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Do the Property Law Principles of a Personal "Benefit" Affecting the Runnability of a "Burden" and the Rule Against Perpetuities Redner Unenforceable Promises to Pay Money When Transferred Land is Used for Specified Energy Activities?

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DO THE PROPERTY LAW PRINCIPLES OF A PERSONAL “BENEFIT” AFFECTING THE RUNNABILITY OF A “BURDEN” AND THE RULE AGAINST PERPETUITIES RENDER UNENFORCEABLE PROMISES TO PAY MONEY WHEN TRANSFERRED LAND IS USED FOR SPECIFIED ENERGY ACTIVITIES?

Rex J. Zedalis*

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I. INTRODUCTION

In an earlier article in this journal,¹ I focused on the matter of the enforceability of a promise to pay money in the event certain lands were to be used for an energy-related activity (e.g., the placement of solar arrays, the erection of wind turbines, or the construction of oil storage tanks). Central attention was given to the enforceability of any such promise against successors in interest to land to which the promise relates—a topic that concentrated on the property law mysteries surrounding the runnability of real covenants and equitable servitudes. Intimately related issues were also considered. This included the possible significance of relevant successors taking less than the entire quantity of land first bound by the energy-related activity.² And whether it proved a complication that the promise to pay first appeared in a grant, conveyance, or declaration in favor of a beneficiary established by a grantor who transferred the land concerned to an original transferee of a

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1. Rex J. Zedalis, *A Promise to Pay Money if Transferred Land is Used for Identified Energy-Related Activity: Can Successors of the Promisor be Bound?*, 50 TULSA L. REV. 805 (2015).

2. *Id.* at 814-18.

chain of title holders connected to the successors now said obligated by the promise.³

As that article made clear, it offered no assessment of at least two potential additional concerns. First, whether a burden otherwise capable of running to a successor of the original covenantee indeed passes to that successor, in the event the nature of the corresponding benefit created by the burden is characterized as “personal” or “in gross.”⁴ Second, whether the fact that the promise to pay is triggered only by the uncertain occurrence of use of the subject land for the identified energy-related activity causes it to be a contingency subject to possible invalidation under the rule against perpetuities?⁵ What follows aims at briefly and succinctly taking up both of those additional concerns, with an eye towards the possibility that Oklahoma law may be predisposed towards handling either the matter of the rule against perpetuities, or that of a burden’s ability to run when its corresponding benefit is personal or in gross, in one particular fashion as opposed to another.

II. RUNNING A BURDEN WHEN THE BENEFIT IS PERSONAL OR IN GROSS

As examined at length in the earlier article, the burden of a covenant or servitude, as well as the corresponding benefit of that covenant or servitude, can either “touch and concern” land, or not. In the context of a transferee of a piece of land taking on a promise to pay money if such land is ever used for an identified energy related activity, that means that the promise itself (i.e., the burden of payment), as well as the benefit to which it gives rise (i.e., the potential receipt of the payment), could be, or not be, about the transferred land, relate to that land, or centered or focused on that land. Certainly there can be no dispute that any such promise, accompanied by the intent that the promise bind each future transferee, is a promise of the sort that would evidence a burden that touches and concerns the land. After all, it is the use of the transferred land for some identified energy activity that triggers the obligation to make the payment that is the essence of the promise itself. The promise burdens the land by conditioning its use for a certain set of activities upon the payment of certain sums of money. Avoidance of having to satisfy that promise is secured by not using the land concerned for the burdened activities. In contradistinction to the payment promise’s connection to the burden, however, the benefit does not affect land. No land is benefited by the burden of payment. Instead, payments resulting from any breach of the condition not to use the relevant land for an identified energy activity simply go to enhancing the fiscal or economic position of the payment’s beneficiary.

This is unlike a situation in which the burden of a money payment is to go to making improvements on some other piece of land left in the hands of the original transferor when burdened property is conveyed to the initial transferee. In such a case, the promise to make payment that burdens particular land gives rise to a corresponding benefit to some other land retained by the original transferor. Rather, in the situation with which we are confronted, a burden that is about land—one which relates to, touches, and concerns land—gives rise to a corresponding benefit that serves the mere financial well-being, the personal economic security of some individual beneficiary, and does not constitute something that

3. *Id.* at 818-22.

4. *Id.* at 827.

5. *Id.*

redounds to the benefit of a particular piece of land. As a consequence, our situation involving a promise to make money payment when transferred land is used for an identified energy related activity pairs a burden that touches and concerns land with a benefit that is personal or in gross; and, it is oft-cited hornbook law that the ability of a burden otherwise capable of running to a successor-in-interest to the original promisor (because the burden is appurtenant to land that has passed from the promisor to their successor) can have its runnability affected adversely by the personal or in gross nature of its corresponding benefit. This has certainly been the case where enforcement of the burden is sought under the law of real covenants, with some divergence of opinion where enforcement is sought under the more generous principles relative to equitable servitudes.

