trusts* [1952] Ch. 534, a royal lives clause was used in a private purpose trust and no objection was taken to this, although the trust, which sought to promote the freedom of the press, was held invalid, as it did not fall within the class of anomalous valid private purpose trusts.

[38] In *Re Moore* [1901] 1 Ch. 936, the will provided for a sum to be held on trust to use the income to maintain a grave "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death". Joyce J. held that this gift was void for uncertainty.

[39] *Supra* note 1.

using a royal lives clause—will be ineffective. The perpetuity period will still be 100 years. It is not possible to provide for a longer period than 100 years, but it is possible to specify a shorter period. This cannot be done by referring to lives in being. One can, however, simply specify a shorter number of years as the appropriate perpetuity period for the trust.

At common law, one has to determine at the outset whether a disposition may possibly vest outside the perpetuity period. Section 34 now provides for a "wait and see" period. If it is uncertain whether or not an interest will vest outside the perpetuity period, one can simply wait until it becomes certain that the vesting will occur outside the permitted period. The disposition only fails at the moment when it becomes certain that vesting will occur (if at all) after the end of the permitted period. Any action taken previously in relation to the disposition remains valid.

It is quite clear that the rule against remoteness of vesting has been reformed. Any doubts there might have been on this score are removed by the express reference to "vesting" in section 34. Section 32, however, is cast in general terms. The new law applies to "the rule against perpetuities". As has been seen, this expression is apt to cover both the rule against remoteness of vesting and also the rule against inalienability.

Unfortunately, little help can be derived from the explanatory statement to the Trustees (Amendment) Bill 2004,[40] which introduced the new section 32 in the *Civil Law Act*. The statement says simply:

> The new section 32 fixes the perpetuity period at a maximum of 100 years and provides that where any instrument making any settlement or disposition of property refers to lives in being or specifies a perpetuity period that exceeds 100 years, the perpetuity period will be deemed to be a period of 100 years.

It is clear, however, that the main focus of the reform of the rule against perpetuities was the rule against remoteness of vesting. Introducing the second reading of the Trustees (Amendment) Bill 2004, which effected the change, the Deputy Prime Minister and Minister for Law, Professor S. Jayakumar said:

> Next, the Bill will reform a complicated common law rule that requires future interests in property to vest within a "perpetuity period", if they vest at all. The period is measured by reference to "lives in being" plus 21 years at the relevant time. There are complicated rules for determining the relevant lives. Sir, not only is this rule complicated for lawyers and judges, it can frustrate the intention of the person creating the trust. For example, a gift is void if it might vest outside the relevant period of time, and a party other than the intended beneficiary may then become entitled to the property.
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> In our consultations, there was overwhelming support for the replacement of the common law perpetuity period with a fixed period. This Bill therefore will replace the common law way of determining perpetuity period with a maximum fixed perpetuity period of 100 years for new trusts.[41]

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40 Bill No. 43 of 2004.

41 Sing., *Parliamentary Debates*, vol. 78, col. 852 (19 October 2004).

In the debate on the second reading of the Bill, Mrs. Fang Ai Lian, Nominated Member of Parliament, raised the question whether the rules relating to non-charitable purpose trusts should be relaxed. Replying to this, Professor Jayakumar said:

> She also touched on single purpose trusts and also non-charitable purpose trusts and the reservation powers of settlors. Let me say that in our review, we did consider the specific areas that she mentioned, but many issues that arise, especially from non-charitable purpose trusts and settlors' reserve powers, are matters which require careful study and we also need to see how other jurisdictions handle them and what has been their experience.

