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## A Modern Guide to Perpetuities

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The entry under "labyrinth" in *Webster's New International Dictionary* reads, in part:

LABYRINTH: a structure full of intricate passageways that make it difficult to find the way from the interior to the entrance or from the entrance to the center <the ~ constructed by Daedalus for Minos, king of Crete, in which the Minotaur was confined>.<sup>1</sup>

The mythical labyrinth of Daedalus was, according to legend, so artfully constructed that no person enclosed in it could find a way out unassisted. The Minotaur, a monster half man and half bull, roamed among its corridors, surprising victims, who were Athenian youths and maidens sent to Crete in tribute and imprisoned in the labyrinth. When the great Athenian hero Theseus was sent to Crete as part of the tribute, Ariadne, the daughter of the King of Crete, fell in love with him and gave Theseus a ball of golden thread to enable him to escape. Fastening one end of the thread to the door of the labyrinth, Theseus unrolled the ball as he moved along the twisting paths of the maze until he found and killed the Minotaur. He then followed the thread back to the entrance to make good his escape.

The Rule against Perpetuities has always seemed to be a modern labyrinth in need of a golden thread. To the student who first encounters it, the Rule appears terribly hard to understand. No matter how diligently studied, the way to solve perpetuities problems remains elusive: One minute you have it, the next minute you don't. Students are usually exhorted to keep trying—"soon you will see the light." They keep try-

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1. WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1981).

ing, but few see the light quickly, and some, groping through the intricate passages of the Rule, never do.

To a person approaching the Rule against Perpetuities for the first time, the Rule appears incomprehensible because he cannot see clearly how perpetuities problems are solved. Courts and commentators speak of "the perpetuities period" and "the measuring lives" as if these terms were perfectly understandable. In fact, these terms are ambiguous and tend to obscure the thought process used in solving perpetuities problems. The key to understanding the Rule lies in seeing how the perpetuities period applicable to the particular interest in question is determined and how the validating life can (or cannot) be found. The Rule may not be easy to understand, but for the student who grasps its internal logic, the Rule is far more accessible than it may initially appear. This logic provides a sure guide in and out of the labyrinth.<sup>2</sup>

## I

### THE BASIC THOUGHT PROCESS INVOLVED

#### A. Introduction

##### 1. The Rule and Its Policies

We start with Gray's classic statement of the Rule: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."<sup>3</sup> Although Gray's one sentence must be qualified in several ways, because of its brevity it is the most useful working description of the Rule.

The fundamental policy assumption of the Rule against Perpetuities is that vested interests are not objectionable, but contingent interests are. The Rule therefore limits the time during which property can be made subject to contingent interests to "lives in being plus twenty-one years."

The assumption that only *contingent* future interests are objectionable is questionable. The Rule has three basic purposes: (1) to limit "dead hand" control over the property, which prevents the present generation from using the property as it sees fit; (2) to keep property marketable and available for productive development in accordance with market

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2. The most widely read summary of the Rule against Perpetuities is, of course, Professor Leach's *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938), updated in Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965). To some extent, this *Guide* covers the same ground as the *Nutshell*, but there are substantial differences. Leach does not deal with how to determine the perpetuities period applicable to the particular interest nor with how to find the measuring or validating life, which is the key to understanding the Rule. Nor does the *Nutshell* contain much exposition of the wait-and-see and *cypres* doctrines, which, developed largely after the *Nutshell* and its update were written, are now very important aspects of the Rule in many jurisdictions.

3. J. GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (4th ed. 1942).

demands; and (3) to curb trusts, which can protect wealthy beneficiaries from bankruptcies and creditors, decrease the amount of risk capital available for economic development, and after a period of time and change in circumstances, tie up the family in disadvantageous and undesirable arrangements.<sup>4</sup>

Whenever future interests, vested or contingent, exist, these three objectives are compromised. These objectives are fully realized only when a person owns an absolute fee simple free of trust. Hence, it is arguable that the Rule against Perpetuities should prohibit all future interests, and not merely contingent interests, that exist beyond the perpetuities period.<sup>5</sup> But history has settled the question differently. The Rule prohibits only those interests that may remain contingent beyond the perpetuities period. Although the rule is thus not finely tuned for carrying out the policies for which it was designed, it does, by and large, effectively prevent tying up property for an inordinate length of time.

All legal and equitable interests in property created in *transferees* are subject to the Rule against Perpetuities. Hence all remainders and executory interests come within the ambit of the Rule. Future interests retained by the *transferor*—reversions, possibilities of reverter, and rights of entry—are not subject to the Rule against Perpetuities.<sup>6</sup>

## 2. *Why Lives in Being are Used to Measure the Period*

Although no one can say for sure what was in the minds of English judges when they fixed on “lives in being” as the appropriate perpetuities period, history does suggest a reason. At the time of the formulation of the Rule against Perpetuities, heads of families—the fathers—were much concerned about securing the family land, perhaps acquired only a couple of generations earlier, from incompetent sons. In the *Duke of Norfolk's Case*,<sup>7</sup> which originated the Rule against Perpetuities, the Earl of Arundel and his lawyer, Sir Orlando Bridgman, created trust indentures to protect the family from the consequences of the insanity of the Earl's eldest son. Lord Chancellor Nottingham recognized this concern as legitimate, and he and his successor judges developed an appropriate

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4. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS), Pt. 1, Introductory Note (1981); F. LAWSON & B. RUDDEN, *THE LAW OF PROPERTY* 185-86 (2d ed. 1982); L. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 36-60 (1955); Ogus, *The Trust as Governance Structure*, 36 U. TORONTO L.J. 186, 214-20 (1986).

5. See Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683, 887 (1958).

6. The exemption of possibilities of reverter and rights of entry is hard to justify because these interests can tie up land for an unconscionable amount of time, potentially forever. See 6 AMERICAN LAW OF PROPERTY § 24.62, at 153-58 (A. Casner ed. 1952); *infra* text accompanying notes 133-37.

7. 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

period during which the father's judgment could prevail.<sup>8</sup> The father could realistically and perhaps wisely assess the capabilities of *living* members of his family, and so, with respect to them, the father's informed judgment, solemnly inscribed in an instrument, was given effect. But the head of the family could know nothing of unborn persons. Hence, the father was permitted control only so long as his judgment was informed with an understanding of the capabilities and needs of persons alive when the judgment was made. This seems the most plausible reason for selecting "lives in being" as the perpetuities period.

Professor Leach observed that the balance struck by the courts permitted "a man of property . . . [to] provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority."<sup>9</sup> There was no need, he thought, to add to "lives in being" a twenty-one-year period in gross instead of an actual minority, or to permit wholly extraneous lives (such as "a dozen healthy babies selected at random") to be included among the "lives in being."<sup>10</sup> Nonetheless, given the historical tendency of property law to forget the original reasons for its rules and to reduce principles to logic, it was perhaps inevitable that the Rule against Perpetuities would become firmly established in the nineteenth century as a purely logical theorem.<sup>11</sup>

### 3. *The Rule Is a Rule of Proof*

The essential thing to grasp about the Rule against Perpetuities is that *it is a rule of logical proof*. The donee of an interest must prove that his interest will vest upon creation or vest or fail thereafter within the applicable perpetuities period. If there is any possibility that the interest will remain contingent after the perpetuities period expires, the interest is void.

The perpetuities period for a particular interest begins at creation of the interest and continues until twenty-one years after the death of persons alive at the creation of the interest who can affect vesting of the interest. If the interest will not necessarily vest or fail within this period, it is void at the outset. *Illustration 1* shows you how to make the necessary proof that an interest will vest or fail within this period.

*Illustration 1.* O transfers a fund in trust to pay the income to A for life, then to A's children for their lives, then to pay the principal to B. A's life estate is vested in possession *upon creation*. The remainder to A's children for their lives will vest in possession or, if there are no children, fail

8. See Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977).

9. 6 AMERICAN LAW OF PROPERTY, *supra* note 6, at § 24.16.

10. *Id.*

11. *Thellusson v. Woodford*, 11 Ves. Jr. 112, 32 Eng. Rep. 1030 (H.L. 1805), is the watershed case that firmed up the Rule into rigorous theory.

upon *A's* death. *B's* remainder is vested in interest upon creation and valid under the Rule.<sup>12</sup> Thus all interests created by the transfer are valid.

As *Illustration 1* shows, the crucial inquiry under the Rule is: When will the interest vest? An interest satisfies the Rule if it will necessarily vest, if at all, either in possession or in interest when it is created or thereafter within the perpetuities period. Observe that, in *Illustration 1*, *B's* remainder is valid because it vests in interest upon creation. It is valid despite the fact that it may vest in possession at the death of *A's* children, which could be well beyond the relevant lives in being plus twenty-one years if *A* has children born after the transfer.

Observe also that *Illustration 1* contains a trust that may endure for the lives of *A's* children born after the date of the transfer. The trust thus possibly may last longer than lives in being at the date of the transfer plus twenty-one years. Nonetheless, the trust is not void. The Rule against Perpetuities does not directly limit trust duration. It is concerned only with the time when interests vest.<sup>13</sup> In *Illustration 1*, all interests in the trust either are presently vested or will vest, if at all, within the period allotted by the Rule. Therefore, the trust is valid in its entirety. If an interest in trust violates the Rule, only to that extent is a trust void.

Here are other illustrations of interests that can be proven valid because they will vest, or fail, within the perpetuities period:

*Illustration 2.* *T* devises Blackacre to *T's* descendants living twenty-one years after *T's* death. The interest in *T's* descendants will vest *twenty-one years after T's death*, or fail before that time if *T's* descendants all die within twenty-one years. Therefore, the gift is valid. If the devise were to *T's* descendants living twenty-two years after *T's* death, it would be void. *T's* present descendants might all die in a common disaster eleven months after *T*, leaving alive a month-old grandchild of *T*. The gift might vest in that grandchild twenty-one years and one month after all the relevant lives in being at *T's* death expire. This would be too remote.

*Illustration 3.* *O*, a teacher, declares a trust of \$100 for the first student in *O's* current wills class to be sworn in as a judge. The gift will vest or fail within the *lives of the students* in the class. The condition precedent will necessarily be met, if it is ever met, before the last surviving student dies.

*Illustration 4.* *O* transfers a fund in trust to pay the income to *A* for life, then to pay the principal to *A's* children who reach twenty-one. The remainder is valid because it will vest, at the latest, *twenty-one years after*

12. Sometimes it is said that the Rule against Perpetuities is not concerned with vested remainders. This merely means that a remainder vested upon creation complies at the outset with the vesting requirements of the Rule. Leach, *supra* note 2, at 647.

13. Since all interests in a trust must be vested within the perpetuities period, a trust can be terminated by the beneficiaries, holding vested interests, at or before the expiration of the perpetuities period. See *infra* text accompanying notes 154-56.

*A's death*, for all *A's* children must reach twenty-one within twenty-one years after *A* dies (plus a period of gestation).

The period of the Rule includes any actual periods of gestation involved. The Rule follows the general principle of property law that a person is in being from the time of conception, if later born alive.<sup>14</sup> A child *en ventre sa mere* when the perpetuities period begins counts as a life in being, and a child *en ventre sa mere* when the perpetuities period ends can take as a beneficiary. Thus:

*Illustration 5.* *T* bequeaths property to *T's* grandchildren who reach twenty-one. The gift is valid. Although *T's* children are given no interest in the property, *T's* children are the validating lives; all of *T's* grandchildren must reach twenty-one, if they ever reach twenty-one, within twenty-one years after the death of *T's* children plus any actual periods of gestation. Suppose that *T* leaves a child, *A*, in the womb at *T's* death; *A* is a life in being at *T's* death if later born alive. Suppose further that *A* is the last survivor of *T's* children, and at *A's* death *A* leaves a child, *B*, in the womb. *B*, a posthumous child of a posthumous child, can take if she reaches twenty-one.

#### B. *When the Lives in Being Are Ascertained*

Although Gray said the life in being must be a person alive "*at the creation of the interest*,"<sup>15</sup> it is more accurate to say that the measuring life or lives must be in being *when the perpetuities period starts to run*. Generally, the perpetuities period begins when the instrument takes effect. If an interest is created by *will*, the measuring life or lives must be in being at the testator's death. If the interest is created by *deed* or *irrevocable trust*, the measuring life or lives must be persons in being when the deed or trust takes effect.

Different rules for determining measuring lives govern revocable trusts and interests created by exercise of a power of appointment. If the interest is created by an *inter vivos trust revocable by the settlor alone*, the measuring life or lives must be persons in being when the power to revoke terminates. If the power to revoke terminates at the settlor's death, as will usually be the case, the measuring lives must be persons alive at the settlor's death. The perpetuities period begins when the power to revoke terminates because, so long as one person has the power to revoke the trust and receive absolute title to the trust assets, the property is not tied up. The rules governing powers of appointments are dealt with later.<sup>16</sup>

14. See Comment, *When Is Child En Ventre Sa Mere Regarded As In Being*, 33 MICH. L. REV. 414 (1935).

15. J. GRAY, *supra* note 3, § 201, at 191.

16. See *infra* text accompanying notes 119-32.

### C. The Validating Life

Because the Rule against Perpetuities is a rule of logical proof, you must look for a life that works in making the proof required. This person, if found, is commonly known as the *measuring life*, but this term is the source of much confusion, particularly among persons beginning a study of the Rule. The term "measuring life or lives" might seem to refer to the life or lives that measure the perpetuities period applicable to the particular interest in question. In fact, however, the term refers to a life or lives that measure a period of time during which a *valid* interest will either vest or fail. In its traditional usage the term "measuring life" is a tautology. If an interest is void, there is no measuring life; if an interest is valid, there is a measuring life (or the interest will vest or fail within twenty-one years).

The Rule is easier to understand if the two distinct types of lives involved in solving perpetuities problems are explicitly separated and defined. First, there are the *relevant* lives—that is, those persons who can affect vesting and therefore fix the perpetuities period applicable to the particular interest in question. Second, there may be a *validating* life—that is, a person from among the relevant lives about whom you can say, "The interest in question will necessarily vest or fail during this person's life or at his death or within twenty-one years after his death." The validating life (traditionally known as the measuring life) is the person you are looking for in order to validate the interest.

In seeking a validating life, you must, of logical necessity, narrow the candidates to persons who might qualify in making the required proof. You will find a validating life, if you find one at all, *only among persons who can affect vesting*.<sup>17</sup> All other persons are irrelevant to the search. If an interest might vest more than twenty-one years after the death of the persons who fix the perpetuities period applicable to the interest, it is void *ab initio*. Therefore, you should test each of these relevant persons to see if the interest will vest or fail during that person's life or within twenty-one years after that person's death.<sup>18</sup> If there is no person among this group of relevant lives by whom the requisite proof can be made, the interest is void unless it must vest or fail within twenty-one years. Thus:

*Illustration 6.* T devises Blackacre to A for life, remainder to A's children

17. "Such [validating] life or lives, if they exist, will be related to the occurrence of the events that lead to the vesting of the non-vested interest in question." RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.3 comment b (1981). Accord J. GRAY, *supra* note 3, § 219.2, n.2; R. MEGARRY & H. WADE, *THE LAW OF REAL PROPERTY* 251 (5th ed. 1984).

18. If the persons who can affect vesting in the same way are so numerous or so situated that it is not feasible to say when the last of them dies, none of them can be a measuring life. All are excluded from the assembly of candidates for testing. See *infra* text accompanying notes 22-24.

who reach twenty-five. The persons in being who can affect vesting are *A* and *A*'s children. (*A* can affect both the time the remainder vests in possession and, by procreating a child or children, the identity of the remaindermen.<sup>19</sup> *A*'s children supply the identity of the remaindermen and, in addition, can affect the condition precedent by reaching twenty-five.) Test each of these persons to see if the remainder will vest or fail for *all* of the class members within twenty-one years after the death of such person.<sup>20</sup> None of them, you will find, permits the necessary proof to be made because this sequence of events might occur: *A* may die leaving an afterborn child under the age of four, which child may reach twenty-five more than twenty-one years after the death of *A* and all of *A*'s children in being at *T*'s death. Hence, *all* of *A*'s children will not necessarily reach twenty-five within twenty-one years of the death of *A* and *A*'s presently living children. (Observe that if the age condition were twenty-one rather than twenty-five, the necessary proof could be made by reference to *A* (see *Illustration 4* above).)

