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10TH ANNUAL WILLS AND ESTATES CONFERENCE

THURSDAY 5 SEPTEMBER 2024

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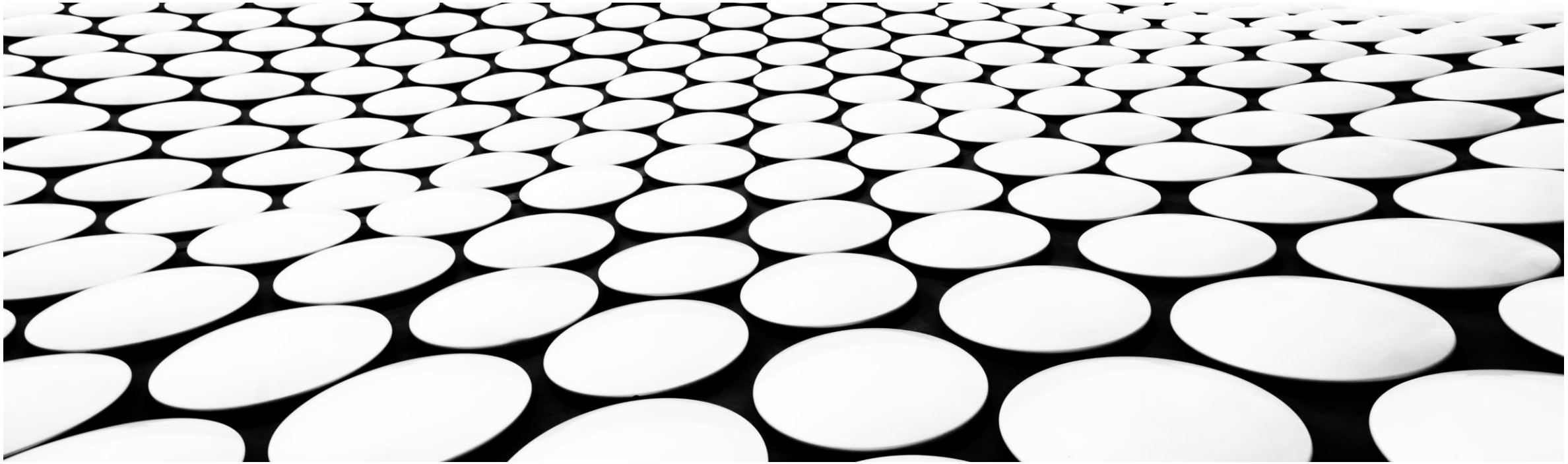
GOOD WILL DRAFTING AND THE 'RULE' IN *SAUNDERS v VAUTIER*

BENEFICIARIES BUSTING TRUSTS AND WHAT CAN BE DONE TO PREVENT IT



SAUNDERS v VAUTIER (1841) EWHC CH J82

- Vautier is the nephew.
- £ 2,000 of East India Company Stock (estimated at AUD$550,000 today).
- Will says that Vautier receives the capital at 25
- Until 25, Vautier received the income
- Vautier turned 21 (age of majority).
- Vautier demands the gift.

THE 'RULE'

- Vautier was successful
- Lord Langdale MR held:

  > I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge

- The 'Rule' has been expressly adopted and re-stated in *CPT Custodian Pty Ltd v Commissioner of State Revenue Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd* [2005] HCA 53

  > [47] There is a further consideration. The facts of the present cases do not, in any event, answer the modern formulation of the rule in Saunders v Vautier, stated as follows in Thomas on Powers:
  >
  > > "Under the rule in Saunders v Vautier, an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation."

THE 'RULE'

- Elements:
  - a trust;
  - adult beneficiaries (sui juris) and consent;
  - interest is in income and capital;
  - interest is vested and not contingent.
- Rule can apply unexpectedly.
- The rule expressly undermines testamentary intent.

VESTED OR CONTINGENT?

- Vested if beneficial interest has passed.
- Can be vested if enjoyment is merely delayed.
- Can be helpful to ask the question ‘What happens if the beneficiary dies?’
- Contingent if attaining an age is a condition.
- Need clear evidence that it is contingent.
- Even if contingent, contingent beneficiaries can consent.
- Courts will favour early vesting.