A decision was made not to relax the substantive rules relating to non-charitable purpose trusts. It does not, however, follow from this that it was intended that the rule against perpetuities as it applies to such trusts should not be changed. There is some logic in saying that in the absence of a comprehensive review of the law of purpose trusts, the current rules should remain untouched. However, given that there was no statement on the matter, it is impossible to discern any intention that the reform proposed to the rule against perpetuities should not apply also to private purpose trusts.[42]

The main policy argument for saying that section 32 of the Civil Law Act should not apply to the rule against inalienability is that any change in the law relating to non-charitable purpose trusts should await a comprehensive review of this area of law. In favour of the opposite view, it may be said that changing the rule against inalienability does not impact in any way on the operation of the law relating to non-charitable purpose trusts. *Re Endacott*[43] sets out when such a trust will be valid, and nothing in section 32 changes the law established by that case. The common law rule against remoteness of vesting contains many traps for drafters of trust instruments and wills, as the Minister pointed out in the second reading of the Bill. The same is true of the common law rule against inalienability, as has been demonstrated in this paper. Since both rules are comprehensively referred to under the heading of the "rule against perpetuity", there is no reason to exclude the latter rule from the benefits of a reform of the rule against perpetuity in the absence of an express provision to this effect.

It is unfortunate that the legislature did not spell out whether or not the new law was to apply also to the rule against inalienability. Other legislatures have been more helpful in this regard. The U.K. *Perpetuities and Accumulations Act 1964*[44] makes it possible to specify an eighty year perpetuity period instead of the common law

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[42] Other jurisdictions have considered this question expressly. The Law Commission of England and Wales, which recommended a single perpetuity period of 125 years, proposed that this should not extend to the rule against inalienability. The reason given for this was that any consideration of the rule against inalienability belonged more properly in a review of the law governing non-charitable purpose trusts and unincorporated associations. See Final Report on the Rules against Perpetuities and Excessive Accumulations (LC251), published 31 March 1998, at ss. 1.14 and 1.15.

[43] *Supra* note 2.

[44] Act No. 55 of 1964.

period of a life in being plus twenty-one years. Section 1 states as follows:

> **Power to specify perpetuity period**
> **32.**—(1) … where the instrument by which any disposition is made so provides, the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument.

The language is more complicated than that employed in section 32 of Singapore's *Civil Law Act*, but the sections are similar in referring to the perpetuity period applicable to a settlement or disposition under the rule against perpetuities. Section 15(4) of the U.K. Act makes it quite clear that nothing in the legislation is intended to affect the operation of the rule against inalienability.[45] The absence of such a provision in the Singapore legislation supports the view that both rules are intended to be covered by the reform in Singapore.

In the absence of any guidance in the text of the statute itself, in the explanatory statement to the bill or in the Minister's speech in Parliament moving the second reading, the question whether the phrase "the rule against perpetuities" is meant to include the rule against inalienability can only be answered by working out the ordinary meaning of the expression "the rule against perpetuities". It is a technical term, so the question is what Singapore lawyers and lawyers in countries with similar legal systems mean by the phrase. When the question is posed in this way, it is quite clear that the expression "the rule against perpetuities" is ordinarily used by lawyers to include the rule against inalienability.

In the leading case of *Re Khoo Cheng Teow,*[46] which established the validity of the use of a royal lives clause in a private purpose trust for Sin Chew ceremonies, the rule against inalienability is referred to consistently throughout the case as "the rule against perpetuities". This expression occurs twice in the headnote to the case in the Malayan Law Journal and eight times in the relatively short judgment of Terrell J. The judgment does not employ any other turn of phrase to describe the relevant rule of law. This case was decided in 1932, but the linguistic usage has not changed in more modern times. In a later case involving a trust for Sin Chew decided in 1998, *Bermuda Trust (Singapore) Ltd. v. Wee Richard*,[47] Judith Prakash J. said:

> It was also agreed that the trust here does not infringe the rule against perpetuities since it is only to continue for the period commencing on the testator's death and ending 21 years after the death of his last surviving grandchild who was alive at the date of the testator's own death.[48]

This is the most recent reported decision in which the rule against inalienability was considered. However, a search on Lawnet reveals that the last time the expression

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45 The opposite approach was expressly adopted in the *Victorian Perpetuities and Accumulations* Act 1968, (No. 7750 of 1968), which provides in s. 18 that the eighty year period available under s. 5 and the "wait and see" rule available under s. 6 apply to non-charitable purpose trusts. The same approach is adopted in the *Tasmanian Perpetuities and Accumulations Act 1992,* (Act 23 of 1992).