Although it is common to speak of validating lives in the plural, a single validating life can be identified from among this group. Whenever an interest must vest or fail at or before the death of a survivor of a group of persons, or within twenty-one years after the death of the survivor, the validating life is the survivor, "for [as] Twisden used to say, the candles were all lighted at once."<sup>21</sup>

If you first identify all persons who can affect vesting, and then test each person, the logical process of the Rule becomes clear. For an interest to be valid, the necessary proof must be made from among persons who can affect vesting. Alternatively, the interest must vest at creation or vest, or fail, within twenty-one years after creation. Following this logical process step by step is the easiest way out of the labyrinth.

#### D. The Perpetuities Period

The logical process underlying perpetuities problems illuminates another sometimes obscure phrase—"the perpetuities period." To say that an interest will not necessarily vest or fail within the perpetuities period means *it will not vest or fail within the lives of persons who can affect vesting of the particular interest plus twenty-one years thereafter*. (It will not necessarily vest or fail within the lives of any other persons you can name either, but such persons are irrelevant to the solution of the particular perpetuities problem.) Each interest thus has an inherent per-

19. *A*'s spouse and other potential sexual partners, who can become a parent of *A*'s child, can affect vesting, but they are redundant. You cannot prove anything by them that you cannot prove by *A*. Hence they do not qualify for testing in search of a validating life.

20. A class gift must be good for all members of the class or it is void for all. See *infra* text accompanying note 81.

21. *Scatterwood v. Edge*, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1699). Judge Twisden's remark about the candles is in *Love v. Wyndham*, 1 Mod. 50, 54, 86 Eng. Rep. 724, 726 (K.B. 1670).



petuities period applicable to it alone. This period is determined by persons who can affect vesting of the particular interest.

Sometimes it is said that the perpetuities period can be measured by *any* life in being, but this statement is not helpful in determining what perpetuities period is applicable to the particular interest in question. To be sure, the scrivener, in framing an instrument, can select any persons now alive to measure the period by connecting them with vesting,<sup>22</sup> but once the instrument becomes effective all lives other than those who can affect vesting are excluded from the picture. When the instrument takes effect, the lives that govern the perpetuities period applicable to the particular interest in question are determined. Only these lives are relevant in answering the question of whether the interest violates the Rule against Perpetuities by possibly remaining contingent more than twenty-one years after their deaths.

It is not difficult to ascertain the persons who can affect vesting and thereby determine the perpetuities period applicable to the particular interest. "Persons who can affect vesting" are given by the definition of a vested interest. An interest is vested when it either vests in possession or vests in interest. Any person who can affect the time a future interest vests in possession is causally related to vesting of the interest. An interest is vested in interest when (1) the beneficiary or beneficiaries are ascertained and (2) any condition precedent is satisfied. Accordingly, the persons who can affect vesting in interest are:

- (a) The beneficiary or beneficiaries of the contingent interest;
- (b) Any person who can affect the identity of the beneficiary or beneficiaries (such as *A* in a gift to *A*'s children); and
- (c) Any person who can affect any condition precedent attached to the gift, or, in case of a class gift, any person who can affect a condition precedent attached to the interest of any class member.

Every person who can affect vesting, either at the time the interest is created or thereafter, qualifies for testing in search of a validating life, subject to some limitations. If persons are redundant,<sup>23</sup> they are excluded. If persons who can affect vesting in the same way are so numerous or so difficult to ascertain that it is impracticable to say when the last of them dies, none of such persons can be used to govern the perpetuities period.<sup>24</sup> All are excluded as measuring lives. Thus:

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22. See *infra* text accompanying note 153.

23. See *supra* note 19.

24. See *Theellusson v. Woodford*, 11 Ves. Jr. 112, 136, 32 Eng. Rep. 1030, 1040 (H.L. 1805); *In re Moore*, (1901) 1 Ch. 936, 938 (holding void for uncertainty a trust for maintenance of a tomb for "the period of twenty one years from the death of the last survivor of all persons who shall be living at my death").

Probably the greatest number of measuring lives ever approved occurred in *In re Warren's Will Trusts*, 105 Sol. J. 511 (1961), where 194 legitimate issue of Queen Victoria were permitted as

*Illustration 7.* *T* bequeaths a sum to the first descendant of *A* to marry a person now alive. *A* can affect vesting by procreating a descendant beneficiary. *A*'s descendants now alive can affect vesting by marrying. All other persons now alive can affect vesting by marrying a descendant of *A*, but all such persons cannot be measuring lives. Because it is not feasible to ascertain when the last of these other persons dies, they cannot be used to measure the length of the applicable perpetuities period. The gift is void because it may vest long after the death of *A* and *A*'s descendants now alive, the only other persons now alive who can affect vesting.

The perpetuities period cannot be measured by lives in being that cannot be traced or that can be traced only at unreasonable cost. It must be feasible to say when the perpetuities period ends.

## II

### THE WHAT-MIGHT-HAPPEN TEST

In searching for a validating life for an interest that does not vest upon creation, you must focus on what *might* happen in the future. You must consider all of the possibilities in order to prove that there is no possibility of remote vesting. What *actually* happens after the interest is created is irrelevant. Even if a court knows, at the time of decision, that an interest has actually vested within the perpetuities period, the court will declare it void if it might not have done so. What might have happened is controlling, not what actually happened.

The what-might-happen test has given rise to a host of improbable possibilities that cause gifts to violate the Rule. These bizarre possibilities, dreamed up by lawyers, attest to the active imagination of the legal profession. First, the famous case of the "fertile octogenarian," one of the strangest aberrations of the legal mind:

*Illustration 8.* *T* devises a fund in trust for *A* (aged eighty) for life, then for *A*'s children for their lives, then to *A*'s grandchildren then living. The remainder to *A*'s grandchildren is void. It will not necessarily vest or fail within the lives of *A* and all *A*'s children and grandchildren alive at *T*'s death, who fix the perpetuities period. Since the law conclusively presumes a person can bear a child at any age, *A* might have a child conceived after *T*'s death and the remainder to *A*'s grandchildren might vest at the death of such child. If this happened, vesting would occur beyond the perpetuities period. It does not matter that, at *T*'s death, *A* may have had a hysterectomy or a vasectomy; the presumption of capacity to bear children is *conclusive*. Because of the possibility that *A* may

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measuring lives for a trust. Admittedly, in England, these royal lives are easier to keep track of than 194 ordinary mortals would be, but tracing so many lives, even those of royals, is difficult and costly. The number of permissible lives should be much more strictly limited. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.16; 5A R. POWELL, THE LAW OF REAL PROPERTY ¶ 766[5] (P. Rohan rev. ed. 1986).

have an afterborn child, the remainder to *A*'s grandchildren is void. (If the possibility of *A*'s having a child were ignored, the remainder would be valid because it would vest or fail at the death of *A* and *A*'s presently living children.)

The conclusive presumption of fertility, laid down almost two centuries ago in *Jee v. Audley*,<sup>25</sup> has been the subject of many gibes as well as more affectionate raillery.<sup>26</sup> Nonetheless, it continues to be followed in perpetuities cases.<sup>27</sup> Ordinarily, the presumption can be avoided only by construction. For example if, in *Illustration 8*, a court were to construe "*A*'s

25. 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787).

26. See, e.g., J. MORRIS & W. LEACH, *THE RULE AGAINST PERPETUITIES* 81-84 (2d ed. 1962); 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.22.

The tabloid *Star* reported birth of a daughter to a 60-year-old woman in Turkey, "making her the oldest woman on medical records to have had a baby. . . . The previous authenticated record for the oldest mother belongs to Ruth Alice Kistler of Portland, Ore., who gave birth to her daughter Susan in 1956 at age 57." *Star Magazine*, Nov. 23, 1982, at 2, col. 1 (New York). THE GUINNESS BOOK OF WORLD RECORDS gives the oldest mother award to Mrs. Kistler. GUINNESS BOOK OF WORLD RECORDS 16 (1986 ed.). Of course, neither of these mothers comes close to the Biblical record set by Sarah, who is said to have given birth to Isaac at the age of 90. *Genesis* 17:15-19.

Although perpetuities law conclusively presumes an older person can have a child at any age, the youngest age of procreation presumed by the law has never been established. In *In re Gaite's Will Trusts*, [1949] 1 All E.R. 459 (Ch.), the court had before it a bequest that would be void only if it were assumed that a person under the age of five could have a child. The court avoided a ruling on the point by holding that any child born to a person under the age of five would be illegitimate and then construing illegitimate children out of the class of beneficiaries.

The youngest authenticated mother on record is Lina Medina, a Peruvian girl from the Andes who gave birth to a son at the age of five. Some years after the birth, *The New York Times* reported that Lina, aged 28, and her son, age 23, were alive and well in Lima. *N.Y. Times*, Apr. 3, 1963, at 70. Occasionally a questionable story of an even younger mother arises. The *National Examiner*, Mar. 12, 1985, at 23, col. 1, reported that a 14-pound baby girl in the Philippines was born pregnant. According to the story, the baby girl had a male fetus growing in her uterus, in the fifth month of its development. A few days after the baby's birth, the fetus was removed by Caesarean section. The newspaper reported that the fetus lived a few hours in an incubator and was baptized Juan according to Catholic rites. The attending doctor said it seemed likely that the developing fetus was really the girl's fraternal twin brother. "Probably the two eggs were fertilized at the same time, but only one became properly implanted in the uterine wall, engulfing the other egg during its faster growth." *Id.* In medical journals, there have been a few dozen cases of fetus-in-fetu reported (as many in boys as in girls!) but no fetus-in-fetu has before been alleged to have been born alive. See 82 AM. J. CLINICAL PATHOLOGY 115 (1984).

27. *In re Lattouf's Will*, 87 N.J. Super. 137, 208 A.2d 411 (1965), seems to be the only exception among American courts.

A few jurisdictions have modern statutes that limit the presumption of fertility in perpetuities cases to statistically significant child-bearing years or that permit the introduction in any case of evidence of capacity to bear children. See FLA. STAT. ANN. § 689.22(5)(d) (West Supp. 1985); ILL. ANN. STAT. ch. 30, § 194, § 4(c)(3) (Smith-Hurd Supp. 1985); N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(e) (McKinney Supp. 1985); TENN. CODE ANN. § 24-5-112 (1980); *cf.* IDAHO CODE § 55-111 (1979) (abolishing presumption). The Florida, Illinois, and New York statutes provide that the possibility that a person may adopt a child shall be disregarded. This seems a sensible way to handle the unlikely possibility of adoption by a person over the age of 50.

Where a trust has been created for *A* for life, remainder to *A*'s children, it has been held in some cases that *A* and *A*'s children can terminate the trust if the evidence shows *A* is past the age of child-bearing. See 4 A. SCOTT, *THE LAW OF TRUSTS* § 340.1 (3d ed. 1967) (cases are split). *But cf.* *Walton v. Lee*, 634 S.W.2d 159 (Ky. 1982) (applying conclusive presumption of fertility in denying

children" to mean *A*'s living children and "*A*'s grandchildren" to mean children of *A*'s living children, the remainder in fee would be valid. A court may so construe an instrument where *A*'s age and physical condition at the date the will is executed make it likely the testator thought further procreation impossible. But such would not be the traditional construction, which is that a gift to "*A*'s children" includes all children, whether born before or after the testator's death.

The second of the fantastical characters imagined by lawyers is the "unborn widow." Thus:

*Illustration 9.* *T* devises a fund in trust for *A* for life, then for *A*'s widow for her life, then to *A*'s issue living at the death of *A* and his widow. The remainder to *A*'s issue may vest at the death of *A*'s widow, and she is not necessarily a woman now alive. If *A* is presently unmarried, *A*'s present wife may die or be divorced and *A* may marry a woman not now alive who turns out to be his widow. Since the remainder in fee may vest at the death of an afterborn person, the remainder is void.<sup>28</sup>

The fact that there is a secondary life estate in a potentially afterborn widow does not necessarily mean the ultimate remainder in fee is void. If the remainder will vest before the widow dies, it may be valid. If, in *Illustration 9*, the remainder had been given to "*A*'s children" rather than to "*A*'s issue living at the death of *A* and his widow," the remainder would be valid. The class of children would close physiologically at *A*'s death, and the remainder would vest in interest then. In contrast, the class of "issue" in *Illustration 9* includes all descendants and does not close until the gift becomes possessory.

Another gift involving an unusual possibility, sometimes overlooked by the drafter, is a bequest involving an administrative contingency that may not occur within the perpetuities period. The "slothful executor" is an example:

*Illustration 10.* *T* devises property to *T*'s issue living upon distribution of *T*'s estate. *T*'s purpose in requiring survival to the time of possession is to avoid administrative costs and possible estate taxation in the estates of any of *T*'s issue who die before *T*'s estate is distributed. Since *T*'s executor may not distribute *T*'s estate for many years, perhaps long after all *T*'s surviving issue are dead,<sup>29</sup> the gift to *T*'s issue living on distribution

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enforcement of a contract of sale of land by a life tenant, aged 76, and her existing children, who were remaindermen).

28. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.21. The "unborn widow" possibility is abolished by statute in a few states which presume a gift to a spouse of a person in being to be a gift to a person in being. FLA. STAT. § 689.22(5)(b) (West Supp. 1986); ILL. ANN. STAT. ch. 30, ¶ 194, § 4(c)(1)(C) (Smith-Hurd Supp. 1986); N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(c) (McKinney 1967); *cf.* CAL. CIV. CODE § 715.7 (West 1982) (deeming spouse of a person in being a "life in being" whether or not the spouse turns out to be a person alive at the beginning of the perpetuities period).

29. Although distribution of an estate ordinarily is completed within a few years of the

(who may be persons not now alive) is too remote and void.<sup>30</sup>

The administrative contingency involved in *Illustration 10* is a true condition precedent: *T*'s will requires *T*'s issue to survive distribution in order to take. Some administrative contingency cases, however, involve language that ought not to be construed to create a condition precedent to vesting. Examples are "to *A* upon distribution of my estate," "to my issue when my debts are paid," and "to *A* upon probate of this will." Language of this sort, not requiring survival, should be construed as merely describing the natural course of events and not importing a condition precedent.<sup>31</sup> Unfortunately, occasionally such language has been construed to create a condition precedent.<sup>32</sup>

We can conclude the discussion of the what-might-happen test with two final examples of remote possibilities, both well-known among perpetuities buffs. First, the famous "magic gravel pit" case: *T* devised his gravel pits to trustees to work them until the pits were exhausted and then to sell them and divide the proceeds among *T*'s issue then living. Because the pits might be worked for centuries, the devise was held void even though the pits in fact were exhausted in six years.<sup>33</sup> Second, the case of the "interminable war": During World War II, *T* devised property to her husband's relatives in Germany who should survive the war. The devise was held void on the ground that World War II might not end within the perpetuities period.<sup>34</sup> (Of course, if the war continued

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testator's death, in a few cases an estate has been tied up for many years in litigation or the will has been found many years after the testator dies. See, e.g., *Richards v. Tolbert*, 232 Ga. 678, 208 S.E.2d 486 (1974) (will found and probated 57 years after the testator's death).

30. *In re Estate of Campbell*, 28 Cal. App. 2d 102, 82 P.2d 22 (1938) (holding void a gift to officers of lodge in office at time of distribution of *T*'s estate). In *Estate of Taylor*, 66 Cal. 2d 855, 428 P.2d 301 (1967), a devise was made to a person if she survived distribution. The court held that since the testator did not intend the executor to have power to select recipients by delaying distribution, the contingent interest would vest at the time distribution reasonably should be made. Under this theory, the devise in *Illustration 10* ought to be valid since a reasonable period would seem necessarily to be less than 21 years.