ADOPTION AND APPLICATION OF THE RULE IN AUSTRALIA

- The rule has been explicitly adopted and applied in Australia: *CPT Custodian Pty Ltd v Commissioner of State Revenue Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd* [2005] HCA 53.

  [43] Saunders v Vautier is a case which has given its name to a "rule" not explicitly formulated in the case itself, either by Lord Langdale MR (at first instance) or by Lord Cottenham LC (on appeal). In Anglo-Australian law the rule has been seen to embody a "consent principle" recently identified by Mummery LJ in Goulding v James as follows:

  > "The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument."

ADOPTION AND APPLICATION OF THE RULE IN AUSTRALIA

- While the rule has broad application in Australia, there are limits.
- *Beck v Henly* [2014] NSWCA 201 sets out circumstances where the rules does not apply. These are:
  - Where the interest is in real property; and
  - Where there are ‘special circumstances’ or ‘good grounds to the contrary’.

ADOPTION AND APPLICATION OF THE RULE IN AUSTRALIA

- The policy reason as to the application to real property was explained in the first-instance decision in Henley, being *Henley; In the Estate of Weinstock and Leo Weinstock* [2013] NSWSC 975:

> [46] The rationale for this is the effect of the division on the value of the whole asset. Cozens-Hardy MR observed in *In Re Marshall* (1914) 1 Ch 192, at 199 that "it is a matter of notoriety, of which the Court will take judicial notice, that an undivided share of real estate never fetches quite its proper proportion of the proceeds of sale of the entire estate", which Sugerman J explained in *Manfred v Maddrell* (1950) 51 SR (NSW) 95 ("Mamfred v Maddrell")(at 97), will thereby have the effect of causing prejudice to the other beneficiaries.

ADOPTION AND APPLICATION OF THE RULE IN AUSTRALIA

- Special circumstances have been deliberately less well-defined. This allows the courts to respond to the circumstances of each case that comes before it.
- Generally, you are looking for property that is not easily able to be equally or easily divided among beneficiaries. For example, a valuable piece of art or racehorses.
- Again, in *Henley; In the Estate of Weinstock and Leo Weinstock* [2013] NSWSC 975:

> [50] The indefinite scope of the necessary "special circumstances" (or "good ground to the contrary") has attracted judicial comment more than once. *In Re Sandemans Will Trust* (at 372) Clauson J commented "the Court has I think been rather careful never to define in precise terms exactly what would be good ground to the contrary". It is difficult to disagree with Clauson J's comment about a rule of such carefully worded imprecision: a comment which, in *Lloyds Bank v Duker* [1987] 1 WLR 1324, at 1330, Judge Mowbray QC aptly characterised as "ruefully" made.

JUSTIFICATION FOR THE RULE

- Undermines testamentary intentions – why?
- It has been said that the principle upon which the rule is based is that any restriction on the enjoyment by a beneficiary who is *sui juris* of a vested interest is inconsistent with the nature of that interest and must be disregarded. Thus understood, the principle often will involve the denial of the intentions of the settlor or testator.

  – Jacobs' Law of Trusts in Australia at [2314].
- Conflict between nature of interest and attempt to delay.
- Also, delay is inconvenient, impractical.
- The opposite view has been taken in the United States.

KRSTIC v STATE TRUSTEES LTD [2012] VSC 344

- Deceased died in 2007 leaving two sons.
- Mark was 24 and Nicholas was 20 at hearing.
- Will contained gifts to Mark and Nick as follows:

  I GIVE the … sum of TWENTY THOUSAND DOLLARS ($20,000.00) …to each of them my sons MARK KRSTIC and NICHOLAS KRSTIC as survive me and attain the age of 21 years severally and absolutely.

  I GIVE the residue of my estate to such of them my said sons MARK KRSTIC and NICHOLAS KRSTIC as survive me and attain the age of forty (40) years and thirty-six (36) years respectively absolutely and if both then equally PROVIDED HOWEVER if either of my said sons should predecease me or fail to attain a vested interest leaving a child or children who survive me and attain the age of 35 years then such child or children will take and if more than one then equally the share which his, her or their father would have taken had he attained a vested interest.

- Both survived deceased by 30 days.
- Residue was worth $450,566.00.
- Mark and Nick applied to court for orders.