A well-known decision relying on just such an approach is *Caullett v. Stanley Stilwell & Sons, Inc.*⁶ After struggling with the notion of the burden involved being one that truly and genuinely touched and concerned the relevant land, the Superior Court of New Jersey noted that, even assuming the burden involved be of such an appurtenant nature, the corresponding benefit to which the burden gave rise still remained personal or in gross.⁷ Given that fact, along with the long-standing rule that the law will not allow the burden of a real covenant to run when its corresponding benefit fails to touch and concern land of the one seeking to enforce the burden,⁸ the court turned its attention to whether the same such rule applied at equity, were the burden sought to be enforced not as a covenant, but as an equitable servitude. On that score, the court indicated that although a split existed between jurisdictions,⁹ the rule to be applied to equitable servitudes in New Jersey was precisely the same as the rule applied in regard to enforcing real covenants at law: obligations associated with a burden will run to successors-in-interest from the original promisor only when giving rise to a corresponding benefit that touches and concerns land.¹⁰ It matters not that the burden itself is irrefutably appurtenant, and would, thus, otherwise be capable of running. Whether at law or at equity, for an appurtenant burden to actually run to a successor of the burdened land, it must give rise to a corresponding benefit that touches and concerns land of the party seeking to enforce the burden. If the benefit is in gross or personal in nature, and is not in fact providing a benefit to other land, the burden that would otherwise run has its runnability impeded. Such a result gives effect to the notion that burdens should not readily be imposed upon those not directly undertaking them merely because they happen subsequently to have acquired an interest in land upon which such burdens rest.

Focusing on equitable principles and the running of the burden side of an equitable servitude, the jurisdictions diverging from the position taken by New Jersey in the *Caullett*

6. *Caullett v. Stanley Stilwell & Sons, Inc.*, 170 A.2d 52 (N.J. 1961).

7. *Id.* at 55.

8. *Id.* at 56.

9. *Id.*

10. *Id.* (citing *Welitoff v. Kohl*, 147 A. 390, 393 (N.J. 1929)).

decision¹¹ include at least New Hampshire,¹² Kentucky,¹³ Pennsylvania,¹⁴ Michigan,¹⁵ Georgia,¹⁶ and Illinois.¹⁷ Decisions in those jurisdictions have permitted the running of a burden that touches and concerns lands passed to a successor-in-interest, despite the fact such a burden has given rise to a corresponding benefit that can be labeled as merely personal or in gross in nature. In allowing such to run, those states appear not only to have favored the view of equity as a device to ameliorate the harshness of results often produced by the strict application of rules of law governing real covenants, but they have also rationalized their approach by insisting that one who has notice of the existence of an appurtenant burden should not be entitled to escape its obligations when taking lands thereby affected, and that such known burdens, taken on freely, should be honored. In other words, the mere fact that the nature of the benefit arising from a burden, which is clearly placed upon lands, exemplifies itself as inuring to the financial advantage of some person or legal entity, should not prevent the burden itself from running to a successor-in-interest when the burden is known to that successor.

The Supreme Court of New Hampshire's decision in *Pratte v. Balatsos* is illustrative.¹⁸ That decision did not involve a factual situation in which a promise regarding the use of certain lands was taken on in the context of a conveyance of the burdened land between the so-called covenantor and covenantee of the promise. Nonetheless, the decision is clear on the point that, once a covenantor agrees to subject their land to a burden that is indisputable in its capacity to affix itself to that promisor's land, that burden becomes able to run to a successor-in-interest to that land, even though the corresponding benefit to which the burden gives rise is one that can only be characterized as personal or in gross, because of merely redounding to the individual advantage of the promise's covenantee. In the exact words of the decision, under such a situation there can be found to exist an obligation or promise "enforceable in equity . . . even if it be not regarded as an agreement running with the land upon which an action at law could be maintained."¹⁹ Noting that the in gross or personal nature of the benefit redounding to the covenantee was accompanied by clear notice of the relevant promise on the part of the original covenantor's successor, the court relied upon Pomeroy's tome on Equity Jurisprudence for the proposition that "the doctrine that a purchaser with notice of a covenant with respect to the use of land takes subject to the covenant may be explained 'by regarding the covenant as creating an equitable easement.'"²⁰

Adding to this is the Supreme Court of Michigan's decision in *Staebler-Kempf Oil*

11. See generally Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 470-71 (1984) (indicating that the approach in *Caullett* might represent the so-called majority approach).

12. *Pratte v. Balatsos*, 113 A.2d 492 (N.H. 1955).

13. *Trosper v. Shoemaker*, 227 S.W.2d 176 (Ky. 1949).

14. *Bald Eagle Valley R.R. v. Nittany Valley R.R.*, 33 A. 239 (Pa. 1895).

15. *Staebler-Kempf Oil Co. v. Mac's Auto Mart*, 45 N.W.2d 316 (Mich. 1951).

16. *Smith v. Gulf Refining Co.*, 134 S.E. 446 (Ga. 1926).

17. *Van Sant v. Rose*, 103 N.E. 194 (Ill. 1913).

18. *Pratte v. Balatsos*, 113 A.2d 492 (N.H. 1955).

19. *Id.* at 495.

20. *Id.*

*Co. v. Mac's Auto Mart.*²¹ The factual situation in that decision is distinguishable from *Pratte*. The Michigan case involved a straightforward instance wherein a covenantee made a conveyance of lands to a covenantor who promised, in return, to purchase from the covenantee transferring the lands, certain specified products the covenantee was in the business of distributing. Further, the promise was said in the instrument articulating it to be one running with the land. The court was entirely satisfied that those who subsequently came into possession of the land were aware of the existence of the promise to purchase the concerned products being linked to the original land transfer because the deed granted to the successor contained the very language of the promise itself. The court thus expressed little reluctance to invoking equity to enforce observance of the promise.

The decision of the Court of Appeals of Kentucky in *Trosper v. Shoemaker* likewise captures the exact same idea.²² As the court puts it, “[h]aving accepted title with [a] condition imposed on it, and which condition was shown in the deed to be a part of the consideration for the conveyance, [the covenantor-grantee] is bound by [the condition].”²³ Nonetheless, it is clear that *Trosper* involved not the question of whether the runnability of the original covenant was impeded at equity by the fact of the benefit created through the imposition of the specific burden involved being personal or in gross in nature, but rather the question of whether a covenant giving rise to a purely personal or in gross benefit could be enforced against the original covenantor by one who was a successor to the original covenantee. In spite of this important difference, there can be no doubt of the court’s insistence that promises once lawfully made are to be enforced at equity.