In a few states statutes presume that administrative contingencies will occur within the perpetuities period. FLA. STAT. § 689.22(5)(c) (West Supp. 1986); ILL. REV. STAT. ch. 30, § 194, § 4(c)(1)(B) (Smith-Hurd Supp. 1986); N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(d) (McKinney 1967).

31. See *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952); 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.23; 5A R. POWELL, *supra* note 24, ¶ 764[5].

32. In *Prime v. Hyne*, 260 Cal. App. 2d 397, 67 Cal. Rptr. 170 (1968), an agreement made during the testator's life by the testator's devisees that they would convey land owned by the testator to the buyer upon distribution of the land to them after the testator's death was held to violate the Rule. See also *Miller v. Weston*, 67 Colo. 534, 189 P. 610 (1920), holding void a bequest to *A* "on the admission of this will to probate." The latter case is particularly absurd. If probate of a will is deemed a condition precedent, one can reason that all devises should be void because probate is an implicit condition precedent to all devises.

33. *In re Wood*, [1894] 3 Ch. 381.

34. *Brownell v. Edmunds*, 209 F.2d 349 (4th Cir. 1953) (alternative holding).

beyond this period, probably there would be little property—and certainly no perpetuities—to worry about!)

These illustrative cases, though not exhausting the unusual possibilities that can be dreamed up to invalidate gifts, suffice to show the traps lying in wait under the what-might-happen rule. It is easy to overlook some highly improbable event that conceivably might happen, but in all probability will not.

### III

#### THE WAIT-AND-SEE DOCTRINE

Largely because the application of the what-might-happen test in the above illustrations seemed indefensible, in the early 1950's Professor W. Barton Leach of Harvard began crusading for a new approach to perpetuities.<sup>35</sup> Leach thought the validity of interests should be judged by what actually happens during the perpetuities period, not by what might happen. The actual events test, dubbed the "wait-and-see doctrine" by Leach,<sup>36</sup> has been adopted by a substantial number of American jurisdictions.<sup>37</sup> Under wait-and-see, the validity of an interest is not judged by what might happen, but rather by whether the interest actually vests within the perpetuities period.

The merits of the wait-and-see doctrine have been widely debated.<sup>38</sup> Its opponents have two major objections. First, they claim that the doctrine increases the grasp of the dead hand by validating future interests that would otherwise fail the what-might-happen test. Second, they suggest that difficult practical problems may result from not knowing whether an interest is valid or void, perhaps for several decades.<sup>39</sup> The proponents of wait-and-see do not foresee that waiting to see what happens during the lives of the beneficiaries or other persons related to vesting will give rise to significant problems but, in truth, only the future can tell. The proponents' inain argnment is that by requiring courts to consider highly improbable events not within the testator's wildest innagination, the what-might-happen test operates capriciously to defeat the testator's intent and unjustly enriches unintended beneficiaries. The proponents thus present the wait-and-see doctrine as consumer protection legislation: It protects the client of, and the beneficiaries of an instrument drawn by, the average lawyer who ships up and overlooks some

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35. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952).

36. *Id.* at 730.

37. *See infra* notes 49-50.

38. For a comprehensive list of articles on wait-and-see, see 5A R. POWELL, *supra* note 24, ¶ 827[A], n.1, & ¶ 827[G].

39. *See id.* at ¶¶ 827[A]-827[H].

unusual possibility that will rarely occur.<sup>40</sup>

Formerly, before the logic of the wait-and-see doctrine was worked through, critics also complained that the doctrine provided no satisfactory way of identifying the lives that measure the wait-and-see period.<sup>41</sup> Now, however, it seems reasonably clear that the common law itself furnishes appropriate measuring lives. The wait-and-see doctrine dictates that what actually happens during the perpetuities period applicable to the particular interest determines the validity of the interest. As the pioneering Pennsylvania statute put it, "*Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.*"<sup>42</sup> Accordingly, the measuring lives for the wait-and-see period should be the same lives relevant under the what-might-happen test: the lives causally related to vesting.<sup>43</sup> These are the lives that govern the perpetuities period applicable to the particular interest.<sup>44</sup> They are:

- (1) Any person who can affect the time the future interest vests in possession;
- (2) Any person who can affect vesting in interest, namely—
  - (a) The beneficiary or beneficiaries of the contingent interest;

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40. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 (1981) adopts the wait-and-see doctrine. It offers this justification:

[T]he what-might-happen approach is nothing more than a trap that is easily avoided by appropriate drafting. The adoption of the wait-and-see approach in this Restatement is largely motivated by the equality of treatment that is produced by placing the validity of all non-vested interests on the same plane, whether the interest is created by a skilled draftsman or one not so skilled.

*Id.* Ch. 1, at 13.

41. See R. MAUDSLEY, *THE MODERN LAW OF PERPETUITIES* 87-109 (1979); L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* 271-73 (2d ed. 1966).

42. 20 PA. CONS. STAT. ANN. § 6104(b) (Purdon 1975) (emphasis added).

43. See Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1654-59 (1985).

44. Megarry & Wade explain it this way:

The policy of the "wait and see" provisions . . . is not to alter the length of the perpetuity period, but to provide that gifts shall be valid if they do in fact vest within it rather than be void if they might by possibility vest outside it. The perpetuity period itself remains unchanged, and the lives in being which determine the period in any given case ought likewise to remain unchanged.

. . . [T]he only lives in being which are significant under the rule at common law are those which in some way restrict the time within which the gift can vest, and which are expressly or impliedly connected with the gift by the donor's directions. The available perpetuity period must always be ascertained before it can be said whether the gift succeeds or fails. The conditions governing the vesting of the gift, and the lives implicated in those conditions, necessarily remain the same, whether or not the conditions are ultimately satisfied. . . .

In order to introduce the "wait and see" principle, therefore, the most that [is] required [is] to enact that no extension of the familiar category of lives should be implied.

R. MEGARRY & H. WADE, *supra* note 17, at 253-54.

(b) Any person who can affect the identity of the beneficiary or beneficiaries;<sup>45</sup> and

(c) Any person who can affect any condition precedent attached to the gift or, in case of a class gift, any person who can affect any condition precedent attached to the interest of any member of the class.

The same restrictions on who can be used as measuring lives at common law also apply under wait-and-see. Redundant lives (that is, persons whose ability to affect vesting ceases when other measuring lives die) are not treated as relevant. In a gift to *A*'s children who reach twenty-five, for example, *A*'s spouse is not a relevant life because *A*'s spouse cannot affect vesting after *A*'s death. Also, where the persons who can affect vesting in the same way are so numerous that it is not feasible to say when they are all dead, none of such persons can be a measuring life. It must be possible to say when the perpetuities period ends.<sup>46</sup>

A brief glance at the preceding illustrations indicates how easy it is to identify these measuring lives. The wait-and-see measuring lives are: in *Illustration 6*, *A* and all of *A*'s children alive at *T*'s death; in *Illustrations 7, 8, and 9*, *A* and all of *A*'s issue alive at *T*'s death;<sup>47</sup> and in *Illustration 10*, all of *T*'s issue alive at *T*'s death. In subsequent illustrations in this *Guide*, the causally related measuring lives for wait-and-see—the lives that govern the common law perpetuities period—will be given in appended footnotes.<sup>48</sup>

Statutes in a number of states adopting wait-and-see provide that lives causally related to vesting are the measuring lives for wait-and-see.<sup>49</sup> In a number of jurisdictions adopting wait-and-see, the measuring

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45. When a gift is made to the children of *A*, *A* can affect the identity of the beneficiaries by procreating a child. When a gift is made to the grandchildren of *A*, *A* and all of *A*'s children can affect the identity of the beneficiaries by procreation. These are the persons who usually will qualify as measuring lives in this category.

46. This principle excludes as a measuring life anyone, other than a beneficiary, whose power to affect vesting can be exercised by successors in interest who cannot be identified. If such a person and his successors could be measuring lives, it would be impracticable to say when the perpetuities period ends. Examples include trustees, donees of assignable fiduciary powers, and owners of a fee simple who can affect vesting of an executory interest by changing the type of land use upon which the executory interest is conditioned. See *infra* notes 130 & 133.

47. In *Illustration 9*, *A*'s widow cannot be a measuring life until *A*'s death because her identity is not ascertainable until then. It is impossible to put on the wait-and-see list all women now alive (any one of whom may turn out to be *A*'s widow); they are too numerous to be identified. When the widow is identified, she is added to the list if she was in being at *T*'s death.

48. For extensive discussion of how lives causally related to vesting are determined in specific cases, see Dukeminier, *supra* note 43, at 1659-74, 1701-08; see also Dukeminier, *Wait-and-See: The Causal Relationship Principle*, 102 L.Q. REV. 250, 256-64 (1986).

49. ALASKA STAT. § 34.27.010 (1986); KY. REV. STAT. ANN. § 381.216 (Michie/Bobbs-Merrill 1972); NEV. REV. STAT. § 111.103 (1985); N.M. STAT. ANN. § 47-1-17.1 (Supp. 1985); R.I. GEN. LAWS § 34-11-38 (1984). In Florida, the measuring lives are those "used to measure the permissible period," which appears to mean the lives who govern the perpetuities period at common



lives have not been specified by statute.<sup>50</sup> Nonetheless, even in these jurisdictions, the logic of wait-and-see suggests implicitly that the measuring lives are the lives that govern the perpetuities period applicable to the particular interest.<sup>51</sup> If these lives are used as measuring lives for wait-and-see, the what-might-happen test of the common law is completely replaced. Any interest valid at common law is necessarily valid under wait-and-see because the validating life at common law must be one of the lives that measures the perpetuities period for wait-and-see.

The *Restatement (Second) of Property*, which adopted wait-and-see, does not use the lives that govern the common law perpetuities period as measuring lives for wait-and-see. Although the *Restatement* affirms that only lives that can affect vesting are relevant to the search for the validating life,<sup>52</sup> it disregards the logic of wait-and-see ("wait out these lives and see what happens") and lays down an artificial list of measuring lives to be used for wait-and-see. The *Restatement* provides for two perpetuities periods—one to be used in applying the what-might-happen test (composed of lives that can affect vesting) and the other (an arbitrarily selected list of lives) to govern wait-and-see. On the *Restatement* wait-and-see list are, briefly characterized, the transferor; any owners of beneficial interests in the property, together with their parents and grandparents; and donees of powers of appointment.<sup>53</sup> Since all the lives that

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law—that is, lives causally related to vesting. FLA. STAT. ANN. § 689.22 (2) (a) (West Supp. 1986). In Washington, wait-and-see is applied to trusts only. The measuring lives are "lives in being or conceived at the effective date of the instrument if by the terms of the instrument the trust is to continue for such life or lives." WASH. REV. CODE ANN. § 11.98.130(2) (Supp. 1987). Since a trust may continue during lives causally related to vesting to see whether the contingent interests vest, the Washington statute may be construed to include as measuring lives persons causally related to vesting.

Similar provisions for using lives relevant to vesting as measuring lives can be found in foreign wait-and-see legislation. See 6 ONT. REV. STAT. ch. 374, § 6(1) (1980); Perpetuities Act, N.W.T. REV. ORD. ch. P-3, § 7(1) (1974) (Can.); Property Law Act of 1974, § 210(4), 1974 QUEENSL. STAT. 713, 813; Perpetuities & Accumulations Act of 1968, § 6(4), 1968 VICT. ACTS 546, 549; Property Law Act of 1969, § 103(3) 18 W. AUSTL. STAT. 229, 286 (1969).

In a few states, limited wait-and-see statutes provide that the measuring lives for wait-and-see shall be the preceding life tenants and other lives upon whose expiration the remainder in question is to take effect. CONN. GEN. STAT. ANN. § 45-95 (West 1981); ME. REV. STAT. ANN. tit. 33, § 101 (1978); MD. EST. & TRUSTS CODE ANN. § 11-103(a) (1974); MASS. GEN. LAWS ANN. ch. 184A, § 1 (Law. Co-op. 1977).

In Illinois, the wait-and-see statute, applicable to trusts only, provides that the measuring lives are the beneficiaries of the trust. ILL. ANN. STAT. ch. 30, ¶ 195, § 5 (Smith-Hurd Supp. 1986).

50. OHIO REV. CODE ANN. § 2131.08(C) (Anderson Supp. 1984); 20 PA. CONS. STAT. ANN. § 6104(b) (Purdon 1975 & Supp. 1986); S.D. CODIFIED LAWS ANN. § 43-5-6 (1983); VT. STAT. ANN. tit. 27, § 501 (1975); VA. CODE ANN. § 55-13.3 (1986). In Mississippi and New Hampshire, courts have adopted the wait-and-see principle. See *Phelps v. Shropshire*, 254 Miss. 777, 183 So. 2d 158 (1966); *Merchants Nat'l Bank v. Curtis*, 98 N.H. 225, 97 A.2d 207 (1953).

51. See *Dukeminier, supra* note 43.

52. See *supra* note 17.

53. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.3(2) (1981).

measure the common law perpetuities period are not on the *Restatement's* wait-and-see list, to preserve gifts valid at common law, the *Restatement* had to retain the common law Rule and treat wait-and-see as a separate, coexisting rule to be applied only if the common law Rule is violated. The *Restatement* does not replace the what-might-happen test with wait-and-see, as occurs when the lives relevant at common law are used for wait-and-see.

There appears to be no justification for adding an additional complex list of wait-and-see lives to a rule already overburdened with technicalities. In addition to being illogical and unprincipled, the *Restatement* list of measuring lives for wait-and-see contains a sizeable number of ambiguities that can only be resolved by litigation.<sup>54</sup> The lives that govern the applicable perpetuities period at common law are easily ascertained and eminently satisfactory measuring lives for wait-and-see. One perpetuities period for each interest is enough.

The recent Uniform Statutory Rule against Perpetuities is a revolutionary statute which, if adopted, probably will bring about the demise of the Rule against Perpetuities.<sup>55</sup> It provides for a ninety-year wait-and-see period.<sup>56</sup> During the ninety-year period after an instrument becomes

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The *Restatement* list, with additional lives, has been adopted in Iowa. IOWA CODE ANN. § 558.68(2)(b) (West Supp. 1985).

Some foreign jurisdictions have mandated artificial lists of measuring lives for wait-and-see, similar to the *Restatement* list. See English Perpetuities & Accumulations Act, 1964, ch. 55, § 3(5); Perpetuities Act, N. IR. PUB. GEN. ACTS ch. 2, § 3(5) (1966); Perpetuities Act, 5 ALTA. REV. STAT. ch. P-4, § 5(2) (1980); Perpetuities Act, 5 B.C. REV. STAT. ch. 321, § 6(2) (1979); Perpetuities Ordinance, YUK. ORD. ch. 23, § 6(2) (1980); Act of Nov. 11, 1964, § 8 (5), 1964 N.Z. STAT. 287, 293; Perpetuities & Accumulations Ordinance 1970, § 8, 1970 H.K. Ord. no. 26.

54. I have elsewhere catalogued these ambiguities. See Dukeminier, *supra* note 43, at 1681-1701; see also 5A R. POWELL, *supra* note 24, at ¶ 766[5], n.20 (referring to "the unmanageable task of determining what lives are involved" under the *Restatement's* wait-and-see provision, and alleging that the *Restatement* "provision multiplies several times over the number of measuring lives that would otherwise be involved under the common-law rule").