KRSTIC v STATE TRUSTEES LTD [2012] VSC 344

Counsel for Mark and Nick argued:

- No grandchildren survived the deceased;
- The gift over could never take effect;
- If Mark or Nick died before 21 ($20k) or 40/36 (residue), the gift would form part of their estate;
- If both died, intestacy would give the same result;
- Mark and Nick are the only people who will ever get the benefit from the estate.

KRSTIC v STATE TRUSTEES LTD [2012] VSC 344

- McMillan J characterised the rule as follows:

  [15] The rule in *Saunders v Vautier* operates to override a testator's intention to prevent the beneficiaries from taking their shares until reaching an age beyond majority. **The rule has no operation unless all the persons who have any present or contingent interest in the property are ascertained, *sui juris* and consent.** In those circumstances, the beneficiaries may put an end to the trust by directing the trustee to transfer the interest in the estate to themselves, notwithstanding any direction to the contrary in the trust instrument.

- McMillan J held:

  [36] … Because Mark and Nicholas are the only persons who between them have an interest in the residuary estate, are sui juris and consent, in my view, they can require the transfer of the residuary estate and any accumulations to themselves by reason of the application of the rule in Saunders v Vautier.

KRSTIC v STATE TRUSTEES LTD [2012] VSC 344

- The critical elements of this decision are:
  - Mark and Nick were the only people who would ever benefit
  - Both consented.
  - Both were sui juris.

- What would have happened if the gift over was effective and children were possible?

ARNOTT v KISS [2014] NSWSC 1385

- Gerdia Lydia Kiss died 16 Feb 2013 (90)
- Survived by:
  - Andrew Mark Kiss (son)
  - grandchildren (26, 24, 22, 19)
- Framed as an application for judicial advice
- Continued as construction

ARNOTT v KISS [2014] NSWSC 1385

4. My Trustees shall hold the rest and residue of my estate… as follows:-

   …to divide the rest and residue of my estate equally between my grandchildren, DANIEL KISS, KARRYN KISS, BENJAMIN KISS and BRENTON KISS who survive me and attain the age of 45 years.

   By way of clarification each grandchild shall take this gift as they reach their 45th birthday and need not wait for the remaining grandchildren to attain their 45th birthday.

ARNOTT v KISS [2014] NSWSC 1385

Plaintiffs argued it had vested because:

- there is no gift over clause in the Will;
- the court will normally construe a Will so as to avoid an intestacy;
- the income was not disposed of in the Will meaning it passes with the corpus;
- there is a power of advancement.

ARNOTT v KISS [2014] NSWSC 1385

Defendants argued it not vested because:

- the gift in clause 4 was a class gift and no interest passes until a member of the class can be identified;
- it was a condition of being a member of the class that the beneficiary have attained the age of 45 years;
- that the gift was contingent was reinforced by the words “by way of clarification”.

ARNOTT v KISS [2014] NSWSC 1385

Justice Hallen held:

- [65] … The gift is not to the named grandchildren, but the named grandchildren who shall attain 45 years of age… therefore, there is no person in whom the residuary estate has vested.
- [66] …the residuary beneficiaries presently are unable to terminate the trust in the Will and the Plaintiffs are not entitled to do so at their behest.

ARNOTT v KISS [2014] NSWSC 1385

The critical elements of this decision are:

- Intestacy was possible and would benefit son;
- No member of class could yet be identified;
- Expression of contingency clear

- Presumption in favour of early vesting was referred to at [41]-[42]

PERPETUAL TRUSTEE COMPANY (CANBERRA) LIMITED v R. RASKER; V. RASKER AND NORTH ROCKS DEAF AND BLIND SOCIETY FOR CHILDREN [1986] ACTSC 97

- Betty Jean Lee died.
- Survived by son, Rodney.
- Betty wanted to rule from the grave.

  4. I DIRECT that my residence "Rosehill" be retained for a period of ten (10) years from my death…

  6. AT THE EXPIRATION OF THE PERIOD OF TEN (10) YEARS my residence shall pass to my said son absolutely provided he is living at that date or in the event of him not surviving such period as to one half share to his wife VIKKI RASKER … and the other one half share to the children of the marriage … living at that date in equal shares as tenants in common and if there are no children of the said marriage such one half share shall pass to VIKKI RASKER ….

