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PROPERTY

Acquisition and Loss of Property: Allow Testamentary and Inter Vivos Alienability of All Future Interests

CODE SECTIONS:	O.C.G.A. §§ 44-5-40 (amended), 44-6-63 (repealed)
BILL NUMBER:	HB 1420
ACT NUMBER:	819
SUMMARY:	The Act broadens the language of the existing Code section to permit testamentary and <i>inter vivos</i> transfers of all future interests.
EFFECTIVE DATE:	March 25, 1994

History

Previously, Code section 44-5-40 allowed future interests to be conveyed by deed¹ if it operated to transfer the title immediately.² On its face, this meant that an *inter vivos* transfer could occur so long as there was no contingency as to the proper takers under the deed.³ Under this interpretation, a person could convey by deed a possibility of reverter, a reversion, a right of entry, or a vested remainder.⁴ There was confusion, however, as to whether the former Code section allowed a transfer of a contingent remainder when the remainder-person was ascertained at time of transfer even if there was an unmet contingency as to the happening of some event.⁵ There was also confusion whether it allowed a transfer of a contingent remainder when the remainder-person was unascertained at the time of the transfer.⁶ Under these circumstances, title, but not possession, could transfer "immediately."⁷

Part of this confusion was created because Code section 44-6-63, which related to the interests of heirs of a remainder-person, treated the interests of such heirs differently depending on whether the interest resulted from a contingency as to a person or from a contingency as to

1. "By deed" refers to transfers made during the grantor's lifetime (i.e., *inter vivos*); the Code section did not apply to interests passing by will or intestacy.

2. O.C.G.A. § 44-5-40 (1991). The statute provided: "A future interest or estate may be conveyed by deed if it operates to transfer the title immediately; and, if not, the instrument will be testamentary and revocable." *Id.*

3. Telephone Interview with Verner F. Chaffin, Callaway Professor of Law Emeritus, The University of Georgia School of Law (Mar. 31, 1994) [hereinafter Chaffin Interview].

4. *Id.*

5. See O.C.G.A. § 44-5-40 (1991) (defining vested and contingent remainders).

6. Chaffin Interview, *supra* note 3.

7. *Id.*

an event.⁸ Courts have applied the distinction set forth in Code section 44-6-63 in interpreting *inter vivos* transfers of contingent remainders⁹ under Code section 44-5-40, even though Code section 44-6-63 applied to testamentary transfers, producing confusing results.¹⁰

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Under modern law, contingent remainders and executory interests are considered present interests in which the right to possession is postponed and uncertain.¹¹ The bill as introduced in the House changed the statute to provide for the *inter vivos* alienability of all future interests, including vested and contingent remainders and executory interests.¹² The change was limited to *inter vivos* transfers, however, and did not address devisability or descendibility of future interests.¹³

As a result, a Senate floor substitute was proposed¹⁴ which expanded Code section 44-5-40 to make all future interests or estates fully alienable, whether by will, intestacy, or deed.¹⁵ The substitute simplified the language of the statute to avoid confusion present in Code section 44-6-63 regarding contingencies as to events and people.¹⁶ This Senate substitute adopted the language of New York's statute which reads: "Future interests are descendible, devisable, and alienable, in the same manner as estates in possession."¹⁷

The Act repealed Code section 44-6-63, finally eliminating the confusing distinction between the types of contingencies that had

8. *Id.*; see O.C.G.A. § 44-6-63(b)-(c) (1991).

9. See, e.g., *McCoy v. Olive*, 148 S.E. 327 (Ga. 1929) (applying CIV. CODE 1910, § 3677 to an *inter vivos* transfer). CIV. CODE 1910, § 3677 was a predecessor to O.C.G.A. § 44-6-63. See also *Britt v. Fincher*, 44 S.E.2d 372 (Ga. 1947) (applying GA. CODE ANN. § 85-704 to an *inter vivos* transfer). For the current version of GA. CODE ANN. § 85-704, see GA. CODE ANN. 85-704 (Harrison 1992) or O.C.G.A. § 44-6-63 (1991).

10. Chaffin Interview, *supra* note 3; see *supra* note 9.

11. Letter from Verner F. Chaffin, Callaway Professor of Law Emeritus, The University of Georgia School of Law, to Thomas E. Jones, Jr., Chairperson of the Fiduciary Section of the State Bar of Georgia (Jan. 5, 1994) (available in Georgia State University College of Law Library) [hereinafter Chaffin Letter].

12. HB 1420, as introduced, 1994 Ga. Gen. Assem.

13. *Id.*

14. Telephone Interview with Sen. Michael Egan, Senate District No. 40 (Mar. 30, 1994).

15. HB 1420 (SFS) 1994 Ga. Gen. Assem. This idea was originally suggested in Chaffin Letter, *supra* note 11.

16. *Id.*

17. N.Y. Est. Powers & Trust Law § 6-5.1 (McKinney 1992); see Chaffin Letter, *supra* note 11.

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remained in the code for one hundred thirty years and bringing Georgia in line with modern trends in property law across the nation.¹⁸

*Cynthia F. Zebrowitz*¹⁹

18. Chaffin Interview, *supra* note 3.

19. The author wishes to thank Beneta Coburn, Instructional Resources Coordinator at Georgia State University's Pullen Library and third year law student, for her help in interpreting this legislation.