Apart from the cases just examined, it is worthwhile to recall some of the language from the Supreme Court of Illinois in *Van Sant v. Rose*.²⁴ There an owner of land conveyed such to a grantee subject to a promise regarding the use of the land. The grantee subsequently transferred the land to his spouse who had full knowledge of the earlier promise. The spouse subsequently pursued designs to use the land for purposes plainly in contravention of the promise. When the original covenantee-grantor sued for injunctive relief to prevent the violative use, the fact that the covenantee had no ownership of surrounding or adjoining lands that would warrant permitting the maintenance of the action for equitable relief was raised. Notwithstanding the covenantee’s position as the holder of but a mere benefit in gross, the court permitted injunctive relief to be sought. In doing so, it stressed the fact the spouse proceeded against the intended purpose with indisputable knowledge of the restrictive character of the earlier promise. As the court put it:

When a vendee purchases with full notice of a valid agreement between his vendor and the original owner concerning the manner in which the property is to be occupied, it is but a reasonable and equitable requirement to hold him bound to abide by the contract under which the land was conveyed.²⁵

21. *Stabler-Kemp Oil Co.*, 45 N.W.2d at 316.

22. *Trosper v. Shoemaker*, 227 S.W.2d 176 (Ky. 1949).

23. *Id.* at 178.

24. *Van Sant v. Rose*, 103 N.E. 194 (Ill. 1913).

25. *Id.* at 196.

Discounting the fact the covenantee-grantor no longer owned other properties that could have been benefited by the restrictive promise, the court said that while it was true that “a bill to enjoin [a] breach of restrictive covenants cannot be maintained by one having no connection with or interest in their enforcement,” it could not “agree that [the] complainants [involved] had no interest.”²⁶ The court stated:

They were the original covenantees, and by their conveyance of the property reserved an interest in it. They conveyed the property subject to that interest. They had a right to reserve such interest, and this right was not dependent upon the covenantees having other property in the vicinity that would be affected by a breach of the covenants, or that they should in any other manner sustain damages thereby.²⁷

The court continued by observing “the right to enjoin the breach of restrictive covenants does not depend upon whether the covenantee will be damaged by the breach, but the mere breach is sufficient ground for interference by injunction.”²⁸ The sum and substance would appear to be that the Illinois court was more interested in holding an original covenantor’s successor-in-interest to a clear promise of which they had knowledge, and which dealt with lands they took by later transfer, than in insisting that the only such promises capable of running to such a successor were those giving rise to a corresponding benefit that could be characterized as real or appurtenant (rather than in gross) because found to touch other lands.

There is also the somewhat more recent decision from the Court of Appeals of Missouri, *Christiansen v. Casey*.²⁹ The facts relative to that decision involved a developer of a subdivision imposing on each of the lots in the development a restriction clearly capable of attaching to the land. The restriction concerned fencing on the lots and the need for approval of such to be obtained from the developer. Following the imposition of the restriction, each of the lots was actually sold to the purchasers, not by the developer, but by the builder who presumably had obtained the restricted lots from the developer. The question confronted by the court was whether, after having divested itself of all the lots in the subdivision, the developer-grantor could continue to claim a benefit it was able to enforce at equity in an action for injunction. The court acknowledged that, once the developer had transferred the lots to the builder and then to particular grantees, any appurtenant or real benefit arising initially from the imposition of the restriction necessarily converted into an in gross or personal benefit. The court then dealt with the issue of a grantor-covenantee possessing a purely personal or in gross benefit using that as the basis for a cause of action to enforce the restriction’s burden against end purchasers who were apparent successors to the intermediate builder.

It is important to call attention to the fact that the developer seeking the injunction

26. *Id.*

27. *Id.*

28. *Id.*

29. *Christiansen v. Casey*, 613 S.W.2d 906 (Mo. Ct. App. 1981).

also had retained other nearby lots outside the restricted subdivision. That fact certainly softened any reluctance the court had towards permitting the developer to proceed. Nonetheless, it is incontestable that the court's opinion contains a surfeit of language stressing that, in Missouri, one taking property with full knowledge that it is subject to an appurtenant restriction cannot escape it simply by showing that a grantor-covenantee seeking to enforce it has nothing more than a personal or in gross benefit. Citing to an earlier decision, the court observed that, as long as a restriction attaching to land is otherwise valid, any "distinction between real and personal covenants would be inconsequential."³⁰ Further, if the restriction is deemed a valid real covenant, it would prove binding, while "[i]f it is to be designated a personal [benefit] covenant, it would likewise [prove] bind[ing] . . . Missouri aligns itself with the states which allow the original grantor to enforce a restrictive covenant when the covenantor has actual or constructive knowledge of the restriction."³¹ Again, while the quoted language speaks of knowledge on the part of the "covenantor," as the lots in the subdivision were not sold to the concerned defendant in this case by the actual developer, it would appear the original covenantor was actually the builder, who then subsequently sold to the defendant, thus making the application of the court's approach—and its consequent emphasis on notice—an application to the successor-in-interest to the original covenantor. Of most importance, though, is the emphasis the court placed on notice or knowledge of the restriction which a party with an in gross or personal benefit is attempting to enforce.