  7. AS TO THE REST AND RESIDUE OF MY ESTATE my son provided he survives me for thirty (30) days shall be entitled to the net income therefrom for a period of ten (10) years at which time the capital shall pass to him and in the event of him failing to survive either period the provisions as to the beneficiaries contained in clause 6 hereof (in the event of the death of my said son) shall apply.

  8. IN THE EVENT OF THE FAILURE OF ANY OF THE FOREGOING PROVISIONS of my said Will as to beneficiaries that part of my estate which so fails shall pass to the North Rocks Deaf & Blind Society for Children…

- Rodney wanted to bust the trust.

PERPETUAL TRUSTEE COMPANY (CANBERRA) LIMITED v R. RASKER; V. RASKER AND NORTH ROCKS DEAF AND BLIND SOCIETY FOR CHILDREN [1986] ACTSC 97

Miles J held:

- [I]t appears to me that the better view is that the rule may be avoided either by the creation of an intervening discretionary trust or by provision for gift over in the event of a contingency taking place. Such contingency may include the death of the donee or legatee.
- If Clause 4 of the will stood on its own, I should have little hesitation in ruling that the beneficiary was immediately entitled to the whole of the testator's interest in the residence "Rosehill". Similarly, if Clause 7 made no provision for the residue to pass to the surviving spouse and surviving children (as yet unborn) if any, in the event of the son failing to survive the period of ten years, the son would be immediately entitled to the residue.
- I think that the will as a whole confers a contingent interest on the charitable organization named in Clause 8.

In obiter, his Honour discussed unborn children.

- There is no evidence as to the age of the second defendant but apparently it is uncontested that she is not yet beyond child-bearing age. Whilst there is no power in the Court to appoint someone to represent a class consisting solely of unborn children (Re Park Q.W.N. 80), I do not think that their contingent interests can be disregarded.

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FALKENHAGEN v PERPETUAL TRUSTEE COMPANY LIMITED [2017] NSWSC 580

- Application brought to end a trust created by deed dated 1 April 1969.
- The trust provided accommodation to the plaintiff by way of a life estate and other rights.
- The Plaintiff was 77 when the proceedings were commenced. His wife was 72. They have no children.
- Two options were put before the court – the first was to end the trust under the rule in Saunders v Vautier and the second was to make a partial administration order under the NSW UCPRs.

FALKENHAGEN v PERPETUAL TRUSTEE COMPANY LIMITED [2017] NSWSC 580

[5] The plaintiff has, on oath, disclaimed any intention to have or to adopt a child, or ever to remarry. Any possibility that the plaintiff will ever, in fact, have a child or remarry is remote.

[6] All persons presently known to have interest in the trust, vested or contingent, seek to have the trust terminated and all trust property conveyed to the plaintiff absolutely, for his own use and benefit.

[7] Any possibility that another beneficiary will materialise, from any quarter, is so remote, as a matter of practical certainty, that it can be disregarded.

[8] The defendant, as trustee of the trust, does not stand in the way of the beneficiaries; provided that:

(a) their objective can be achieved in a manner consistent with principle; and

(b) it is protected against any prospective liability should another beneficiary materialise against all expectation.

Lindsay J ultimately held that the rule in *Saunders v Vautier* could not apply as a future wife or children may come into being, even if the prospect is remote.

BATTEN v SALIER [2023] NSWSC 378

- This represented the culmination of several pieces of litigation about the validity of the informal will ([2013] NSWSC 1895), a construction suit ([2015] NSWSC 853), and the vesting application ([2023] NSWSC 378).
- The words in the will read:

  > After my death the rent from 19 must be put aside for him at 18 years [of age] to take what is in the bank both for his studies and whatever else he needs. Roby Angius will look after Shon's interest at 25 years [of age] the Flat will be his

- Lindsay J set out the result of the construction suit at [5]:

  > [5] In reasons for judgment, on a construction suit, published on 1 July 2015 as Gordon Salier v Robert Angius [2015] NSWSC 853, Ball J determined (by orders set forth in paragraph [94] (7)-(8), supported by reasons articulated at paragraphs [76]-[83]) the nature of the plaintiff's gift in terms to the following effect:
  >
  > > "The property at 19/8 Allen Street, Waterloo is to be held by the first defendant on trust for the fourth defendant until the fourth defendant turns 25, at which time the property is to be transferred to him. The income derived from the property is to be accumulated until the fourth defendant turns 18, at which time amount accumulated and future income is to be paid to the fourth defendant as and when it is earned."