46 *Supra* note 5.

47 [2000] 2 S.L.R. 126 [*Wee Richard*].

48 *Ibid.* at para. 6.

was used in a reported Singapore judgment was in *Re Estate of Chong Siew Kum.*[49] Andrew Ang J.C. used the expression there to refer to both the rule against remoteness of vesting and the rule against inalienability. He said:

> Moving to the next contention of plaintiff's counsel, it is baffling as to what basis he had for saying that the trusts failed for breach of the rule against perpetuities. There were no words of limitation giving rise to the risk of remoteness of vesting, nothing to suggest that the trusts were to be of perpetual duration nor any restrictions on the alienation of income of the trust property extending beyond the perpetuity period. I concluded that this defence was devoid of merit.[50]

The same usage is found in England. It has already been noted that the U.K. *Perpetuities and Accumulations Act 1964* reformed "the rule against perpetuities", but found it necessary to include an express exclusion for the rule against inalienability, which would otherwise have been covered by the statutory reform. In the leading modern case on private purpose trusts, *Re Endacott*,[51] Lord Evershed M.R. noted that it had not been suggested that the trust in question would offend "the rule against perpetuities".[52] Later on in his judgment, he expressed the view that the anomalous cases should not be extended because:

> So to do would be to validate almost limitless heads of non-charitable trusts, even though they were not (strictly speaking) public trusts, so long only as the question of *perpetuities* (emphasis added) did not arise; and, in my judgment, that result would be out of harmony with the principles of our law.[53]

The textbook writers are consistent in treating the rule against inalienability under the heading of "the rule against perpetuities".[54] Underhill and Hayton take pains to distinguish between the two aspects of the rule against perpetuities, but they note:

> The two rules appeared relatively similar before the Perpetuities and Accumulations Act 1964 so that in the case law trusts are often said to be void for perpetuity without it being made clear whether the perpetuity arises from the prospect of a contingent interest not becoming vested in *persons* till too remote a time or from the prospect of income having to be used forthwith for particular *purposes* for too long a period.[55]

Interestingly enough, Morris and Leach in their book, *The Rule Against Perpetuities*, address directly the question of nomenclature. They write:

> Much of the trouble over terminology is caused by the fact that the Rule against Perpetuities itself is misnamed. It should have been called the Rule against Remoteness of Vesting. Its name obscures its true function and purpose. But its name is hallowed by tradition: to change it now would be unthinkable.

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49 [2005] 2 S.L.R. 324.
50 *Ibid.* at para. 65.
51 *Supra* note 2.
52 *Ibid*. at 240.
53 *Ibid*. at 246.
54 See Morris and Leach, *supra* note 26 at 321 *et seq.*; Maudsley, *supra* note 21 at 166 *et seq.*; Megarry and Wade, *The Law of Real Property*, 17th ed. (London: Sweet & Maxwell, 2008) at paras. 9-137 *et seq.*
55 Underhill and Hayton, *Law Relating to Trusts and Trustees*, *supra* note 37 at para. 11.2.

> The present writers conclude that it is best to follow the line of least resistance and call the rule restricting the duration of trusts for non-charitable purposes "The Rule against Perpetuities". This admittedly involves using the same word "perpetuity" in two different senses, as meaning (1) an interest which may vest at too remote a date, and (2) a non-charitable purpose trust which lasts too long. It also involves calling two different rules by the same name. But since the periods of both rules are the same, it seems unlikely that confusion will result.[56]