No court decisions have been found in Oklahoma directly analyzing whether an appurtenant burden is capable of running to a successor-in-interest of the burdened land when the benefit flowing from the burden fails to touch and concern land held by the party prosecuting the cause, and, instead, simply benefits that entity personally, whether in a financial, or in another fashion. Despite this absence, there is at least one case in which the court upheld the ability of a covenantee to seek injunctive relief and, in doing so, used language obviously reminiscent of what courts in those jurisdictions favorably disposed to enforce appurtenant burdens accompanied by in gross or personal benefits have utilized. *Blackard v. Good*³² concerned the enforceability of a restriction designed to protect the ambience of subdivided and developed lands. When the original owner-covenantee was approached about selling a tract within the subdivision to one who was thinking about developing the tract as an animal hospital, it was made clear to the prospective purchaser that a sale would not be consummated. Thereafter, another person bought the tract and subsequently sold it to a further intermediary acting on the behalf of the originally spurned purchaser. After the acquisition, plans were made to proceed with the animal hospital. The original owner-covenantee objected, noting that it had imposed clear written restrictions regarding permitted and prohibited uses of the land, and that all who had acquired interests in the land took with knowledge of the restrictions. In agreeing with the covenantee, the court, in reliance on an earlier case, noted that: "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. *A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the*

30. *Id.* at 910.

31. *Id.*

32. *Blackard v. Good*, 248 P.2d 596 (Okla. 1952).

estate with notice."³³

Just as in *Christiansen, Van Sant, Staebler-Kempf, and Pratte*, the court in *Blackard* indicated the single most powerful piece of evidence in an action at equity to enforce an appurtenant burden is notice of the burden on the part of the covenantor or its successors-in-interest. From the language the court relied upon, at equity even covenant's deemed personal, and not capable of running under strict rules governing real covenants at law, can be enforced in a suit for injunctive relief in the event the burden of the covenant or restriction is one of which clear and unquestioned notice is had. While it is indisputable that the facts involved in *Blackard* do not concern the narrow situation of the runnability of an appurtenant burden in a case in which the accompanying benefit happens to be purely personal, there can be no doubt that in discussing the availability of injunctive relief to a covenantee who has imposed a plainly appurtenant burden on a covenantor, the central consideration is whether that covenantor, or its successors, are fully apprised of the restriction under which they must operate.

Allowing enforcement of an appurtenant burden, when such is sought by one holding the consequent benefit in gross, seems unobjectionable under the Restatement (Third) of the Law of Property (Servitudes).³⁴ Nothing in that recapitulating and change-prompting articulation of the governing law suggests opposition to allowing a burden clearly designed to touch and concern lands to run, whenever such gives rise to a corresponding benefit that plainly does nothing more than serve the personal interest of a particular promisee or covenantee. Preferring to speak in terms of servitudes, rather than the more traditional, time-honored, and commonly used appellations of real covenants and equitable servitudes, section 8.1 of the Restatement provides that "[a] person who holds the benefit of a servitude . . . has a legal right to enforce the servitude," and that "[o]wnership of land intended to benefit from enforcement of the servitude is *not* a prerequisite to enforcement."³⁵ As the section goes on to provide, "a person who holds the benefit of [such] a covenant in gross" and seeks to enforce the accompanying burden must nonetheless be able to "establish a legitimate interest in enforcing the covenant."³⁶ Section 8.3 follows this by indicating that the remedies available to enforce servitudes include "any appropriate remedy or combination of remedies, . . . includ[ing] declaratory judgment, compensatory [and other forms of] damages . . . injunctions, restitution, and imposition of liens."³⁷

The obvious effect is to permit courts to direct the payment to a covenantee of any promised monies associated with burdens triggered by specified uses of the lands concerned. It would not matter that the entity to whom such monies were to be paid only has what would be described as a benefit in gross. As long as the burden were one seen as appurtenant to land, and the promisee or covenantee seeking enforcement were said to have a legitimate interest in enforcing such, then no reason would exist for insulating any entity in possession of such land from action by the promisee. There is no reason to believe the requisite interest in enforcement would be absent in situations in which it is the original

33. *Id.* at 598 (emphasis added).

34. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.5 (AM. LAW INST. 2000).

35. *See id.* § 8.1 (emphasis added).

36. *Id.*

37. *Id.* § 8.3.

promisee who seeks prosecution of the enforcement action. The principal drafter of the Restatement's two volumes on servitudes seems favorably disposed to finding that such an interest in enforcement would exist whenever the original promisee or covenantor continues to hold lands in close proximity to, but outside, a subdivision which the promisee had placed under restriction.³⁸ Thus, it would seem reasonable to consider the fact that an original promisee continues to claim the right to insist upon the enforcement of an in gross benefit involving a cash payment as a similarly sufficient interest.³⁹ Equally as important, it would seem the Restatement considers irrelevant the fact that the original covenantor or promisor taking on the burden of money payment subsequently transfers the burdened land to a successor-in-interest. As section 5.2 of the Restatement's volumes on servitudes provides, "an appurtenant . . . burden runs to all subsequent owners and possessors of the . . . burdened property."⁴⁰ Indeed, the reason underpinning this resides in the Restatement's section 5.1 reiteration of the long-standing common law rule that "[a]n appurtenant . . . burden . . . passes automatically with the [passage of] the property interest to which it is appurtenant."⁴¹ As any burden that is real or appurtenant attaches itself to lands concerned, it necessarily and instantaneously transfers to one to whom the land itself transfers.