BATTEN v SALIER [2023] NSWSC 378

It seems that by this stage, no one was going to argue the point, so it was for the Plaintiff to simply make his case. Lindsay J continued:

[7] Both the first defendant and the second defendant have filed submitting appearances in these proceedings. The plaintiff's claims for relief are not opposed.

[8] In support of the plaintiff's primary claim for relief the following features of the case are noted:

1. The plaintiff ceased to be under any form of disability when, at the age of 18 years, he attained his majority.

2. Under the deceased's will the plaintiff, having attained his majority, is absolutely entitled to all income, including accrued income, on the property.

3. Although the will is expressed to defer the plaintiff's full enjoyment of the property until he attains the age of 25 years, his entitlement to the property is not conditional upon his attainment of that age.

4. The party who would stand to benefit from a finding that the plaintiff's entitlement to the property is conditional upon his attaining the age of 25 years (the second defendant) does not advance such a case, but rather submits to the orders of the Court.

..

[10] In my opinion, the plaintiff is entitled to relief in the nature of that sought in his primary claim for relief because, upon a proper construction of the deceased's will, he has an absolute vested and indefeasible interest in the capital and income of the trust property held for his benefit.

REFLECTIONS ON THE CASES

- Deep consideration of who is entitled.
- Need to consider testate and intestate succession.
- Cannot ignore unborn beneficiaries.
- Effective gifts over can prevent application of the rule.
- There is a presumption in favour of early vesting.
- Rule is intended to undermine intention.
- Facts of each case are critical.

PRACTICAL IMPLICATIONS

- A vested gift belongs to minor's estate even if held on trust. This may give rise to a statutory will application.
- If minor dies while a child, it forms part of their estate.
- Intestate distributions are seldom appropriate.

EXAMPLE - JACK AND JILL

- Jack and Jill have a child, Annie (8).
- Jack and Jill are separated. Annie has nothing to do with Jack.
- Jill's sister Sally helps out with Annie's care.
- Jill dies.
- Annie and Sally survive by 30 days.
- Residue is $800,000.
- Will reads:

  > I give the residue of my estate to my dear daughter Annie Smith when she attains the age of 25 provided she survives me but if she dies before me then to give it to my sister Sally Smith.

- No interpretive clauses

EXAMPLE - JACK AND JILL

- Survival gives benefit
- Enjoyment merely delayed
- No contingent beneficiaries (Annie survived)
- Intestate beneficiary – Annie
- If Annie died, it would form part of her estate.
- Only intestate beneficiary is estranged father Jack

EXAMPLE - JACK AND JILL

- Annie can bust the trust at 18, but more importantly she needs a will.
- Annie can't make a will (Wills Act 1969 s.8)
- Someone can apply for a statutory will (Wills Act 1969, Part 3A) or apply for leave to make a will (Wills Act 1969, s.8A).

FURTHER EXAMPLE – A LARGER FAMILY

- Agnes Louise Gregory died leaving two sons aged 49 and 46. One son has two daughters, Mary (22) and Madeleine (17).
- The Will provides:

  (ii) to hold the balance remaining on the following Trusts:

  (a) my son DANIEL GREGORY, my son FREDERICK GREGORY, my granddaughter MARY LOUISE GREGORY and my granddaughter MADELEINE GRACE GREGORY who survive me and reach the age of twenty-five (25) years in equal shares. Should any of the beneficiaries predeceased their share is to be equally divided between the surviving beneficiaries.

- There are no backup gifts of residue. There are no substitutional provisions. There is a power of advancement:

  (b) Apply for the maintenance, education, advancement or benefit of a beneficiary the whole or any part of the capital or income of that share of my estate to which that beneficiary is entitled or may in the future be entitled and the receipt of the payee is an absolute discharge;

- The whole of the family does not want the bother with the trusts for Mary and Madeleine.
- Does the rule apply? If not, what would need to change for it to apply?

PRACTICE TIPS

Ask yourself:

- Is the same person or class of persons entitled to the capital and income?
- Is the gift vested or contingent?
- If it is contingent, what are the contingencies?
- If the gift appears to be vested, are there other words in the will which could be said to express a contrary intention?
- Who would benefit on intestacy?

QUESTIONS? COMMENTS?

THANK YOU FOR YOUR TIME TODAY

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