55. The draftsman, Professor Waggoner, rejects the principle, accepted by other authorities, see *supra* note 17 and accompanying text, that only persons causally connected to vesting are relevant to the search for a validating life. See Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714, 1717 (1985). Professor Waggoner posits that all "people who are connected in some way to the transaction" are relevant, a broad and undefined premise from which it is impossible to reason rigorously. Consequently, Professor Waggoner is unable to deduce what lives govern the common law perpetuities period. *Id.* at 1714-24; see Dukeminier, *A Response by Professor Dukeminier*, 85 COLUM. L. REV. 1730, 1731 (1985). As a result, the Uniform Statute is based upon the unsupportable idea that the persons governing the common law perpetuities period cannot be logically and definitely ascertained.

For a critique of the Uniform Statute, see Dukeminier, *The Uniform Statutory Rule against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. (forthcoming 1987).

56. The Prefatory Note to the Uniform Statute suggests that the administrative burden of tracing lives for wait-and-see is substantial and can be avoided by using a period of years for wait-and-see. UNIF. STATUTORY RULE AGAINST PERPETUITIES, Prefatory Note at 9-10 (1986) (mimeographed). This is probably true if "a dozen healthy babies" selected at random are used as measuring lives, but in the real world where "a dozen healthy babies" rarely exist, this argument is

effective, no interest created by that instrument can be declared void.<sup>57</sup> At the end of ninety years, any then-contingent interest that has not satisfied the common law Rule against Perpetuities is declared void and reformed so as to vest within ninety years "in the manner that most closely approximates the transferor's manifested plan of distribution" which went into effect ninety years previously.<sup>58</sup> Inasmuch as no instrument drafted by a lawyer can violate the Rule against Perpetuities for ninety years,<sup>59</sup> it will be impossible for a lawyer, who enters the bar at roughly the age of twenty-three, to violate the Rule during the lawyer's lifetime. Under these conditions, it is likely that students will not make the effort to learn a Rule they cannot violate; teachers will tire of teaching a Rule students view as irrelevant to their professional lives; and lawyers who know the rule will die off, so that when ninety years rolls around, the Rule—instead of being revived from ninety years in dead storage—will be formally abolished and only a ninety-year wait-and-see period will remain.

The proponents of the Uniform Statute believe that a ninety-year perpetuities period is justified by the fact that, under existing law, a knowledgeable lawyer can tie up property in trust for approximately ninety years by selecting youthful measuring lives.<sup>60</sup> It is true—as Professor Leach pointed out long ago—that an expert lawyer can tie up property "for an *unconscionable* period—viz., twenty-one years after the deaths of a dozen or so babies chosen from families noted for longevity, a term which, in the ordinary course of events, will add up to about a century."<sup>61</sup> But it is also true that Professor Leach condemned the idea of using extraneous lives as "a capricious exercise of the power of the dead hand."<sup>62</sup> In drafting trusts, lawyers in this country have agreed with Leach that the use of extraneous lives is inappropriate; they rarely, if ever, use "a dozen healthy babies," either as lives to measure the duration of a trust or as lives in a perpetuities saving clause.<sup>63</sup> In a strange

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much exaggerated. The common law measuring lives for wait-and-see are, in almost all cases, the beneficiaries of the trust or a parent or grandparent; the trustee must keep up with the deaths of these persons in any event in order properly to administer the trust.

57. With a couple of exceptions. An exercise of a special or testamentary power must vest within ninety years from the date the power was created, and an interest that cannot possibly vest within ninety years can be declared void.

58. UNIFORM STATUTORY RULE AGAINST PERPETUITIES § 3. Earlier reform of a class gift can take place when the share of any class member is to take effect in possession and an interest that cannot possibly vest within ninety years is reformed earlier. *Id.* § 3(2)-(3).

59. With exceptions noted *supra* note 57.

60. UNIF. STATUTORY RULE AGAINST PERPETUITIES, Prefatory Note at 12 (1986).

61. 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.16, at 52 (emphasis added).

62. J. MORRIS & W. LEACH, *supra* note 26, at 13.

63. A perpetuities saving clause is a technical clause designed to prevent a perpetuities violation and intended to take effect only if the trust does not timely end as specified in the dispositive provisions. See *infra* text accompanying note 153.

twist of reasoning, the Uniform Statute takes what might happen, what lawyers *might* do—and not what actually occurs—as the justification for its version of an actualities test.<sup>64</sup> The Uniform Statute gives every trust a wait-and-see period of ninety years, which is, in effect, a proxy for a wait-and-see perpetuities period measured by the lives of a dozen babies from ordinary families, plus 21 years.<sup>65</sup> The Uniform Statute has cloned Professor Leach's dozen healthy babies.

The Uniform Statute is a quantum leap toward extended dead-hand rule.<sup>66</sup> Title may be uncertain for ninety years. Since, under the statute, it is no longer necessary to know about the dozen-healthy-babies gimmick in order to create trusts for ninety years, the statute invites lawyers unversant with the law of future interests to create long-term ninety-year trusts.<sup>67</sup> These trusts may lack the flexible powers an experienced estate planner gives to the trustee and beneficiaries to deal with changing circumstances over a long period of years. If a decline in knowledge of the Rule sets in, as seems likely, more and more attorneys will start drawing ninety-year trusts. Ninety years far exceeds the length of time the average trust currently lasts. In the large majority of cases, ninety years also will greatly exceed the length of the common law perpetuities

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64. The Uniform Statute does not give clients of an unskilled lawyer "equality of treatment" sought by the *Restatement*, see *supra* note 40; a skilled lawyer would never insert a saving clause using the lives of 12 healthy babies plus 21 years—or their proxy, 90 years. Saving clauses commonly use the lives of beneficiaries of the trust and members of the family necessarily involved in vesting. If "equality of treatment" is to be achieved, the perpetuities wait-and-see period should be either the common law perpetuities period or the *Restatement* wait-and-see period, either of which resembles the kind of saving clause a skilled lawyer would use. The family of a testator who consulted an unskilled lawyer may find it is distinctly *not* equal treatment to be straitjacketed for 90 years with the inept work of a thoughtless drafter.

65. The Prefatory Note to the Uniform Statute states that 90 years is a proxy for a saving clause that produces, on average, a six-year-old measuring life. A six year old has a 69-year life expectancy, to which 21 years is added for a total of 90 years.

66. The Prefatory Note to the Uniform Statute denies this: "*Aggregate dead-hand control will not be increased beyond what is already possible by competent drafting under the common-law Rule.*" UNIF. STATUTORY RULE AGAINST PERPETUITIES, Prefatory Note at 12-13 (1986)(emphasis in original). Upon careful examination, this sentence appears to be saying something like, "if an easy method of pollution is made available, aggregate pollution will not be increased beyond what would be the result if all industry polluted at the level skillful and careful polluters now can, but seldom, do."

67. The Commissioners on Uniform State Laws reject the prudence of the judges who thought a person should be able to tie up property only for the lives of known persons. See *supra* text accompanying notes 7-9. The Prefatory Note at 11 explains: "In consequence, it is clear that an allowable waiting period measured by the lifetime of individuals in being at the creation of the interests plus 21 years is not scientifically designed to and does not in practice expire at the latest point when actual vesting *should be allowed*—on the death of the last survivor of the after-born beneficiaries." (emphasis added) Why a person "should be allowed" to tie up property for the lives of after-born beneficiaries, persons whose competence he cannot judge, is not discussed. It is, of course, a critical policy question. It can be done now only by resort to some sort of gimmick like "a dozen healthy babies," denounced by Professor Leach.

period applicable to the particular interest. The Uniform Statutory Rule against Perpetuities has given a bizarre turn to perpetuities "reform."

#### IV

#### THE MEANING OF VEST

##### A. *General Definition*

Under the Rule against Perpetuities, an interest is vested when the taker is ascertained and any conditions precedent are met. If the beneficiary is unascertained or if the interest is subject to a condition precedent, the interest is contingent. In the case of a gift to a class, an interest is vested only when all beneficiaries are ascertained—i.e. the class is closed—and when all conditions precedent have been satisfied for every class member.

The common law developed many rules of construction to aid in classifying interests, all of which are applicable in determining whether an interest is vested or contingent under the Rule against Perpetuities. The traditional approach to construing instruments was set out by John Chipman Gray: "[E]very provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied."<sup>68</sup> Modern courts, however, usually assume that the donor intended to create valid interests, not void ones. Consequently, an increasing number of courts are construing instruments to avoid violations of the Rule where such construction is reasonable. This modern trend away from the "remorseless" construction advocated by Gray is favored by commentators.<sup>69</sup>

##### B. *Condition Precedent Distinguished from Condition Subsequent*

In classifying interests as vested or contingent, it is necessary to distinguish carefully a condition precedent from a condition subsequent. An interest subject to a condition precedent is contingent. The term "condition precedent" refers to an event that, under the terms of the limitation, must occur *before* the interest vests. Examples are "to A if A reaches twenty-one" and "to A if A survives B."

In contrast, the term "condition subsequent" refers to an event that cuts short an interest if the event happens. A condition subsequent almost always describes a condition that will divest a vested interest. An interest that is vested subject to divestment does not violate the Rule against Perpetuities, which is concerned solely with contingent interests. The following two cases show this distinction:

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68. J. GRAY, *supra* note 3, § 629.

69. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.45; 5A R. POWELL, *supra* note 24, ¶ 777.

*Illustration 11.* *T* bequeaths a fund in trust to pay the income to *A* for life, then for *A*'s children *who shall reach twenty-five*. The gift to *A*'s children is subject to a condition precedent of reaching twenty-five and is void (see *Illustration 6*).<sup>70</sup>

*Illustration 12.* *T* bequeaths a fund in trust to pay the income to *A* for life, then for *A*'s children, but if *none of A's children reaches twenty-five*, to *B*. No child of *A* is twenty-five at *T*'s death. The gift to *A*'s children is valid because the class will close at *A*'s death, vesting under the Rule against Perpetuities at that time. There is no condition precedent attached to the gift to *A*'s children, only a condition subsequent. The gift to *B* is void because it is subject to a condition precedent that may be satisfied more than twenty-one years after the death of *A*. *A*'s presently living children may all die before reaching twenty-five and *A* may leave surviving only a child aged two, born after *T*'s death. If this were to happen, it would not be known for twenty-three more years whether *B* would take the property. Because this is too remote, *A*'s children have an indefeasible gift.<sup>71</sup>

The distinction between a condition precedent and a condition subsequent is a subtle one, and the particular language of a poorly drafted instrument may be difficult to classify. The key to classifying an interest as contingent or vested is to focus solely on the words of the instrument creating the particular interest and classify each interest in sequence. As Gray put it:

Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to, the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested.<sup>72</sup>

In *Illustration 11*, for example, a condition is incorporated in the language describing the gift to *A*'s children. In *Illustration 12*, no condition is attached to the gift to *A*'s children; the condition appears only in the limitation over to *B*. The difference is entirely a matter of words. Although the testator's intent is substantially the same in the two cases, the different phrasing results in dramatically different consequences.

Bear in mind that the termination of the preceding estates is not a condition precedent to a future interest vesting in interest. As a corollary, words in the instrument stating that a future interest shall become possessory upon the termination of the preceding estate do not express a condition precedent. Thus:

*Illustration 13.* *T* bequeaths a sum in trust for *A* for life, then for *A*'s

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70. If we wait and see for the lives relevant to vesting, such lives are *A* and all of *A*'s children alive at *T*'s death.

71. Under wait-and-see, the lives causally related to vesting of the gift to *B* are *A*, all of *A*'s children alive at *T*'s death, and *B*.

72. J. GRAY, *supra* note 3, § 108.

children for their lives, then *upon the death of A and A's children to B*. The italicized words do not state a condition precedent to vesting. They are always construed to refer to the event upon which all the preceding estates will terminate. Thus construed, these words are surplusage. They do not express a contingency. The remainder to *B* is vested and valid upon creation.

### C. *Vested with Possession Postponed*

Where a gift is made to a person upon attaining a designated age, attaining the designated age may not be a condition precedent if the language of gift falls within the rules of construction laid down in *Clobberie's Case*.<sup>73</sup> Under these rules, a gift to a person "to be paid at" or "payable at" a designated age is vested in the person with possession postponed. If the person dies before attaining the designated age, his personal representative is entitled to the gift because survivorship is not required. Hence a gift "to the children of *A* payable at their respective ages of twenty-five" or "*to be paid* at their respective ages of twenty-five" does not impose a condition precedent of reaching twenty-five, and the gift does not violate the Rule against Perpetuities. So too, a gift "to the children of *A* at their respective ages of twenty-five, and in the meantime *they are to receive the income*," does not state a condition precedent of reaching twenty-five. The rule of construction involved here, which comes from *Clobberie's Case*, is sometimes phrased: A gift of income, with principal payable at a designated age, vests the principal. A gift that is vested with possession postponed satisfies the Rule against Perpetuities.<sup>74</sup>

Why should a gift vested in interest with possession postponed satisfy the Rule against Perpetuities? The policies underlying the Rule are compromised when a person cannot take possession of that which he owns. The property is not freely exchangeable, and the dead hand continues to rule. The truth is, policy considerations have been slighted in transplanting what is vested in one context into another context. Courts have held, without discussion, that an interest vested for one purpose is vested for all purposes (with the obvious exception of vesting of class gifts under the Rule against Perpetuities).<sup>75</sup> The reasons for the different rules in which vest is a key word are ignored. Although the rules in *Clobberie's Case* were laid down to carry out the average donor's intent as to whether survivorship to the designated age is required, they have been carried over into the Rule against Perpetuities without paying any attention to potential continued dead hand control in violation of the

73. 2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677).

74. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.19, at 61-62.

75. See Dukeminier, Book Review, 77 YALE L.J. 159, 168-72 (1967).

policy of the Rule. This transplantation elevates form over substance. The length of dead hand rule will almost always be the same whether the testator makes a gift "to *A* for life, then to the children of *A* payable at twenty-five" or "to *A* for life, then to the children of *A* who reach twenty-five." Yet the former is valid, and the latter is void.<sup>76</sup>

#### D. *Executory Interests*

Generally, executory interests are divesting interests. An executory interest must divest ("cut short") a preceding vested interest in order to become possessory. The preceding vested interest may be either in the transferor or in a transferee. An exception is an executory interest following a fee simple determinable. Such an executory interest does not divest the fee simple determinable but becomes possessory upon the automatic termination of the determinable fee.

Executory interests are of two types: (1) executory interests not certain to become possessory and (2) executory interests certain to become possessory. An executory interest not certain to become possessory is treated as contingent until it either vests in possession or turns into a vested remainder. There is no difference in the treatment of such executory interests and contingent remainders under the Rule against Perpetuities. Thus:

*Illustration 14.* *T* devises property to *A* for life, then to *A*'s children for their lives, then to *B*, and if *B* is not then living, to *B*'s heirs. *B*'s heirs have an executory interest that will either divest *B*, thus turning into a vested remainder, or fail if *B* survives *A* and *A*'s children. In either case, the executory interest must vest or fail at or before *B*'s death, and it is valid; *B* is the validating life.

If an executory interest is certain to become possessory, it is treated like a vested remainder. Thus:

*Illustration 15.* *T* devises Blackacre to *A* to become possessory thirty years after *T*'s death. *A* has an executory interest that will divest the fee simple in *T*'s heirs upon an event certain to happen. *A*'s executory interest is functionally equivalent to a vested remainder after a term of years (compare *T* "to my heirs for thirty years, then to *A*"). It is vested upon creation and valid under the Rule.<sup>77</sup>

A comparable executory interest, certain to become possessory in thirty years, is a bequest "to *A* (aged five), to be paid when *A* reaches

76. Another example of how the word vest fails to coordinate law and policy: A devise "to *A* for life, then to *A*'s children for their lives," is valid even though the property will be tied up for the entire lives of *A*'s children. On the other hand, a devise "to *A* for life, then to *A*'s children who reach 25," which will tie up the property only until the children reach 25, and not for their entire lives (unless they all die before reaching 25), is void.

77. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.20: RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4, *Illustration 18* (1981).



thirty-five." *A* is not entitled to present possession; therefore *A*'s interest is a future interest.<sup>78</sup> It is not a remainder because no preceding freehold is created to support it. It is an executory interest. Since *A* does not have to survive to age thirty-five to receive the gift, *A*'s interest is certain to become possessory in *A* when *A* reaches thirty-five or, if *A* dies before reaching that age, in *A*'s personal representative when *A* would have reached thirty-five had *A* lived. The type of interest *A* owns has long been treated as vested with possession postponed.

In earlier times, it was said that an executory interest cannot vest in interest prior to vesting in possession or prior to turning into a vested remainder.<sup>79</sup> But, as Professor Leach has noted, "this statement is supportable only on historical grounds having no relation to present practical considerations, nor is it really observed by the courts in situations where it counts."<sup>80</sup> Under modern thought, executory interests certain to become possessory are the functional equivalents of vested remainders, and are thus treated as vested in interest. The executory interest in *Illustration 15* is an example: the possessory interest in *T*'s heirs and the executory interest are both vested. Similarly, a gift to the children of *A*, payable at their respective ages of twenty-five, creates an executory interest that may vest prior to becoming possessory. Today executory interests are being assimilated into remainders, with the same definitions of vested and contingent being applied to both.

## V

### CLASS GIFTS

#### A. *The All-or-Nothing Rule*

Under the Rule against Perpetuities, a class gift is either valid for all class members or valid for none. A class gift cannot be partially valid and partially void. If the interest of any member of the class possibly can vest too remotely, the entire class gift is invalid. Hence, a class gift is

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78. Historically, *A*'s interest was called a "present" interest, a label that avoids the issue of whether *A*'s interest is presently a *possessory* interest or a *future* interest. Since the Rule against Perpetuities applies only to future interests (as opposed to possessory interests), it is vital to know whether *A*'s interest is possessory or future. The label "present interest" tells us nothing about this and is analytically vacuous in this context. See Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13, 23-28 (1958); cf. Makdisi, *The Vesting of Executory Interests*, 59 TUL. L. REV. 366, 388 (1984) (suggesting *A*'s interest is more analogous to a vested remainder than to an executory interest).

79. This rule apparently rested on strange metaphysical notions about seisin uncongenial to modern thought. With respect to remainders, "seisin of the inheritance" passed to a vested remainderman at the time of the conveyance, and, if the remainder were contingent, it was held in the "bosom of the law" until the remainder vested. In contrast, the holder of an executory interest was viewed as having no actual or expectant share in seisin. See A. GULLIVER, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 193-201 (1959).

80. W. LEACH & J. LOGAN, FUTURE INTERESTS AND ESTATE PLANNING 253 (1961).

vested under the Rule against Perpetuities only when (1) all members of the class are identified—that is, the class is closed—and (2) all conditions precedent have been satisfied for every member of the class.<sup>81</sup> A class gift vested subject to open is not vested under the Rule against Perpetuities. To satisfy the Rule, the class must be closed.

The easiest way to solve perpetuities problems involving class gifts is to ask two questions corresponding to the two requirements for vesting of class gifts. First, ask: *When will the class close?* If the class might close beyond the perpetuities period, the gift is void because the beneficiaries may not all be identified within such period. However, if the class will certainly close within the perpetuities period, proceed to ask the second question: *When will all conditions precedent for every member of the class be satisfied?* If all conditions precedent might not be satisfied until after the perpetuities period has run, the gift is void. If, on the other hand, all conditions precedent will be satisfied, if at all, within the perpetuities period, the gift is valid. Observe that the class must close and all conditions precedent must be satisfied within the perpetuities period, if at all, for the gift to be valid.

*Class closing rules.* A class can close either physiologically or, perhaps earlier, under the rule of convenience. A class closes physiologically at the death of the parent of the class. In a gift to the children of *A*, for example, the class closes physiologically at *A*'s death. At that time all members of the class are identified. Look back at *Illustrations 8, 9, and 10*. In each case the Rule is violated because the class of beneficiaries might remain open until the death of an afterborn parent. The class will not necessarily close within twenty-one years after the end of the relevant lives.

Under the "rule of convenience," the class will close whenever any member is entitled to demand possession of his share. Some class gifts may be saved from voidness through the operation of this rule because it may close the class prior to the time it would close physiologically. Courts follow the rule of convenience when it is impossible to make a minimum distribution to the class member presently entitled unless the class is closed. Here are some examples:

*Illustration 16.* *O* conveys land to her daughter *A* for life, then to *O*'s grandchildren. The class of *O*'s grandchildren will close physiologically at the death of *O*'s children, not all of whom are necessarily alive. Hence the physiological closing of the class is too remote. However, under the rule of convenience, the gift to *O*'s grandchildren is good if a grandchild of *O* is alive at the date of the conveyance. The grandchild alive at the

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81. The all-or-nothing rule is criticized at 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.26. But apparently only the Mississippi court has refused to follow it. See *Carter v. Berry*, 243 Miss. 321, 361-68, 140 So. 2d 843, 849-51 (1962).

date of the transfer (or his personal representative) will be entitled to possession of his share at *A*'s death, thus closing the class at *A*'s death.<sup>82</sup> If *O* has no grandchildren alive at the date of the conveyance, the gift is void because the class of grandchildren may stay open during the lives of *A*'s afterborn children. This chain of events might happen: *O* has an afterborn child, *X*; then *O*, *A*, and all of *A*'s presently living children die; then twenty-three years later *X* marries and has a child (grandchild of *O*) who claims the gift. This is more than twenty-one years after the relevant lives in being expire.<sup>83</sup>

*Illustration 17.* *T* devises Blackacre to the grandchildren of *A* who attain the age of twenty-five. *A* survives *T*. Under the rule of convenience, the gift is valid if a grandchild of *A* is aged twenty-five at *T*'s death, for in that event the class of grandchildren will close at *T*'s death, and the grandchildren then living are the validating lives. They will either reach twenty-five or die under that age, dropping out of the class, within their own lives. If no grandchild is aged twenty-five at *T*'s death, the gift is void. All of *A*'s presently living children and grandchildren might die tomorrow. A year later, *A* might have a child, *X*, and die. *X* might then have a child (grandchild of *A*) who reaches twenty-five more than twenty-one years after the expiration of the relevant lives. This is too remote.<sup>84</sup>

In sum, when working with class gifts, first look to see when the class will close physiologically. If it will close physiologically too remotely, then see if the class will close within the perpetuities period under the rule of convenience. If the class will close either physiologically or under the rule of convenience within the perpetuities period, proceed to see whether every condition precedent will be satisfied within that period.

Where there is a condition precedent, not only must the class close, but also the condition precedent must be satisfied for all members of the class within the perpetuities period, if at all. *Illustrations 6 and 11* show cases in which the class will close within the period (at *A*'s death), but the condition precedent may not be met for all members of the class within twenty-one years thereafter.

Words that merely refer to the age at which the beneficiaries are entitled to possession, and do not require survival to that age, do not state a condition precedent.<sup>85</sup> When a class gift is construed as vested

82. If the donative instrument were a will or a revocable trust, rather than a deed, the gift to the transferor's grandchildren would be valid regardless of whether a grandchild were alive at the transferor's death. The transferor's children would be the validating lives; the class of grandchildren would close at their deaths.

83. If no grandchild is alive at the time of the conveyance, the lives causally related to vesting, which may be used as measuring lives for wait-and-see, are *O*, *A*, and all of *O*'s children alive at the time of the conveyance.

84. The persons who can affect vesting are *A* and all of *A*'s children and grandchildren alive at *T*'s death. They may be used as measuring lives under wait-and-see.

85. See *supra* text accompanying note 73.

with possession postponed, the only question is when the class will close. There is no condition precedent to be met.

### B. Gifts to Subclasses

One of the most common violations of the Rule occurs when the transferor attempts to tie up property in trust for two generations with remainder in fee to the third generation. The fertile octogenarian case, *Illustration 8*, is an example. If the instrument is phrased so as to divide the third generation into subclasses, the gifts of the remainder may be wholly or partially valid. To create subclasses, the instrument must provide that upon the death of *each* member of the second generation (rather than upon the death of *all* members of the second generation), the share of the dying person shall vest in his children or issue. If the instrument contains such a provision, the share given the children of any person in being when the instrument takes effect will vest, if at all, at the death of their parent, a life in being. Such a gift is valid. On the other hand, the share given the children of an afterborn person may vest upon the death of such afterborn person. Such a gift is void.<sup>86</sup> Thus:

*Illustration 18.* *T* devises a fund in trust for *A* for life, then for *A*'s children for their lives, and upon the death of any child of *A* leaving surviving issue, to distribute the share of the principal from which such child has been receiving the income to such child's issue then living. At *T*'s death *A* has a living child, *B*. Two years later, *A* bears a child, *C*. The life estates in *B* and *C* are valid. Are the remainders in fee valid? The gift to *B*'s issue is valid because it will vest, if at all, upon the death of *A* and *B*, persons in being. However, the gift to *C*'s issue is void because it may vest upon the death of *C*, an afterborn person.<sup>87</sup> If *A* is survived by only two children, *B* and *C*, on *B*'s death one half the principal is paid to *B*'s issue, and on *C*'s death one half the principal goes to *T*'s residuary devisees or *T*'s heirs.

The doctrine of subclasses or separate shares also applies where there are divesting gifts. For example, suppose in *Illustration 18* that the trust had been set up for *A* for life, then for *A*'s children, but if any child of *A* becomes a lawyer, his share shall go to *A*'s other children. In this case, any child of *A* in being at the testator's death would be divested if he or she became a lawyer, but the afterborn children of *A* could not be divested.

86. *Cattlin v. Brown*, 11 Hare 372 (Ch. 1853); *American Sec. & Trust Co. v. Cramer*, 175 F. Supp. 367 (D.D.C. 1959); see 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.29.

87. Under wait-and-see the lives in being that can affect vesting of the remainder to *C*'s issue are *A* and *B*. *A* can affect vesting in possession as well as the identity of the remaindermen (by procreating *C* after *T*'s death). *B* can affect the time a portion of the remainder in *C*'s children vests in possession. If *B* dies without issue before *C*, *C* will be entitled to all the income, and *C*'s issue will be entitled to the entire trust principal upon the deaths of *A*, *B*, and *C*.

### C. Gifts of Fixed Sums

If a donor gives a fixed sum to *each* member of a class, each gift is tested separately under the Rule.<sup>88</sup> The all-or-nothing rule does not apply. The reason for judging each gift separately is that the amount each person will take is fixed and cannot be increased or decreased by any fluctuation in the number of recipients. Vesting of each beneficiary's gift cannot be affected by other members of the class. Thus:

*Illustration 19.* *T* bequeaths \$1000 apiece to *T*'s nephews and nieces, whether born before or after *T*'s death. *T* is survived by her parents, her sister *A*, and *A*'s daughter *B*. After *T*'s death, a child, *C*, is born to *A*, and a child, *D*, is born to *T*'s parents. *B* is entitled to receive \$1000 because her gift vests at *T*'s death. Each child of *A* born after *T*'s death is entitled to receive \$1000 because the gift will necessarily vest or fail at or before the death of *A*. Hence *C* takes \$1000. However, the gifts to the children of *D* are void since they may vest during the life of an afterborn person, *D*.<sup>89</sup>

## VI

### CONSEQUENCES OF VIOLATING THE RULE

#### A. General Rule

When an interest violates the Rule against Perpetuities, the general rule is that the invalid gift is stricken from the instrument, and the other valid gifts take effect as if the invalid gift were not in the instrument. If, upon striking out a gift in a *deed*, there is an incomplete disposition of the property, the property returns to the transferor upon the expiration of the valid interests. In the case of a transfer by *will*, if any remainder in a nonresiduary clause is found invalid, the residuary devisees take any interest not previously disposed of.<sup>90</sup> If the invalid remainder is found in the residuary clause, a reversion arises in the testator's heirs. Thus:

*Illustration 20.* *T* devises Blackacre to *A* for life, then to *A*'s children who reach twenty-five. *T*'s residuary devisee is *B*. *T*'s heir is *C*. The remainder to *A*'s children is struck out because it is void.<sup>91</sup> Upon *A*'s death, *B* takes Blackacre. If there were no residuary clause, or if the residuary clause devised the residue, including Blackacre, to *A* for life, remainder

88. *Storrs v. Benbow*, 3 De Gex, M. & G. 390, 43 Eng. Rep. 153 (Ch. 1853); see 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.28.

89. The wait-and-see measuring lives for the gifts to children of afterborn children of *T*'s parents are *T*'s parents. Neither *A* nor *B* can affect in any way the \$1000 gifts to children of afterborn children of *T*'s parents.

90. The name of the interest taken by the residuary devisees is in some dispute. It may be called a remainder or a reversion. See J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 694 (3d ed. 1984); Holt, *The Testator Who Gave Away Less Than All He or She Had: Perversions in the Law of Future Interests*, 32 ALA. L. REV. 69, 72-79 (1980).

91. The persons who can affect vesting, who may be measuring lives for wait-and-sec, are *A* and all of *A*'s children alive at *T*'s death.

to *A*'s children who reach twenty-five, *T*'s heir, *C*, would have a reversion.

Two states have statutes changing the general rule. In Georgia and Pennsylvania, an invalid remainder passes to the preceding life tenant rather than to the transferor or his devisees or heirs.<sup>92</sup> This solution is particularly appealing where the testator has created a void remainder in the children of the life tenant, as in *Illustration 20*, since the intended recipients (the children) may ultimately receive the property by inheritance from their parent.

If the preceding valid estate is a defeasible fee, either in possession or in remainder, the invalid divesting interest is struck out, and the fee is no longer subject to divestment. Thus:

*Illustration 21.* *T* devises Blackacre to *A* for life, then to *A*'s children, but if any child of *A* dies before attaining the age of twenty-five, his share shall go to *A*'s other children. *A* has one child, *B*, aged two, at *T*'s death, and a child, *C*, is born two years after *T*'s death. The gift to *A*'s other children divesting *B*'s share is valid because divestment must take place, if at all, during *B*'s life. The gift divesting *C*'s share is void, because divestment may take place during the life of an afterborn person, *C*, more than twenty-one years after relevant lives in being expire.<sup>93</sup> *C*'s interest cannot be divested.

### *B. Infectious Invalidity*

The general rule, discussed above, does not necessarily apply where the invalid gift is an essential part of the testator's dispositive plan. If the court finds that the testator would have preferred other parts of the plan to fail had he known the gift would be invalid, the doctrine of "infectious invalidity" applies. This doctrine says that, if necessary to carry out the testator's plan, the invalidity of a remainder will infect the valid preceding estates and cause them to fail as well. The typical case of infectious invalidity occurs when a plan calls for equal distribution among the families of the testator's children, but the bequest to one child's family violates the Rule. Thus:

*Illustration 22.* *T* devises one-half of her property outright to her daughter, *D*. The other one-half *T* devises in trust for her son, *S*, for life, then for *S*'s children for their lives, then to *S*'s grandchildren in fee simple. *D* and *S* are *T*'s only heirs. The remainder to *S*'s grandchildren violates the Rule and is void.<sup>94</sup> If the general rule is applied, giving a reversion in *S*'s

92. GA. CODE ANN. § 44-6-1(a) (1982); PA. CONS. STAT. ANN. tit. 20, § 6105(c) (Purdon 1975).

93. Under the causal relationship principle of wait-and-see, the divesting gift is valid if it divests within 21 years after *A*'s death. *A* can affect the identity of the beneficiaries of the executory interest, as well as the time of possession.