Especially instructive in connection with Restatement section 8.1's indication of the enforceability of an appurtenant burden, notwithstanding its accompaniment by a benefit in gross, are both the section's official Comments and the Reporter's Note.⁴² After providing a brief background on the historical antecedents of the traditional opposition to enforcement of appurtenant burdens by one holding a mere benefit in gross, Comment (a) provides that the "rule requiring land ownership as a prerequisite to enforcement has become obsolete."⁴³ The function the rule served was to assure that the person seeking enforcement had a genuine interest to protect, and that rather than adopting a flat prohibition on enforcement by persons holding mere benefits in gross, a "substitute rule requiring the beneficiary of a covenant in gross to establish a legitimate interest as a prerequisite" was preferable.⁴⁴ Comment (c) on the exact same section follows this up by noting that such legitimate interest would exist in the context of a so-called conservation servitude in the event enforcement would advance the servitude's purpose.⁴⁵ It continues by observing that "[o]ther covenants in gross are more like simple contracts, and should be subject to the usual requirements for establishing the right to sue for breach of contract."⁴⁶ The latter would plainly appear to be present in an instance in which a money payment obligation has been taken-on by a covenantor-transferee of certain lands who has committed to render up a fee for specified energy related uses of the lands concerned. In further explicating

38. Susan French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225, 230 (2000).

39. It bears noting, however, that the Restatement section 7.12 does place a limit on the length of time any such money payment obligation endure. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.12 (AM. LAW. INST. 2000).

40. *See id.* § 5.2.

41. *See id.* § 5.1.

42. *Id.* § 8.1.

43. *Id.* § 8.1 cmt. a.

44. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.1 cmt. a (AM. LAW. INST. 2000).

45. *Id.* § 8.1 cmt. c.

46. *Id.* (emphasis added).

Comment (c), the Reporter's Note observes the requirement of a "legitimate interest in enforcement of the servitude is intended to provide a . . . means of preventing opportunistic use of servitude violations for extortion or other improper purposes."⁴⁷ It is beyond question that, when an original covenantee or promisee seeks enforcement of the kind of payment obligation with which we are here concerned, the idea is far from extortion or some other improper purpose. Nothing more than the honoring of a solemn contractual promise is the goal of the enforcement action. It bears calling attention to the fact that the Reporter's Note accompanying the earlier section 2.6 of the Restatement indicates the case law in the country "show[s] that [,while some authority exists to the contrary,] covenant benefits in gross are recognized and enforced in a variety of contexts."⁴⁸ In light of the fact that there is some case law in Oklahoma applying various principles articulated in the Restatement (Third) when it comes to servitudes, including a concurring opinion in a 2002 Supreme Court of Oklahoma decision, it would not seem beyond the pale to imagine that formulation of the law is being looked to for guidance in deciding how to resolve a problem such as that posed in this essay.⁴⁹

III. UNCERTAINTY OF PAYMENT AND THE RULE AGAINST PERPETUITIES

Apart from the matter of the runnability of the payment burden when it is accompanied by a benefit that is personal or in gross is the other matter of the rule against perpetuities and its affect on the payment obligation given that the obligation itself is uncertain, if ever, to occur. Again, in the context of assumed energy related uses of the subject land, the uncertainty of any payment of money would be based on a promise that, in the event the land concerned be used for some specified energy activity (e.g., the placement of oil storage tanks, solar collection arrays, wind turbines), then, and only then, would the obligation to pay be triggered. The unpredictability of whether the concerned land would ever be used for the particular specified energy related activity obligating money payment thus raises the possibility of an entity, generations removed from those originally creating the obligation, insisting on entitlement to claim its benefit. As the rule against perpetuities aims at uncertainties that vest distant in time, it would be natural to assume that any promise to pay based on the possible and eventual use of land for specified energy related activities would become ensnared within the rule's many complexities.

The rule against perpetuities is clearly designed to affect interests that vest, if ever, too distantly in time. In doing so, it removes impediments to alienability, and prevents control over wealth being exercised by those who have long since passed away. A classic statement of the court-made rule dating from the seventeenth century declares an interest not to be good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest.⁵⁰ Though deceptively simple in its statement, the rule harbors innumerable complexities that one of the rule's scholars characterized as a "technically-ridden legal nightmare" that can prove a "dangerous instrumentality in the

47. *Id.* § 8.1, rptr.'s note.

48. *Id.* § 2.6, rptr.'s note.

49. *Beattie v. State ex rel. Grand River Dam Auth.*, 41 P.3d 377 (Okla. 2002)(J. Opala, concurring); *Margerson v. Charter Oak Homeowners Ass'n*, 283 P.3d 973 (Okla. Civ. App. 2010).

50. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (1942).

hands of most members of the bar.”⁵¹

While the nature of any promise made by a transferee or conveyee of land to make money payment in the event the transferred land is used for a specified energy related activity seems subject to the rule, there are several reasons why it would not apply. The first has to do with the fact that the rule against perpetuities would only apply to interests in land,⁵² that might be described as contingent remainders or executory interests.⁵³ And, since the interest in land transferred in the context of our situation, involving specified energy related activity, is most appropriately described as a vested interest accompanied by a contractual promise that might produce revenues for some beneficiary, in the event the specified activity occurs, the situation would fall beyond the rule’s reach. The land interest transferred is neither a contingent remainder nor an executory interest. There is nothing about the transferred interest that suggests it represents, as a contingent remainder would, the balance of an estate in land that the conveyer wishes to remain away from her after less than the entire estate has been transferred away to another. There is also nothing in the transferred interest that suggests, as an executory interest would, that the conveyer wishes to transfer an estate to another upon a condition that can cause its divestment, with some follow-on interest then commencing in a third person. Instead, the transfer involved in our case concerns an estate in land that is passed to a conveyee who merely promises that, whoever then owns the lands, will pay money in the event the land conveyed be put to use by the then owner for the specified energy related activity. Again, rather than the standard interest in land upon a contingency that thereby triggers the rule against perpetuities, we have a vested interest in land, accompanied by a contractual promise to pay money if the land transferred ever be used for certain identified activity.