Before leaving the question of terminology, it is intriguing to note that a way has been suggested to cut the Gordian knot. There are those who argue that there are not in fact two rules. There is only one rule against perpetuities, the ordinary rule against remoteness of vesting, which applies also to non-charitable purpose trusts. The argument runs as follows. Suppose a bequest of $1,000 to a trustee to use the income from this fund to maintain the testator's tomb. The residuary legatee has an equitable interest in the $1,000 under a resulting trust, but the trustee has the power to use the income for the maintenance of the tomb. Should the trustee not maintain the tomb, the residuary legatee would be at liberty to apply to court for the money.[57] The trustee cannot be compelled to maintain the tomb, but he or she has the power to do so. The situation is the same as where a donee has a special power of appointment. Under the rule against remoteness of vesting, a special power of appointment is too remote if it could be exercised after the perpetuity period has expired, and if a power of appointment is too remote, no valid appointment can be made under it.[58] By the same token, if the terms of a non-charitable purpose trust give the trustee the power to make an appointment (i.e. use the income to maintain the tomb) after the perpetuity period has expired, the power is too remote and no appointment can be made under it. It follows that a trust for non-charitable purposes cannot last longer than the perpetuity period.[59]

The advantage of this explanation is that it provides a tidy way of reconciling what otherwise appear to be two different, but confusingly similar, rules. If accepted, it would make it quite clear that the new regime established by section 32 of the *Civil Law Act* applies to non-charitable purpose trusts. The only objection to following this approach is that it has never even been considered by the courts, let alone adopted by them.[60]

IV. Application of New Law to Non-Charitable Purpose Trusts

If it is accepted that the rule against inalienability has been amended in Singapore, there remains the question of how the new section 32 should be applied to non-charitable purpose trusts. Some cases are quite straightforward. The usual practice of specifying a twenty-one year time limit for such trusts is unaffected by section 32. This section provides that "the perpetuity period shall be 100 years or such *shorter* period as may be specified in the instrument by which the settlement or disposition is

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56 Morris and Leach, *supra* note 26 at 326.

57 *Pettingall v. Pettingall* (1842) 11 L.J.Ch. 176.

58 See now *Civil Law Act, supra* note 1, s. 33(3).

59 See Bryant Smith, "Honorary Trusts and the Rule against Perpetuities" (1930) 30 Colum. L. Rev. 60; Sheridan, *supra* note 26 at 57-8; Morris and Leach, *supra* note 26 at 324-5.

60 There is a passing reference to this approach in *Re Producers' Defence Fund* [1954] V.L.R. 246 at 255.

made". The alternative form of words "for so long as the law allows" now produces a perpetuity period of 100 years.

The more difficult case is where the instrument does not specify any time limit. At common law this has been interpreted as a direction to carry out the purposes of the trust forever. There is, however, no reason for the courts to adopt the same approach when construing section 32 and unless a shorter perpetuity period is expressly stated in the instrument, it should be understood that the applicable period is 100 years. This approach is clearly contemplated by section 32(2), which provides: "Where any instrument making any settlement or disposition of property refers to lives in being or specifies a perpetuity period that exceeds 100 years, the perpetuity period shall be deemed to be a period of 100 years". If a testator specifically directs that his grave should be maintained for 500 years, then the perpetuity period will be 100 years. By the same token, if the testator expressly directs that his grave should be maintained forever, the perpetuity period should be 100 years. It follows that if the testator specifies no time limit—which is understood at common law as a direction to maintain the grave forever—the perpetuity period must be 100 years.

One can reach the same result by an alternative route. Under section 34, one no longer asks at the outset whether there is any risk that the trust might infringe the rule against perpetuities. The new law requires one to wait and see whether the rule against perpetuities is actually infringed. The trust fails only when this becomes certain. On this basis, if a testatrix leaves $1,000 to use the income from this fund for the maintenance of her pet tortoise, Terry, one waits to see whether the tortoise survives the 100 year period. The trust fails only when Terry reaches his one hundredth birthday. Anything done previously in relation to the trust remains valid. Even in the case of a trust to maintain a grave, it will not be certain that the perpetuity period will be infringed until 100 years have passed. It is always possible that the cemetery may be acquired by the State for purposes of redevelopment.[61]