94. Under the causal relationship principle of wait-and-see, the measuring lives are *S* and all of

one-half to *T*'s heirs, *D* and *S*, *D* will ultimately end up with three-quarters of *T*'s property—one-half at *T*'s death and one-quarter at the death of *S* and *S*'s children. In order to achieve the intended equal distribution between the children, it has been held that the entire will fails, resulting in intestate distribution in equal shares to *D* and *S*.<sup>95</sup>

There is an alternative to infectious invalidity almost never considered by the courts. When a donor attempts to create a remainder in the children of the preceding life tenants and the remainder violates the Rule, increasing the preceding life estate to a fee simple would often work more equitable results than infectious invalidity.<sup>96</sup> In *Illustration 22*, for example, if this were the remedy decreed by the court, the trust would be valid for *S*'s life, and *S*'s children would take the remainder in fee simple.

An argument for the latter result can be made by way of analogy to a fee simple gift in which a subsequent clause modifies the gift so as to violate the Rule against Perpetuities. A modifying clause is treated like a condition subsequent; neither invalidates a previous gift if the previous gift by itself does not violate the Rule.<sup>97</sup> In *Illustration 22*, for example, if the devise had been "to *S* for life, then to *S*'s children, but I desire *S*'s children to receive only the income for their lives, with principal to be paid to their issue," the gift to the children's issue would be void, and the modifying clause beginning with "but I desire" would be struck from the will. This would leave *S*'s children with an absolute gift, to become possessory upon *S*'s death. Following this analogy, the same disposition should occur in *Illustration 22* since the difference between the language used there and in a modifying clause does not reflect a substantial difference in intention. Nonetheless, unless the gift over is by a clause reducing a fee simple gift, the cases do not support giving an absolute fee simple to the preceding takers even when they are the parents of the intended ultimate takers whose gift is void.

### C. Split Contingencies

If a donor makes a gift upon two contingencies, one of which must occur, if at all, within the perpetuities period and the other of which might occur too remotely, the donative instrument is treated as making two separate gifts. If the language of the will expressly separates the two contingencies and the valid contingency actually happens, the gift is

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*S*'s children and grandchildren living at *T*'s death. These are the lives who can affect vesting of the remainder.

95. *Taylor v. Dooley*, 297 S.W.2d 905 (Ky. 1956); see also *Morton Estate*, 454 Pa. 385, 312 A.2d 26 (1973); *In re Harden*, N.Y.L.J., Sept. 17, 1985, at 13, col. 6 (New York County Sur. Ct.).

96. See *supra* text accompanying note 92.

97. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.53.

good.<sup>98</sup> Thus:

*Illustration 23.* *T* bequeaths a fund in trust to pay the income to her son, *S*, for life, then to *S*'s widow, if any, for life, then *upon the widow's death or upon the death of S if he leaves no widow* to *S*'s issue then living. The testator has expressly split the events upon which the gift to *S*'s issue will vest. The gift to *S*'s issue living upon the widow's death is void because of the possibility that *S* will marry a woman not alive at *T*'s death.<sup>99</sup> The gift to *S*'s issue living upon the death of *S* if he leaves no widow is good. The issue take if *S* actually dies without leaving a widow.

Observe that in *Illustration 23*, the testator *expressly* stated separately the two events upon which *S*'s issue are to take. This is essential if the gifts to issue are to be tested separately. Even though these two events are implicit in the limitation, and the limitation in *Illustration 23* would mean the same thing if the italicized words had been omitted, the court will not treat the limitation as making separate gifts unless the events are expressly separated in the will. If the italicized language in *Illustration 23* had been omitted, the gift to *S*'s issue would be entirely void.<sup>100</sup>

#### D. Equitable Reformation or Cy Pres

The power of a court to reform invalid gifts in order to carry out the general intent of the donor when his specific intent cannot be given effect is known as the *cy pres* doctrine. The term *cy pres*, coming from Law French, means as near as practicable.<sup>101</sup> The standard view is that the judicial *cy pres* power applies only to charitable gifts that fail, never to gifts to private beneficiaries.<sup>102</sup> Nonetheless, a few courts have applied the *cy pres* doctrine to private gifts violating the Rule against Perpetuities. These courts reform gifts violating the Rule to approximate most closely the transferor's intent.<sup>103</sup> In a growing number of states, statutes give courts this power. In several states, statutes empower the court to

98. See *id.* § 24.54.

99. Under wait-and-see, the measuring lives causally related to vesting are *S* and *S*'s issue living at *T*'s death, plus *S*'s widow if she was alive at *T*'s death.

100. For an argument that a court itself should sort out the different possible events upon which a gift can vest and give effect to the gift if it vests upon an event that must happen, if at all, within the perpetuities period, see Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459 (1968); cf. Simes, *supra* note 41, at 284-85 (objecting to a court's separating the different contingencies on the ground that it would have the effect of a court's waiting to see whether a valid contingency happens).

101. Someone hearing of the doctrine, and not knowing of its French origin, might think it another of those shorthand expressions like wait-and-see: "When you *see* what you've done, you *pray* the court to fix it."

102. 4 A. SCOTT, *supra* note 27, § 399.

103. *In re Estate of Chun Quan Yee Hop*, 52 Haw. 40, 469 P.2d 183 (1970); *Carter v. Berry*, 243 Miss. 321, 136 So. 2d 871 (1962); *Edgerly v. Barker*, 66 N.H. 434, 31 A. 900 (1891); *Berry v. Union Nat'l Bank*, 262 S.E.2d 766 (W. Va. 1980). But see *Merrill v. Wimmer*, 481 N.E.2d 1294 (Ind. 1985) (rejecting *cy pres*).



reform invalid interests as soon as the donative instrument becomes effective.<sup>104</sup> In other states that have adopted wait-and-see, statutes authorize reform where invalid interests do not in fact vest in time under the wait-and-see doctrine.<sup>105</sup>

The primary criticism of the *cy pres* doctrine is that it gives courts broad power to rewrite wills without any guidelines except the testator's presumed intent. This criticism is overstated. Courts have more discretionary power with respect to the construction of wills than is commonly recognized. In the law of wills, courts often imply gifts to fill in a gap in disposition, though the act of implication may not be openly acknowledged.<sup>106</sup> Further, the doctrine of infectious invalidity permits courts to strike down valid gifts and give the gifts to others. Motivated by the desire to avoid lawyer malpractice suits and unjust enrichment of unintended beneficiaries, modern courts are increasingly willing to correct scrivener's mistakes in drafting a will.<sup>107</sup>

Moreover, if higher courts lay down appropriate guidelines for how *cy pres* should be exercised in standard cases, the discretionary power of lower courts will be substantially reduced. One way of limiting a court's power to rewrite the will is to direct a court to insert a saving clause, to become effective only if the contingency that causes the gift to violate the Rule actually happens.<sup>108</sup> Such a clause will rarely be operative because the contingencies causing violation of the Rule—for example, the fertile octogenarian or the unborn widow—are usually quite unlikely to happen. If a saving clause were inserted by a court, the transferor's wishes would be carried out exactly in most cases. Inserting a saving clause that becomes operative only in the event of remote vesting is similar to adopt-

104. CAL. CIV. CODE § 715.5 (West 1982); IDAHO CODE § 55-111 (1979) (trusts only); MO. ANN. STAT. § 442.555 (Vernon 1986); OKLA. STAT. ANN. tit. 60, § 77 (West Supp. 1985); TEX. PROP. CODE ANN. § 5.043 (Vernon 1984).

105. ALASKA STAT. § 34.27.010 (1986); IOWA CODE ANN. § 558.68(3) (West Supp. 1986); KY. REV. STAT. ANN. § 381.216 (Michie/Bobbs-Merrill 1979); NEV. REV. STAT. § 111.103 (1985); N.M. STAT. ANN. § 47-1-17.1 (Supp. 1985); OHIO REV. CODE ANN. § 2131.08(C) (Anderson Supp. 1985); R.I. GEN. LAWS § 34-11-38 (1984); S.D. CODIFIED LAWS ANN. § 43-5-6 (1983); VT. STAT. ANN. tit. 27, § 501 (1975); VA. CODE ANN. § 55-13.3 (1986); WASH. REV. CODE ANN. § 11.98.150 (Supp. 1987) (trusts only). Wait-and-see and *cy pres* have also been adopted by RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.4 comment a, 1.5 (1981).

106. See J. DUKEMINIER & S. JOHANSON, *supra* note 90, at 389-90.

107. See generally Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982); see also Will of Shiftan, N.Y.L.J., Sept. 1, 1977, at 11, col. 6 (Westchester County Sur. Ct.) (ordering the insertion of a clause limiting duration of a trust to the perpetuities period, omitted by error of the scrivener); English Administration of Justice Act, 1982, pt. IV, § 20 (providing for reformation of a will because of clerical error or failure to understand the testator's instructions; enacted two years after *Ross v. Caunters*, [1980] 1 Ch. 297, held lawyers liable for negligence to intended will beneficiaries).

108. See Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 6 (1963).

ing wait-and-see and *cy pres*. The saving clause does not become operative until it is clear that remote vesting will otherwise occur.

The following hypotheticals illustrate alternatives for reformation in jurisdictions that have adopted *cy pres* but not the wait-and-see doctrine.

*Illustration 24.* (Age Contingency) *T* bequeaths a fund in trust for *A* for life, then to *A*'s children who reach twenty-five. The remainder to *A*'s children is void.<sup>109</sup> Exercising *cy pres* at the testator's death, a court has three choices. First, a court may reduce the age contingency for all children of *A* to twenty-one.<sup>110</sup> Second, a court may isolate the contingent event that causes the gift to be void; this event is the possibility that *A* will die leaving an afterborn child under the age of four. Then the court may insert a saving clause providing either (1) that if such event occurs, the age contingency for all children of *A* will be reduced to the age necessary to validate the gift for every child,<sup>111</sup> or (2) that if such event occurs, the age contingency for each child born after *T*'s death who is under the age of four at *T*'s death will be reduced to the age necessary to validate the gift for each such child.<sup>112</sup> The last alternative interferes least with the testator's intent, but courts in the reported cases have adopted the first alternative, which interferes most with the testator's intent.<sup>113</sup>

*Illustration 25.* (Fertile Octogenarian) *T* bequeaths a fund in trust for *A* for life, then for *A*'s children for their lives, then to *A*'s grandchildren. The remainder to *A*'s grandchildren is void.<sup>114</sup> The court has several choices. It may construe "*A*'s children" to include only presently living children and "*A*'s grandchildren" to include only children of *A*'s pres-

109. Under the causal relationship principle of wait-and-see, the measuring lives are *A* and all of *A*'s children alive at *T*'s death. These are the persons who can affect vesting.

110. This choice is apparently mandated by statutes in some states specifically providing for lowering of an age contingency that violates the Rule. See CONN. GEN. STAT. ANN. § 45-96 (West 1981); FLA. STAT. ANN. § 689.22(4) (West Supp. 1985); ILL. ANN. STAT. ch. 30, § 194, § 4(c)(2) (Smith-Hurd Supp. 1986); ME. REV. STAT. ANN. tit. 33, § 102 (West 1978); MD. EST. & TRUSTS CODE ANN. § 11-103(b) (1974); MASS. GEN. LAWS ANN. ch. 184A, § 2 (West 1977); N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1967).

111. The judicial decree reforming the instrument under this choice would provide: "If at *A*'s death any child of *A* who was not alive at *T*'s death is under the age of four, the age contingency for all the children of *A* shall be reduced to an age determined by adding 21 to the age of the youngest such child." See Browder, *supra* note 108, at 5.

112. The saving clause would read: "If at *A*'s death any child of *A* who was not alive at *T*'s death is under the age of four, the age contingency for each such child shall be reduced to an age determined by adding 21 to the age of each such child." This solution is suggested by RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5 comment e (1981), when the court reforms an interest after it does not in fact vest in time, but this is a possible reformation at the beginning.

113. See Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974); Carter v. Berry, 243 Miss. 321, 136 So. 2d 871 (1962); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891); Berry v. Union Nat'l Bank, 262 S.E.2d 766 (W. Va. 1980); see also *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 469 P.2d 183 (1970) (reducing period in gross from 30 years after testator's death to 21 years).

114. If the wait-and-see measuring lives are the persons who can affect vesting, they are *A* and all *A*'s children and grandchildren living at *T*'s death.

ently living children.<sup>115</sup> Alternatively, the court may insert a saving clause providing, "If *A* has a child conceived after *T*'s death, and such child lives for more than twenty-one years after the death of the survivor of *A* and all of *A*'s children alive at *T*'s death, the remainder in fee will vest in interest indefeasibly in *A*'s grandchildren twenty-one years after the death of such survivor." A third option for the court is to give the remainder in fee to *A*'s children on the theory that *A*'s grandchildren will likely inherit it from them.

*Illustration 26.* (Determinable Fee) *T* devises Blackacre to the School Board so long as used for a school, then to *A* and her heirs. The gift over to *A* violates the Rule against Perpetuities.<sup>116</sup> A court may reform the gift by holding that *A*'s interest is valid for *A*'s life, or for twenty-one years, or for *A*'s life plus twenty-one years. Motivated by the policy of making land marketable, the court may go even further and hold that, if *A*'s interest does not vest within the time allowed, the School Board has a fee simple absolute.<sup>117</sup>

Where a jurisdiction has adopted both wait-and-see and *cy pres*, reformation occurs at the end of the wait-and-see period. Although reformation will rarely be required, since most gifts will vest in time, the *Restatement (Second) of Property* contains useful illustrations of appropriate reformation at the end of the wait-and-see period.<sup>118</sup>

## VII

### POWERS OF APPOINTMENT

When applying the Rule against Perpetuities to powers of appointment, it is necessary to divide powers into two groups: (1) general powers presently exercisable, and (2) general testamentary and special powers. The donee of a general power presently exercisable by the donee alone is treated as the absolute owner of the property subject to the power, because the donee can exercise the power by appointing the property to himself in fee simple. The donee can acquire absolute ownership with the stroke of a pen.<sup>119</sup> On the other hand, the donee of a testamentary or special power is not treated as owner of the property subject to the power, because the power cannot be exercised presently for the donee's sole benefit. If these basic assumptions are kept in mind, the application

115. This solution is appealing when *A* is beyond normal childbearing years. This solution was adopted in *Estate of Grove*, 70 Cal. App. 3d 355, 138 Cal. Rptr. 684 (1977).

116. The only life causally related to vesting is *A*, the beneficiary. Under the causal relationship principle of wait-and-see, *A*'s interest is good for *A*'s life plus 21 years.

117. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5 comment b (1981), states that it would be appropriate to increase a determinable fee into a fee simple absolute when the wait-and-see period expires.

118. *Id.* § 1.5

119. For perpetuities purposes, the donee of a presently exercisable general power is in the same position as the settlor of a revocable trust. See *supra* text accompanying note 16.

of the Rule makes sense. The two basic questions arising with respect to powers are: (1) Is the power valid? (2) Is the exercise of the power valid?

### A. *Whether the Power Is Valid*

A general power of appointment exercisable by the donee alone during life is valid if the power will necessarily become exercisable within the perpetuities period. Once the power becomes exercisable, the donee has the equivalent of fee simple ownership. Thus, if a trust is set up for the children of *A* (a living person), and each child of *A* is given an inter vivos general power over his share of the principal, the general powers are all valid. They will all become exercisable at the end of a period of minority after *A*'s death. The crucial question in testing the validity of general inter vivos powers is: When will the power become exercisable? The moment it becomes exercisable the property is not tied up.<sup>120</sup>

A general testamentary power or a special power is void if the power can be exercised beyond the perpetuities period. Property subject to such a power is tied up so long as the power endures. Thus, in contrast to a general inter vivos power, the crucial question is: How long can the power endure? Without some type of saving clause, a testamentary power or a special power cannot be created in a person not living.<sup>121</sup> Thus:

*Illustration 27.* *T* bequeaths a fund in trust for *A* for life, then for *A*'s children for their lives, with each child to have a general testamentary power over his or her share. *A* has no children at *T*'s death. The general testamentary powers are all void because they can be exercised at the end of lives not in being.<sup>122</sup> If the children were given powers to consume principal during their lives, such powers would also be void unless they were completely unrestricted and the equivalent of general powers presently exercisable.