There are a couple of Oklahoma Supreme Court decisions that are illustrative of precisely the distinction just referenced. *Producers Oil Co. v. Gore*,⁵⁴ handed down in 1980, involved an oil and gas lease in which the lessor and so-called operator, Producers, agreed to provide a fractional shared interest in the lease to a non-operating partner, Gore. In the separate, fractional share-transferring operating agreement between Producers and Gore, the two partners provided for a right of first refusal or preemptive right that would have permitted either of the two, in the event either decided to sell their interests, to purchase that interest from the other. When a question arose regarding whether any such interest subject to the court described preemptive rights fell within the terms of the rule against perpetuities, the court took great pains to resort to language that emphasized the nature of interests within the reach of the rule, and interests falling outside its scope. Clearly, whether the preemptive right involved in the case would ever be triggered could be described as contingent and uncertain to occur, thus making it a right that might be thought within the rule’s ambit. After all, at the time of its creation and even afterwards,

51. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349, 1349 (1954).

52. On the application of the rule to personal property as well, see THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 205 (1984).

53. On the inapplicability of the rule to possibilities of reverter and rights of reentry see *Schaefer v. Apel*, 295 Ala. 277, 328 So. 2d 274 (1976); *Laurel v. Powers*, 366 So. 2d 1079 (Miss. 1979); *Cnty Sch. Bd. v. Dowell*, 190 Va. 676, 58 S.E.2d 38 (1950); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS. § 1.4 cmt. c (1983).

54. *Producers Oil Co. v. Gore*, 610 P.2d 772 (Okla. 1980).

there was absolutely no way of knowing if either partner would desire, at some future point in time, to sell its interest.⁵⁵ Yet, notwithstanding this contingency, the court went out of its way to note that not all contingent interest's come within the rule's condemnation. As the court put it, the rule "concerns rights of *property* only, and does not affect the making of *contracts*."⁵⁶ Continuing, the court noted that "[i]f Operator's and Non-Operator's rights under the preemptive provision do not create property rights but are merely contractual, the rule would not apply."⁵⁷ Having stressed this distinction, the court then invoked the fact the preemptive right could not, in any event, possibly be considered violative of the rule, because of an exception regarding preemptive rights that are found, as here, not to extend beyond the duration of the basic lease itself.

The distinction drawn by the court in *Producers Oil Co.* between property rights subject to the rule, and contract rights not subject thereto, was relied upon in that case for explaining why, in a decision rendered thirteen years earlier by the same court, it was determined that a preemptive right regarding an oil and gas lease was within the rule's reach. In the earlier case of *Melcher v. Camp*, the facts were slightly, yet quite importantly, different from those involved in *Producers*.⁵⁸ In *Melcher*, there was, again, an oil and gas lease. However, it was the fee simple owner, lessor of the land that was the subject of the lease that was involved in the legal dispute with the lessee. According to the terms of the lease, the lease rights applied only to those geologic strata above 5,500 feet in depth, with the fee owner, lessor retaining all rights to strata below that depth. Both the lessor and lessee also entered into a separate preemptive agreement whereby the fee owner, lessor agreed that if it ever desired to subject the strata below 5,500 feet in depth a lease, it would provide the lessee with the right of first refusal.⁵⁹

While much can be made of various differences between the facts of *Producers* as opposed to those in *Melcher*, the most determinative difference, and the one emphasized by the court in *Producers*, concerned the nature of the interest that was tied-up with the uncertainty or contingency that might be thought to activate the strictures of the rule against perpetuities. The contingency in *Producers* was that it was unclear when, if ever, either the non-operating or the operating partner holding fractional share interests in the lease would want to sell their respective interests.⁶⁰ In *Melcher*, the contingency was when, if ever, the fee owner, lessor would ever want to subject the strata below 5,500 feet to lease rights.⁶¹ Unquestionably, both cases involved a contingency that might make one think of the rule against perpetuities.⁶² As the court in *Producers* emphasized, however, the contingent interest could be seen as involving a mere contractual right—the separate, fractional share-transferring operating agreement between the Producers Oil Co. (the lessee/

55. It should be observed that, despite this fact, given that the contingency would have occurred during the life of the partners, the twenty-one year time period for vesting under the rule would have been nonetheless satisfied.

56. *Gore*, 610 P.2d at 774 (emphasis added).

57. *Id.*

58. *Melcher v. Camp*, 435 P.2d 107 (Okla. 1967).

59. *Id.* (providing a description of the facts).

60. *Gore*, 610 P.2d 772.

61. *Melcher*, 435 P.2d 107.

62. *Id.*; *Gore*, 610 P.2d 772.

operator) and its partner, Gore (the non-operator).⁶³ And, as the same court pointed out, the contingent interest in *Melcher* involved a property right—the separate commitment by the fee owner, lessor vesting the lessee with the preemptive right of first refusal to acquire a lease to the strata below 5,500 feet in the event the lessor were to ever desire to subject strata at such depth to oil and gas activity.⁶⁴

Closely related to the contingency in the *Producers* case is that involved in the problem with which we are here concerned. While clear that the uncertainty of whether the money payment obligation will be triggered by use of certain transferred lands for specified energy related activity, it is beyond dispute that the uncertainty is linked not to an interest in property that can be described as a contingent remainder or executory interest. Instead, the interest in property transferred by the conveyer-promisee is an interest that is plainly vested, with the conveyee-promisor taking on an adjunct payment promise that may never produce because of the contractual contingency upon which it depends.