There is a slight difficulty in applying the new wait and see rule to purpose trusts. Section 34 was clearly drafted with the rule against remoteness of vesting in mind. It uses the word "vesting", stating that "the disposition shall be treated, until such time (if any) as it becomes certain that the vesting will occur, if at all, after the end of the perpetuity period, as if the disposition were not invalid as infringing the rule against perpetuities". To return to the previous illustration, no vesting actually occurs on the death of Terry, the tortoise. The correct analysis is that once administration of the estate of the testatrix has been completed, the equitable interest in the $1,000 vests in the residuary legatee, subject a power for the trustees to use the income to maintain Terry. That power ceases after 100 years or on the earlier death of Terry. In reality, however, a right to a form of vesting does indeed occur when the purpose trust comes to an end. While the trust is in existence and the trustees wish to perform it, the residuary legatee has no right to call for the money. Once the trust comes to an end, the residuary legatee has the right to call upon the trustees to vest legal title to the $1,000 in him or her. In the context of a purpose trust, the reference to "vesting" in section 34 can be understood as a reference to the right to call for the legal title once the purpose trust comes to an end.

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[61] See *Wee Richard*, *supra* note 47, for an illustration of a case where a trust for Sin Chew became impossible to perform within the perpetuity period.

V. Drafting Points

The legislature has not been kind to lawyers drafting wills. Until the matter is resolved by the courts, one cannot be completely certain whether non-charitable purpose trusts are governed by the common law rule against perpetuities or by section 32. In the circumstances, the only safe course of action is to try to ensure that the trust complies with both versions of the rule. Unfortunately, this may not always be possible. It may be helpful, however, to set out a few guidelines.

The simplest course of action would be to avoid the rule against perpetuities altogether by providing that trustees can have the use of both capital and income for the stated purposes. Generally speaking, this cannot be recommended. The difficulty is that there is no means of effectively controlling the trustees in these situations. The trustees might use so much money that the fund does not even last for twenty-one years. The residuary legatee can claim the capital if the trustees are not performing the trust, but it is difficult to see how he or she can have any right to challenge the trustees if they are acting within the terms of their power.

It would be foolhardy to create a purpose trust without a time limit. That will produce a 100 year perpetuity period if the statute applies, but the trust will be invalid at common law. The standard practice of specifying a twenty-one year perpetuity period is the safest course of action in most cases. It will generally be appropriate for trusts to maintain pets, save for the exceptional case where there is a risk of the animal surviving that period. The result is that one has a twenty-one year perpetuity period both at common law and under the statute.

The use of the phrase "for so long as the law allows" will produce a twenty-one year perpetuity period at common law and a 100 year period under the statute. This has the advantage of creating a valid trust under both systems, but leaving open the possibility of a longer perpetuity period, should it ultimately be decided that the relevant rule is that laid down by section 32. The disadvantage is that until the matter is decided by the courts, the trustees will not know for sure how long the trust will last. They might feel it advisable not to continue performance of the trust after the twenty-one year period without obtaining the directions of the court. The difficulty, however, is that in practice only small sums of money are usually placed on trust for purposes, so the trust fund is unlikely to be large enough to cover the trustees' legal costs. What this is likely to mean in practice is that, should the residuary legatee ask for the money at the end of the twenty-one year period, the trustees might well feel that the safest course of action would be to hand over the money to him or her. After all, they are under no obligation to perform the purpose trust. They merely have a power to do so, so they will not be in breach of trust for failing to perform after the twenty-one year period.

At the other extreme from trusts for pets, one has trusts for the maintenance of graves or for the performance of Sin Chew ceremonies. In this situation, clients may well feel that a twenty-one year limitation is inadequate. One should not limit the trust to 100 years, as this would make it invalid at common law. The safest course of action is to use a royal lives clause. This will produce a valid trust under both systems. Under the statute, the perpetuity period will be 100 years. At common law, it will probably be rather longer, as given the normal life span of human beings today, the last survivor of the descendants of the named royal may well live for about

100 years, and one then has to add another twenty-one years. Again, the difficulty is that until the matter is determined by the courts, nobody will know for sure how long the trust will last. One can only hope that it will not take 100 years for the matter to be resolved by the courts or by amending legislation!