### B. *Whether the Appointment Is Valid*

An appointment by a donee of a general power presently exercisable is treated under the Rule against Perpetuities as a transfer by a fee simple owner, and adjudged accordingly. The perpetuities period begins to run from the date of exercise.

An appointment by a donee of a general testamentary power or a special power is treated as if the donee is the agent of the donor who created the power. The appointment is read back into the creating instrument, and the validating life for the appointment must be a person

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120. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.31.

121. See *id.* § 24.32.

122. Under the causal relationship principle of wait-and-see, the powers are valid if exercised within 21 years of *A*'s death.

alive at the date the power was created. Because the property is deemed tied up from the time the power is created, the perpetuities period begins to run on that date.<sup>123</sup> Even though the appointment is read back into the creating instrument, we nevertheless take into account facts existing at the date of the appointment in determining the validity of the appointment. This is known as the second-look doctrine.<sup>124</sup> Thus:

*Illustration 28.* *T* bequeaths a fund in trust for *A* for life, and then among *A*'s issue as *A* appoints, and in default of appointment, to *A*'s children who reach twenty-five. *A* dies, after appointing the property to her child *B* for life, remainder to *B*'s children. The perpetuities period for the appointment begins to run at *T*'s death, and the validating life must be a person alive at *T*'s death. To test the validity of the appointed interests, read the appointment back into *T*'s will: to *A* for life, then to *B* for life, remainder to *B*'s children. The remainder to *B* for life is valid because it vests in possession at the death of *A*, who was alive at *T*'s death. The only question is whether the remainder to *B*'s children is valid. In deciding this question, look to see if *B* was in being at *T*'s death. If *B* was in being at *T*'s death, then the remainder to *B*'s children is valid. It will vest, or fail, on the death of *B*, a person in being at *T*'s death. If *B* was not in existence at *T*'s death, the remainder to *B*'s children is void since it may vest upon the death of a person not alive when the power was created, to wit, *B*.<sup>125</sup>

Under the leading case of *Sears v. Coolidge*,<sup>126</sup> the second-look doctrine is applicable to gifts in default of appointment as well as to exercises of the power. In *Illustration 28*, if *A* does not exercise the power or exercises it invalidly, the gift in default at *A*'s death is judged in the same manner as an exercise of the power is judged. If all of *A*'s children are four or more years of age at *A*'s death, the gift in default is valid. If any child of *A* is under the age of four at *A*'s death, the gift in default is void.

### C. What Happens if Appointment Fails

If the donee makes an invalid appointment, the property passes in default of appointment to the takers in default. If there are no takers in default—either because they are not specified or the gift to them is invalid—the property goes back to the donor or the donor's estate.

123. A few states do not follow this rule. In two states, the perpetuities period for appointed interests runs from the date of exercise of a general testamentary power. See WIS. STAT. ANN. § 700.16 (c) (West 1981); *Industrial Nat'l Bank v. Barrett*, 101 R.I. 89, 98, 220 A.2d 517, 523 (1966). In three other states, the perpetuities period for appointed interests begins to run for all powers, special as well as general, from the date of exercise of the power. See DEL. CODE ANN. tit. 25, § 501 (1974); FLA. STAT. ANN. § 689.22(2) (b) (West Supp. 1986); S.D. CODIFIED LAWS ANN. § 43-5-5 (1983).

124. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.35.

125. Under the causal relationship principle of wait-and-see, the remainder to the children of *B*, an afterborn person, is valid if it vests within 21 years after *A*'s death.

126. 329 Mass. 340, 108 N.E. 2d 563 (1952).

There is one exception to these rules: the doctrine of capture.<sup>127</sup> If the donee of a *general* power of appointment manifests an intent to assume control of the property for all purposes and not just for the purpose of appointing it expressly to someone, the donee captures the property and the property goes to the donee's estate. Commonly, a donee manifests his intent to assume control for all purposes by including provisions in his will that blend the appointive property with the donee's own property. For example, if the donee's residuary clause says, "I give all of my own property and any property over which I have a power of appointment to . . .," the donee probably has captured the property for his estate. If the perpetuities violation is in the residuary clause of the donee's will, the captured property goes to the donee's heirs. The doctrine of capture does not apply to special powers, but only to general powers. Since the donee of a general power could expressly appoint to his estate, the doctrine of capture supplies that result when his intent is implicit in his actions.

#### D. Discretionary Trusts

A discretionary power in a trustee to pay or accumulate income, or to pay income among such members of a class as the trustee selects, is treated like a special power of appointment. If the power can be exercised beyond the relevant lives in being plus twenty-one years, the power violates the Rule against Perpetuities.<sup>128</sup> Thus:

*Illustration 29.* T bequeaths a fund in trust to pay the income to A for life, then in the trustee's *discretion* to pay the income among such of A's children as the trustee selects until the last child of A dies, then to distribute the principal to A's issue then living. The gift of principal is void for reasons heretofore given.<sup>129</sup> The trustee's discretionary power, exercisable during the lives of A's children (some of whom may be born after T's death) is void.<sup>130</sup> Only A's life estate is good. (If the trust had been a

127. See 5 AMERICAN LAW OF PROPERTY, *supra* note 6, § 23.61.

128. An honorary trust for the support of pet animals or graves is treated like a special power of appointment under the Rule against Perpetuities. The honorary trust is void if it can last beyond the perpetuities period. Thus a bequest of \$5,000 for the support of my dog Trixie is void. Only human beings can be measuring lives, and Trixie may live for more than 21 years after all human beings now alive are dead. No one knows how long a dog might live. See J. MORRIS & W. LEACH, *supra* note 26, at 323-27.

129. See *supra* Illustration 8.

130. It may be partially valid if Gray's argument set forth in the text accompanying note 131, *infra*, is accepted.

Under the causal relationship principle of wait-and-see, the trustee's power is valid for the life of A and all of A's children in being at T's death plus 21 years thereafter. The trustee is not a measuring life for wait-and-see because the power is assignable to a successor fiduciary. If trustees could be measuring lives, the perpetuities period would not end until there is no one alive who was alive at T's death, since any of such persons could be appointed successor trustee and exercise the

mandatory rather than a discretionary trust, the life estate in *A*'s children would be good.)

Gray took the position that a discretionary trust does not create one power that is either entirely valid or void, but a succession of annual powers exercisable with respect to each year's income.<sup>131</sup> Although Gray's position finds mixed support in the cases,<sup>132</sup> perhaps because it is seldom argued by counsel, it appears to be sound. If Gray's argument is accepted, the discretionary power in *Illustration 29* is not wholly void, but can be exercised annually for twenty-one years after *A*'s death.

Nevertheless, because of the danger of violating the Rule against Perpetuities, no lawyer should create a trust that lasts longer than lives in being plus twenty-one years where the trustee has discretionary power over income or principal.

### VIII

#### FORFEITURE FOR VIOLATION OF LAND USE RESTRICTION

Possibilities of reverter and rights of entry, which may be retained only by a transferor of property, are exempt from the Rule against Perpetuities. However, the equivalent executory interest in a transferee of property is subject to the Rule. This difference in treatment leads to strange and indefensible results. Compare these two cases:

*Illustration 30.* *O* conveys Blackacre to *A* and his heirs, but if Blackacre is not used for residential purposes, to *B* and her heirs. The executory interest in *B* is subject to a condition precedent of cessation of residential use. The interest is void because it may not vest in possession within the perpetuities period.<sup>133</sup> *B*'s interest is struck out, leaving *A* with a fee simple absolute.<sup>134</sup> *But:* If *O* had retained a right of entry, instead of

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power. It would thus be impossible to say when the perpetuities period ends. See *supra* note 46; cf. *infra* note 133.

131. J. GRAY, *supra* note 3, § 410.1-.5.

132. Cases contrary to Gray's position are *Bundy v. United States Trust Co.*, 257 Mass. 72, 153 N.E. 337 (1926); *Thomas v. Harrison*, 24 Ohio Op. 2d 148, 191 N.E.2d 862 (1962). Cases supporting Gray's position are *Lyons v. Bradley*, 168 Ala. 505, 53 So. 244 (1910); *Woodruff Oil & Fertilizer Co. v. Estate of Yarborough*, 144 S.C. 18, 142 S.E. 50 (1928); *Tidex v. Trustees Executors & Agency Co.*, [1971] 2 N.S.W.L.R. 453.

133. Under the causal relationship principle of wait-and-see, *B*'s interest is valid for *B*'s life plus 21 years. *B*, the beneficiary, is causally connected to vesting because an ascertained beneficiary is required for a vested interest. *A* and all succeeding owners of Blackacre are also causally connected to vesting because they can affect the condition precedent attached to *B*'s interest. But neither *A* nor the succeeding owners can be measuring lives for wait-and-see because the lives of all persons who can affect vesting in the same way must be traceable. Since the ownership of Blackacre can be transferred to anyone in the world, if the owners could be measuring lives the perpetuities period would end only when there is no one alive who was alive at the date of the conveyance. That is impossible to ascertain. See *supra* note 46 and accompanying text.

Under Uniform Statutory Rule against Perpetuities § (a) (2) (1986), the executory interest in *B* is valid for 90 years. The act greatly extends dead hand control by forfeiture restrictions on land use.

134. *Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142 (1855).

creating an executory interest in *B*, the right of entry would be valid. *O* or *O*'s heirs could exercise the right of entry whenever Blackacre ceased to be used residentially, perhaps centuries hence.

*Illustration 31.* *O* conveys Blackacre to *A* and his heirs so long as it is used for residential purposes, and if Blackacre is not used for residential purposes, to *B* and her heirs. The executory interest in *B* violates the Rule against Perpetuities because it may not vest in possession within the perpetuities period.<sup>135</sup> Take a blue pencil and strike out only the words associated with the executory interest, beginning with "and if." This leaves a fee simple determinable in *A*, and since *O* has not disposed of the entire fee simple, a possibility of reverter not subject to the Rule arises in *O*.<sup>136</sup>

*Illustrations 30 and 31* show the extreme importance of slight differences in language under the Rule. In many cases the scrivener will not have consciously chosen a determinable fee or a fee simple subject to condition subsequent, but the result turns upon words fortuitously used.<sup>137</sup>

The results in the illustrations above are malpractice traps for lawyers. To avoid perpetuities problems, a lawyer can carry out *O*'s intent by using two instruments rather than one. The first instrument conveys Blackacre to *B*; in the second instrument, *B* conveys to *A* either a fee simple subject to a right of entry in *B* or a determinable fee with a possibility of reverter in *B*. *B* now holds a right of entry or a possibility of reverter, exempt from the Rule, rather than an executory interest which is subject to the Rule. It has even been held that a testator can circumvent the result in *Illustration 31* by using two clauses in a will: the first clause devises a fee simple determinable to *A*, and the residuary clause devises the possibility of reverter to *B*.<sup>138</sup>

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135. Under the causal relationship principle of wait-and-see, *B*'s interest is valid for *B*'s life plus 21 years. See *supra* note 133.

136. *Institution for Savings v. Roxbury Home for Aged Women*, 244 Mass. 583, 139 N.E. 301 (1923).

137. The fee simple determinable and the possibility of reverter have been abolished in California and Kentucky. Statutes convert these interests, respectively, into a fee simple subject to condition subsequent and a right of entry. CAL. CIV. CODE § 885.020 (West Supp. 1987) (right of entry called power of termination); KY. REV. STAT. ANN. § 381.218 (Michie/Bobbs-Merrill 1972). In these states, *Illustration 31* would be treated like *Illustration 30*. If a right of entry were created, it would be valid for only 30 years. See *infra* note 139. In Kentucky, a right of entry may be created in a transferee. KY. REV. STAT. ANN. § 381.219 (Michie/Bobbs-Merrill 1972).

138. *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N.E.2d 922 (1950). Under orthodox doctrine the case is wrong, since a possibility of reverter retained by a will is created in the testator's heirs, not in the testator, who is dead. Property interests can neither be created in, nor retained by, dead persons. *In re Pruner's Estate*, 400 Pa. 629, 162 A.2d 626 (1960). *Woburn Church and Institution for Savings v. Roxbury Home for Aged Women*, 244 Mass. 583, 139 N.E. 301 (1923), *supra* note 136, have been superseded by a 1954 Massachusetts statute that permits a possibility of reverter to be created in a transferee as well as the transferor. The possibility of reverter is good for 30 years. MASS. GEN. LAWS ANN. ch. 184A, § 3 (West 1977). Although the statute was not intended to permit rights of entry to be created in transferees, see Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349, 1355, 1364 (1954), a recent Massachusetts



It is hard to think of a more striking example of the triumph of form over substance. The exemption of possibilities of reverter and rights of entry from the Rule permits the creation of a true perpetuity—a future interest that can endure potentially forever, resulting in all the problems that arise from unmarketable land. In order to avoid such problems, a number of state statutes impose a fixed-year limit upon these interests, usually thirty years.<sup>139</sup> These statutes produce an odd result. The transferor can retain a possibility of reverter or right of entry for only thirty years, but a functionally equivalent executory interest in a transferee can be created to endure for the entire perpetuities period.<sup>140</sup>

Subjecting possibilities of reverter and rights of entry to the Rule against Perpetuities would eliminate the difference in treatment between these interests and the functionally equivalent executory interest. If possibilities of reverter and rights of entry are subject to one time limitation (say, thirty years) and executory interests are subject to another (lives in being plus twenty-one years), a lawyer interested in giving the grantor the power to declare forfeiture for a period measured by lives in being plus twenty-one years can do so by using two instruments. The first instrument creates a defeasible fee in *A* and an executory interest in *B* which is limited to become possessory, if at all, twenty-one years after the death of a dozen named persons. The second instrument transfers *B*'s executory interest back to the grantor. However, if all similar interests were subject to the same time limitation, the two-pieces-of-paper routine would become irrelevant.

If the jurisdiction were to subject possibilities of reverter and rights of entry to the perpetuities rule and adopt wait-and-see for the common law perpetuities period, all invalid future interests created to enforce forfeiture restrictions on land use—whether created in transferor or trans-

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case holds that the statute authorized the creation of rights of entry in transferees. The court stated that the statute makes possibilities of reverter and rights of entry "indistinguishable in operation from executory interests created by analogous language." *Oak's Oil Serv., Inc. v. Massachusetts Bay Transp. Auth.*, 15 Mass. App. Ct. 593, 598, 447 N.E.2d 27 (1983), *appeal denied*, 389 Mass. 1103 (1983). Hence, it appears that the statute has swept aside another Massachusetts landmark, *Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142 (1855), *supra* note 134.

139. CAL. CIV. CODE § 885.030 (West Supp. 1986) (30 years); FLA. STAT. ANN. § 689.18 (West 1969) (21 years); ILL. ANN. STAT. ch. 30, ¶ 37e (Smith-Hurd 1969) (40 years); KY. REV. STAT. ANN. § 381.219 (Michie/Bobbs-Merrill 1972) (30 years); MASS. GEN. LAWS ANN. ch. 184A, § 3 (Law Co-op. 1977) (30 years); NEB. REV. STAT. § 76-2,102 (1981) (30 years); N.Y. REAL PROP. LAW § 345 (4) (McKinney 1968) (30 years); R.I. GEN. LAWS § 34-4-19 (1984) (20 years).

140. In three states possibilities of reverter and rights of entry are cut off after 30 years if the condition has not happened, unless the instrument is drawn so that the interests become possessory, if at all, during the perpetuities period. CONN. GEN. STAT. ANN. § 45-97 (West 1981); ME. REV. STAT. ANN. tit. 33, § 103 (1978); MICH. COMP. LAWS ANN. §§ 554.62-554.64 (Supp. 1986). Thus, possibilities of reverter, rights of entry, and executory interests can be created to endure for the perpetuities period. If the instrument is not drafted so as to satisfy the Rule against Perpetuities, however, possibilities of reverter and rights of entry are valid for 30 years and executory interests are entirely void.

ferees—would be valid for the life of the initial beneficiary of the future interest plus twenty-one years. Such a step would greatly simplify the law and eliminate potential lawyer malpractice traps.