A second reason for viewing the promise to pay of concern here as not within the scope of the rule against perpetuities has to do with the basic constructional preference given to language in legal instruments that might be thought of as tripping the rule's invalidating features. Justice Opala's supplemental opinion on rehearing in the 1987 Oklahoma Supreme Court case of *Matter of Estate of Crowl*, is particularly instructive in that regard.⁶⁵ The facts of that case involved a situation in which an individual, vendor, who subsequently died, had earlier entered into an option contract, exercisable upon the vendor's death, to sell additional acreage to a vendee-optionee. The executor of the vendor's estate then refused to honor that option, claiming, among other things, the invalidity of the option under the rule against perpetuities. Opala's opinion on rehearing points out that the option involved in the case was plainly valid under the rule. After all, by its very nature, it would not only be exercised during the lifetime of the optionee, but would be exercised at the time of the death of the vendor, optionor—let alone within twenty-one years of the optionor's death. But more significantly for present purposes, Opala makes clear that Oklahoma law has a strong constructional preference for avoiding the invalidation of grants that might otherwise be seen as violative of the limitation on perpetuities.⁶⁶ The implication of the latter is that every grant raising a question under the rule against perpetuities should, if at all possible, be construed (or reformed by the court) in a way that assures it comports with the dictates of the rule. Fundamentally in that regard, all grants containing contingencies are to be scrutinized sedulously. And, in no circumstance should a grant be found within the scope of the rule simply because of the existence of a contingency. The rule against perpetuities only affects contingent grants of property rights, and not contingent grants of contract rights. Thus, the contractual nature of a promise to pay money in the event transferred lands wind up being used for some specified energy related activity should never be enough, just because of its contingent and uncertain to occur quality, to cause the promise to pay to be subjected to the rule.

63. *Gore*, 610 P.2d 772.

64. *Melcher*, 435 P.2d at 108-09. *See also* *Trecker v. Langel*, 298 N.W.2d 289 (Iowa 1980)(not reaching the perpetuities question, but noting that if it were to apply, it would have to be determined whether the rule actually reached preemption rights that are intended to be personal).

65. *In re Crowl*, 737 P.2d 911 (Okla. 1987).

66. *Id.*

This constructional preference for construing grants containing some contingency as consistent with what the rule against perpetuities demands certainly suggests that the contingency confronted in the context of a grant of land, accompanied by a promise to pay money in the event the land is put to some specified energy related use, should, if at all possible, be seen as neither violative of the rule, nor even within its scope. As recounted in the several paragraphs above, in the absence of the constructional preference utilized in Oklahoma, there remains ample reason to believe that the promise to pay money based on the eventuation of the contingency of transferred lands being used for certain energy related activities does not even fall within the reach of what the rule is designed to cover. To reiterate, involved here is a contractual promise, not a contingent interest in property. When that reality conjoins with a constructional preference tilting against invalidation under the rule, there would appear every reason to try and read the energy related promise to pay in a manner consistent with the prescriptions the rule establishes.

Section 3.3 of the Restatement (Third) of Property: Servitudes provides yet a third reason for conceiving of the promise to pay associated with energy related activities as not within the ambit of the rule against perpetuities.⁶⁷ That section clearly states: “The rule against perpetuities does not apply to servitudes or powers to create servitudes.”⁶⁸ As discussed at length earlier in this essay, the Restatement uses the term servitudes to include all those restrictions or conditions on the use of land the common law had long characterized as either real covenants or as equitable servitudes. The promise of present concern—the payment of money in the event land transferred to the conveyee-promisor is used for particular energy related activities—falls into that category, and has been examined at length in Part II of this essay from the vantage of the rules affecting the runnability of a covenant or a servitude to successors in interest to the originally contracting parties.

In explication of the Restatement (Third’s) declaration not to apply the rule against perpetuities to servitudes, it is observed in the comments accompanying section 3.3 that evolution in the law has been occurring in the courts of many jurisdictions since the 1980s.⁶⁹ Further, the Reporter’s Notes also observe that there are numerous factual situations which suggest the wisdom of not applying the perpetuities rule to servitudes.⁷⁰ Indeed, various court decisions are in accord with that exact approach. An example closely, but not completely, related to the sort of covenant or servitude of instant concern here—a promise to pay money conditioned upon the use of lands for certain energy activities—involved a homeowners’ association assessment found not to violate the rule against perpetuities.⁷¹ While the assessment imposed on homeowners in that case was not of the contingent, conditional, or uncertain to occur nature characterizing the promise to pay in our case concerning energy related uses of land, the court involved held it did not matter that the assessment obligation extended beyond the period traditionally and under the relevant statute specified as a perpetuity as the interest in land to which the obligation attached was

67. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.3 (AM. LAW INST. 2000).

68. *Id.*

69. *Id.* § 3.3 cmt. b.

70. *Id.* § 3.3, rpt. ’s note.

71. *Kell v. Bella Vista Vill. Prop. Owners Ass’n*, 528 S.W.2d 651 (Ark. 1975).

a vested interest.⁷² In another example, an agreement to restore quarrying affected land to its original condition upon the completion of mining activity on a parcel adjacent another parcel held by the agreement's beneficiary was similarly held not subject to the rule against perpetuities.⁷³ Here, unlike in the preceding case, the court found the agreement's restoration obligation to be contingent or conditional upon the cessation of quarrying activities. It then went on and held the beneficiary of the agreement possessed an interest in land indisputably vested as of the time of the agreement's making, thus taking the agreement outside the ambit of the perpetuities rule.⁷⁴

Besides the three preceding reasons for finding the rule against perpetuities inapplicable to a promise to pay money in the event transferred land is used by the transferee for specified energy related activities, a fourth and final reason also exists. Though not aware of cases in other jurisdictions that are precisely identical with the factual situation of instant concern in this essay, there are a couple of closely similar cases in which promises to pay money have been held not affected by the rule on perpetuities. The implication of these similar cases is that, it is not wholly beyond the realm of reasonableness to consider the view that the rule does not apply to promises to pay money in the event transferred land is used for certain energy related activities as completely consonant with the rule's overall aim of targeting contingencies. Such promises to pay undoubtedly involve a contingency that is uncertain or speculative in nature. But as the rule against perpetuities is triggered only when what is concerned is a transfer of a contingent interest in land, promises to pay on a contingency involving energy related uses of land fail to implicate the rule.

Importantly, the case of *Cloud v. Ass'n of Owners, Satellite Apt. Bldg., Inc.*, a 1992 decision out of Colorado, arrives at just that conclusion.⁷⁵ There a transferee of lands promised to make payments to a transferor-promisee calculated on the basis of a percentage of the future rental amounts secured from occupants. The uncertain nature of the actual amount, if any, that would be paid by the promisor to the promisee, and the fact that the promise was not limited in its duration, was said not to be violative of rule against perpetuities. In the estimation of the court, the property interest involved in the case was vested and, therefore, outside the rule's reach.⁷⁶ Even more significant, from the standpoint of similarity to the situation of instant concern in this essay, is the 1975 case of *Kleinheider v. Phillips Pipe Line Co.*⁷⁷ There a transferee-promisor of an energy pipeline easement committed to pay additional monies to the transferor-promisee in the event the transferee-promisor used the easement for additional energy pipelines. Despite the fact the promise to pay connected to a certain additional energy related use that was uncertain to occur, it was decided that rule against perpetuities was not violated given that the easement granted was vested when originally conveyed.⁷⁸

In both *Cloud* and *Kleinheider*, there existed promises to pay money, just as in the

72. *Id.* at 760.

73. *Moody v. Bayer Constr. Co.*, 627 P.2d 1171 (Kan. Ct. App. 1981).

74. *Id.* at 278.

75. *Cloud v. Ass'n of Owners, Satellite Apt. Bldg., Inc.*, 857 P.2d 435 (Colo. 1992).

76. *Id.* at 438.

77. *Kleinheider v. Phillips Pine Line Co.*, 528 F.2d 837 (8th Cir. 1975).

78. *Id.* at 844.

instant situation with which we have here been concerned.⁷⁹ Further, they both also involved promises to pay that had their obligation triggered by some event that was contingent or uncertain to occur. Nonetheless, both cases found that, in spite of the existence of some contingency, nothing about the situations resulted in a violation of the rule against perpetuities.⁸⁰ The rule clearly applies in the context of contingencies. Yet it only applies whenever the nature of a contingency is one that involves a property interest; not when it involves a mere contractual interest that is contingent. *Cloud* and *Kleinheider* both involved property interests considered vested, with the only contingencies there present involving mere contractual promises regarding the payment of money on certain conditions. In that respect, both cases are perfectly consistent with what has been suggested regarding a conveyee-promisor's promise to pay money in the event transferred land is used for specified energy related activity.⁸¹ There can be no question that a promise of that sort is based on a contingency. What is needed to activate the rule against perpetuities, however, is not simply a contingency, but a contingent property interest. It is not enough that a contingent contractual commitment be all that is involved. The rule is only triggered whenever it is a property interest that is based upon a contingency.

IV. CONCLUSION

Taken together, the collectivity of the analysis reflected in the current essay, and that presented in this journal's earlier volume,⁸² make clear that promises to pay money, if transferred land is used for specified energy-related activity, are enforceable against successors-in-interest to the land bearing that particular burden. The rule against perpetuities certainly seems to provide no obstacle to enforcement. After all, it aims at transfers of contingent interests in property, not at transfers of vested interests accompanied by ancillary contractual commitments of a contingent sort. Exactly the same thing is capable of being said about the fact the promise of payment involves an *in gross* or personal benefit. Clearly, ample law appears to support the running of such as a servitude, even though an appurtenant burden gives rise to a benefit that happens not to touch and concern lands.

Increasing demands for energy may, in the future, require the utilization of greater amounts of land for energy related activities. Many of these activities could vary considerably from traditional extractive efforts in which exploiters of energy resources have historically been engaged. They could involve everything from the construction of oil storage tanks, to the erection of wind turbines or solar arrays. Owners of land of interest to such exploitative enterprises may be willing to transfer land to which they have title, but only on the condition that the occurrence of certain specified energy related activities result in the making of money payments to the original transferor-promisee, or another to whom an interest in payments has been assigned or conveyed. There appears to exist nothing about such payment promises that would frustrate their enforcement. Much in the mysteries of the law of real covenants and equitable servitudes would support that position.⁸³ And, as

79. *Id.*; *Cloud*, 857 P.2d at 435.

80. *Kleinheider*, 528 F.2d 837; *Cloud*, 857 P.2d 435.

81. *Kleinheider*, 528 F.2d 837; *Cloud*, 857 P.2d 435.

82. Zedalis, *supra* note 1.

83. *Id.*

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indicated in the preceding pages, neither the basic notion in property law that the *in gross* or personal nature of a benefit can affect the runnability of an otherwise appurtenant burden, nor the rule against perpetuities that targets contingencies, would seem inconsistent with that view. Especially would that appear the case under Oklahoma law, and when the payment burden is seen from the perspective of the law of servitudes.