*Exception: Charitable Gifts.* The Rule against Perpetuities does not apply to gifts of property where all possible beneficiaries are charities. If land is given to Clarity *A* with a gift over to Charity *B* if a specified event occurs, the executory interest in Clarity *B* is exempt from the Rule against Perpetuities. Thus a gift of land to a school board so long as used for a school, then to the town library, is a valid gift. This exception applies only if both the possessory estate and the future interest are given to charitable organizations. It does not apply if either interest is in a private individual.<sup>141</sup>

## IX

### OPTIONS TO PURCHASE LAND

An option to purchase land, which is specifically enforceable in equity, creates in the optionee an equitable interest in land. Because an option tends to reduce the incentive of the owner of land to improve it so long as the option exists, courts have subjected the option to the Rule against Perpetuities. In several jurisdictions a preemptive option (or right of first refusal), giving the optionee the right to buy if the optionor decides to sell, also has been held to come within the Rule. The modern trend, however, has been to free preemptive options from the Rule and to subject them instead to the rule against unreasonable restraints on alienation.<sup>142</sup> The latter rule offers a more flexible tool for dealing with the wide variety of preemptive options encountered today.

Under the traditional application of the Rule against Perpetuities, an option to purchase is treated like a future interest, contingent upon exercise of the option. If an option can be exercised beyond the perpetuities period, the option is void *ab initio*.<sup>143</sup> For example, an option to

141. See 4 A. SCOTT, *supra* note 27, §§ 401.5-7.

142. See *Metropolitan Transp. Auth. v. Bruken Realty Corp.*, 67 N.Y.2d 156, 492 N.E.2d 379 (1986) (holding a preemptive option not within the Rule against Perpetuities but subject only to the rule prohibiting unreasonable restraints on alienation, and citing numerous cases pro and con from other jurisdictions); accord, *Estate of Johnson v. Carr*, 286 Ark. 369, 691 S.W.2d 161 (1985); *Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537 (Colo. 1985) (right of preemption in condominium declaration); *Barnhart v. McKinney*, 235 Kan. 511, 682 P.2d 112 (1984).

An option contained in a lease giving the tenant the right to purchase the land or renew the lease is also not subject to the Rule against Perpetuities. Such an option does not make the land less productive; rather, it encourages the tenant to improve the land and capture the value of the improvement by exercising the option. See *Rose v. Chandler*, 279 S.E.2d 423 (Ga. 1981); 5A R. POWELL, *supra* note 24, ¶ 771[2].

143. *Certified Corp. v. GTE Products Corp.*, 392 Mass. 821, 467 N.E.2d 1336 (1984); see also *Shaffer v. Reed*, 437 So. 2d 98 (Ala. 1983) (option given to legatees to purchase bank stock violates Rule against Perpetuities).

purchase granted to *A* and her heirs, which is assignable and exercisable by someone other than *A* more than twenty-one years after *A* is dead, is void.

It is sometimes necessary to distinguish an option in the grantor from a right of entry, which is exempt from the Rule. Take this case:

*Illustration 32.* For \$5,000, *O* conveys land to the school board, but if the land ceases to be used as a school, *O* and her heirs are entitled to reenter and retake the land upon refunding the purchase price. If *O* has an option, the option is void, and the school board has a fee simple absolute.<sup>144</sup> If *O* has a right of entry, the right of entry is exempt from the Rule and is valid. Where *O* must pay money to retake the land, courts have held that *O* has an option, which is void.<sup>145</sup> Yet, it is not easy to explain why *O* should lose if the deed requires her to repay the purchase price upon reentry and win if the deed provides *O* can reenter without payment.

Subjecting options to the Rule against Perpetuities has been sharply criticized. Applying the Rule to options permits optionors to escape bad bargains when the land value rises by claiming a Rule violation, and subjects lawyers who draft options to malpractice claims if they do not limit the option's exercise to the perpetuities period.<sup>146</sup> Because options are commercial transactions, they seldom endure, or are intended to endure, for many years. Options reasonably limited in time pose no threat to the public welfare; in fact, they are useful in facilitating the development of land. No good reason appears why a court should not save an unlimited option to purchase by holding that the parties intended the option to be exercised within a reasonable time, which is necessarily less than twenty-one years.<sup>147</sup>

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144. Under the causal relationship principle of wait-and-see, the option is valid for the optionee's life plus 21 years. The original optionee (beneficiary) is a measuring life. Assignees cannot be measuring lives. Since the option could be assigned to any person in the world, if assignees could be measuring lives, the perpetuities period would not end until all potential assignees alive at the option's creation were dead. See *North Bay Council, Inc., Boy Scouts of America v. Grinnell*, 123 N.H. 321, 461 A.2d 114 (1983) (holding option valid for optionee's life plus 21 years); *supra* note 46 and accompanying text; see also *Henderson v. Millis*, 373 N.W.2d 497 (Iowa 1985) (ignoring list of measuring lives in Iowa wait-and-see statute and holding wait-and-see period is the life of optionee plus 21 years).

145. *Peele v. Wilson County Bd. of Educ.*, 56 N.C. App. 555, 289 S.E.2d 890 (1982); *Martin v. Prairie Rod and Gun Club*, 39 Ill. App. 3d 33, 348 N.E.2d 306 (1976).

146. See 6 AMERICAN LAW OF PROPERTY, *supra* note 6, § 24.56.

147. See *Young v. Cass*, 255 Ga. 508, 340 S.E.2d 185 (1986). In commercial leasing and sales, courts generally construe the contract to require performance within a reasonable period of time. See also *Ryland Group, Inc. v. Wills*, 331 S.E.2d 399 (Va. 1985).

## X

## TERMINATION OF TRUSTS

A. *Duration of Trusts*

Under the Rule against Perpetuities, a trust may extend beyond the perpetuities period.<sup>148</sup> The Rule is concerned only with the time when interests vest, not with trust duration. Nonetheless, language occasionally appears in the cases suggesting that a trust is void if it can endure beyond the perpetuities period.<sup>149</sup> Although this language may indicate that the court did not properly grasp the Rule, it also reflects a judicial sense that overlong trusts are against public policy.<sup>150</sup> The cases serve as a warning against creating any trust that can endure beyond the perpetuities period. There is always a danger that a court, not adequately schooled in the technical application of the Rule, may unwittingly strike down an overlong trust even though all interests in the trust will vest or fail within the perpetuities period.<sup>151</sup> Where the trust can extend beyond the perpetuities period, an additional danger is that some discretionary power in the trustee may be void if it is exercisable beyond the perpetuities period.<sup>152</sup>

B. *Preventing Perpetuities Violations in Trusts*

To avoid any potential perpetuities problem, the careful lawyer

148. A few states have statutes prohibiting suspension of the power of alienation, which may limit the duration of trusts to the perpetuities period. See MINN. STAT. ANN. § 501.11(6) (West Supp. 1986); MONT. CODE ANN. §§ 70-1-407, 70-1-410 (1985); NEV. REV. STAT. § 166.140 (Michie, 1986); N.Y. EST. POWERS & TRUSTS LAW §§ 7-1.5, 9-1.1 (McKinney 1967 & Supp. 1987); N.D. CENT. CODE §§ 47-02-27, 47-02-31 (1960); OKLA. STAT. ANN. tit. 60, § 175.47 (West 1971); S.D. CODIFIED LAWS ANN. §§ 43-5-1, 43-5-4 (1983); WIS. STAT. ANN. § 700.16 (West 1981). Both South Dakota and Wisconsin have abolished the common law Rule against Perpetuities; if the trustee is given a power of sale, the power of alienation is not suspended and the trust can endure forever. See generally, J. DUKEMINIER & S. JOHANSON, *supra* note 90, at 862-67.

In 1986, the Delaware legislature enacted a statute abolishing the common law rule for interests held in trust and providing a 110-year wait-and-see period for such interests. DEL. CODE ANN. tit. 12, § 213 (1986 Supp.).

149. See G. BOGERT & G. BOGERT, TRUSTS AND TRUSTEES § 218 (rev. 2d ed. 1979); see also *infra* note 151.

150. On the policy against trusts enduring beyond the perpetuities period, compare Downing, *The Duration and Indestructibility of Private Trusts*, 16 W. RES. L. REV. 350 (1965) (perpetuities period devoid of social value), with 5A R. POWELL, *supra* note 24, ¶ 772[3] (perpetuities period necessary for limiting trust duration).

151. Courts have struck down trusts that might endure beyond the perpetuities period in *Fuller v. Fuller*, 217 Ga. 316, 122 S.E.2d 234 (1961); *Burton v. Hicks*, 220 Ga. 29, 136 S.E.2d 759 (1964), *overruled by Burt v. Commercial Bank & Trust Co.*, 244 Ga. 253, 260 S.E.2d 306 (1979); *Letcher's Trustee v. Letcher*, 302 Ky. 448, 194 S.W.2d 984 (1946); *American Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E.2d 104 (1948); cf. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963) (questioning the reasoning of *Williamson* and holding that the Rule is concerned only with time of vesting).

152. See *supra* text accompanying note 128.

always limits the duration of trusts to the perpetuities period. Ordinarily this is accomplished by a saving clause terminating the trust upon the expiration of specified measuring lives plus twenty-one years. Here is an example of a saving clause:

*Notwithstanding any other provision in this instrument, this trust shall terminate, if it has not previously terminated, twenty-one years after the death of the survivor of the settlor's issue living at the date this instrument becomes effective. In case of such termination, the then remaining principal and undistributed income of the trust shall be distributed to the settlor's issue then living per stirpes.*

When a trust terminates within the perpetuities period, all interests in the trust are necessarily valid. If the drafter mistakenly creates an interest that would otherwise be invalid, a saving clause will cure the oversight. Because unintentional violation of the Rule is easy, a perpetuities saving clause should be inserted in every trust instrument.<sup>153</sup>

### C. Beneficiaries' Power to Terminate Trusts

Although the Rule against Perpetuities may not directly limit the duration of trusts, an associated rule prohibits any private trust from remaining indestructible beyond lives in being plus twenty-one years. If the rule is violated, the beneficiaries can terminate the trust.<sup>154</sup> It is not entirely clear from the paucity of cases whether a provision forbidding termination of a trust is void from the beginning if the provision can endure beyond the perpetuities period *or* whether the beneficiaries can terminate the trust only after the relevant lives in being plus twenty-one years have expired. Thus:

*Illustration 33.* *T* bequeaths property in trust for *A* for life, then for *A*'s children, the principal to be paid to them when the youngest child reaches age thirty. At *T*'s death *A* has no children. The gift to *A*'s children is valid under the Rule against Perpetuities because it will vest on *A*'s death with possession postponed. The trust is not invalid even though it may last for more than twenty-one years after *A*'s death. Nonetheless, *either* the restraint postponing payment is void *ab initio* and the trust can be terminated after *A*'s death when all of *A*'s children reach majority *or* the trust can be terminated by its beneficiaries twenty-one years after *A*'s death.

The *Restatement (Second) of Property* adopts the wait-and-see approach and permits termination of the trust when it actually endures for the applicable lives in being plus twenty-one years.<sup>155</sup> Two states have also adopted the wait-and-see approach to trust termination and permit trust

153. For excellent advice on how to draft instruments to avoid the Rule, see McGovern, *Perpetuities Pitfalls and How Best to Avoid Them*, 6 REAL PROP., PROB. & TR. J. 155 (1971).

154. 1 A. SCOTT, *supra* note 27, § 62.10.

155. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.1 (1981).

termination when the perpetuities period expires.<sup>156</sup>

## XI ATTORNEY MALPRACTICE

Although the Rule against Perpetuities is most often violated by average practitioners not abreast of the Rule or by persons who draw their own wills, highly respected lawyers have occasionally run afoul of the Rule. This is not surprising when so much turns on the form of expression. Calling the Rule "a technicality-ridden legal nightmare," Professor Leach has warned that the Rule "is a dangerous instrumentality in the hands of most members of the bar."<sup>157</sup>

The consumer protection movement, which has swept society since the 1950's, has brought with it attorney malpractice liability. In an increasing number of jurisdictions attorneys are liable to intended beneficiaries of negligently drafted instruments.<sup>158</sup> Whether is it negligent to draft an instrument that violates the Rule against Perpetuities is not settled. One California case, *Lucas v. Hamm*,<sup>159</sup> held that it was not negligent on the specific facts of the case. The court stated that the perpetuities violation in the case, of the administrative contingency variety, was such "that an attorney of ordinary skill acting under the same circumstances might well have 'fallen into the net which the Rule spreads for the unwary' and failed to recognize the danger."<sup>160</sup> *Lucas*, however, is a shaky precedent. It has been criticized as an embarrassment to the profession.<sup>161</sup> It is hard to explain to the public how a court can, in good conscience, invent a complicated rule, foist it on the public, yet exempt lawyers from knowing it. One lower California court has warned that the ultimate conclusion of *Lucas* is of doubtful validity today.<sup>162</sup> Fortunately, two years after the *Lucas* decision, the California legislature came to the rescue and adopted *cy pres*.<sup>163</sup> Now that a court can reform a violation of the Rule in order to carry out the testator's intent, it is likely that a negligent California lawyer will have to pay, at most, only the costs of a reformation lawsuit.

The threat of attorney malpractice liability probably will be a strong

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156. CAL. CIV. CODE § 771 (West 1982); ILL. ANN. STAT. ch. 30, ¶ 195, § 5 (Smith-Hurd Supp. 1986).

157. Leach, *supra* note 138, at 1349.

158. See Johnston, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 636-43 (1982).

159. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

160. *Id.* at 593, 364 P.2d at 690, 15 Cal. Rptr. at 826.

161. See Note, 81 L.Q. REV. 465, 478-81 (1965).

162. *Wright v. Williams*, 47 Cal. App. 3d 802, 809 n.2, 121 Cal. Rptr. 194, 199 n.2 (1975).

163. CAL. CIV. CODE § 715.5 (West 1982) (enacted 1963).

force for reform of this intricate field.<sup>164</sup> Average practitioners, not always having at their fingertips the golden thread that leads through the perpetuities maze, are—together with their clients—the primary beneficiaries of the wait-and-see and *cy pres* doctrines.

### CONCLUSION

The golden thread, which leads in and out of the intricate passages of the Rule against Perpetuities, is the internal logic of the Rule. This internal logic provides the guide to solving perpetuities problems:

First, find the persons who can affect vesting of the interest in question. These persons govern the perpetuities period applicable to the particular interest. The validating life, if one exists at all, will be found among such persons.

Second, since the Rule against Perpetuities is a rule of proof, try to find among these relevant persons one who enables you to prove the validity of the interest. To validate an interest, you must prove that the interest will either vest or fail at creation or within twenty-one years after the death of one or more relevant persons. If your opponent can prove that the interest might vest more than twenty-one years after the death of all relevant living persons, the interest is void.

If there is no validating life among the lives relevant to vesting, and the jurisdiction applies wait-and-see for the common law perpetuities period, wait out the lives of these relevant persons plus twenty-one years to see if the interest actually vests within the perpetuities period.

With this thread of logic, you can explore the twisted paths of the Rule without fear of getting lost. It is the most valuable clue to solving perpetuities problems. Moreover, it yields a coherent picture of how wait-and-see fits into the common law. The internal logic of the Rule is the cord that connects the future to the past.

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164. See Dukeminier, *Cleansing the Stables of Property: A River Found at Last*, 65 IOWA L. REV. 151, 159-60 (1979). In *Millwright v. Romer*, 322 N.W.2d 30 (Iowa 1982), the court appeared to assume that an attorney who violates the Rule is liable for negligence, but held the suit barred by the statute of limitations. One year later, the Iowa legislature adopted wait-and-see and *cy pres*. IOWA CODE ANN. § 558.68 (West Supp. 1986) (enacted 1983).

