Memorandum 90-22

Subject: Study L-3013 - Uniform Statutory Rule Against Perpetuities

The proposition before the Commission is whether to approve a tentative recommendation for adoption of the Uniform Statutory Rule Against Perpetuities (USRAP). This memorandum provides a summary of the major issues concerning USRAP and the staff's conclusions. At the March meeting, we plan to discuss these issues and then review the staff draft statute.

Directly following this memorandum is a staff draft of a *Tentative Recommendation Proposing Enactment of the Uniform Statutory Rule Against Perpetuities* (on white paper). A copy of the official text of the Uniform Statutory Rule Against Perpetuities in pamphlet form also accompanies this memorandum.

Extensive background materials, consisting of the consultant's background study, several law review articles, and many letters and memos, pro and con, from law professors and practicing lawyers accompany this memorandum as exhibits. (The exhibits are collected in a separate binder for Commissioners.) The exhibits are listed and indexed on the first two pages of the exhibits (on buff paper). For those who would like a good sampling of these materials, without reading lengthy articles, the staff suggests that you browse through the following: Charles Collier's Background Study (Exhibit 1, pp. 1-20); the Pedowitz article (Exhibit 1, pp. 55-56); the letters from law professors on both sides of the issue (Exhibits 5 & 6, pp. 189-224); Prof. Dukeminier's June 9 letter (Exhibit 7, pp. 225-36); Prof. Waggoner's July 5 letter (Exhibit 9, pp. 241-45); Prof. Dukeminier's July 12 letter (Exhibit 10, pp. 259-60); Prof. Waggoner's October 16 letter (Exhibit 11, pp. 261-62).

Background

The Common Law Rule Against Perpetuities

The common law Rule Against Perpetuities [the "Rule"] is most widely known in Professor Gray's formulation:

> No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

The central function of the rule is to mediate between those who seek to tie up their property for generations into the future and those in later generations who wish to control the property, free of the dead hand. The Rule is also described as the "rule against remoteness in vesting," since it operates to invalidate contingent interests. The Rule also had the effect of making sure that the time during which property was inalienable was not overly long. However, since the Rule permits the creation of interests tying up property for 100 years, it has also been called the Rule for Perpetuities.

In general, the Rule permits creation of interests by will or revokable trust that will vest in a transferor's grandchildren and require them to survive until 21 years of age, but not the creation of interests that will vest only in great grandchildren. The Rule can operate harshly, however, since it invalidates a disposition if there is any conceivable possibility that it will violate the rule, regardless of whether it is likely to do so, and regardless of how reasonable the disposition appears. Typical violations of the Rule include the following:

> Age contingencies greater than 21: T devises property in trust, with income to A for life, and then to A's children who reach age 25; this disposition fails because A could have another child after T's death who can die or reach age 30 more than 21 years after persons alive at T's death.
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> Unborn widow: T devises property to his son B for life, then to B's wife for life, remainder to B's then-surviving issue; this disposition fails because B's widow could be a person born after T's death and live for more than 21 years after B dies.

Fertile octogenarian: T devises property in trust, with income to 80-year-old C for life, then to C's children for life and, on the survivor's death, remainder to C's grandchildren; this disposition fails since C is conclusively presumed to be able to have more children, which can happen after T's death, with that child surviving more than 21 years after the death of C's children alive at T's death.

Administrative contingency: T devises property to T's issue surviving at the distribution of the estate; this disposition is invalid since administration of the estate could occur more than 21 years after lives in being.

Individuals who draft their own wills or trusts without expert advice can easily run afoul of the Rule, but many lawyers have also failed the test, notwithstanding the prominent position the rule enjoys in the law school curriculum. As estate planning has become more complex, using powers of appointment and discretionary trustees' powers, there is a greater risk of perpetuities violations. The Rule is a trap for the unwary, but can also trap the wary.

California Law

Over the years, California has engaged in periodic judicial and statutory interpretation, revision, refinement, and clarification of the Rule. California statutory law includes the common law Rule, with its lives in being plus 21 years (Civ. Code § 715.2), as well as an alternative 60-year period in gross (Civ. Code § 715.6).

Civil Code Section 715.2 provides the basic California rule in the following language:

> 715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities.

The special 60-year rule is set out in Civil Code Section 715.6:

> 715.6. No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code.

(It should be noted that this 60-year period is not a wait-and-see period, but provides an alternative to the lives-in-being plus 21 years scheme of the common law Rule in Section 715.2. Violation of the statutory rule is still judged by the "what if" approach, by virtue of the language "must vest, if at all.")

The harshness of judging the validity of nonvested interests at the time of their creation under Civil Code Section 715.2 or 715.6 is mitigated by a *cy pres* provision that permits judicial reform of instruments to avoid violation of the rule (Civ. Code § 715.5). This section also provides that it is to be "liberally construed and applied to validate [the] interest to the fullest extent consistent with" the "general intent of the creator of the interest whenever that general intent can be ascertained." This feature of California law is termed "immediate *cy pres*," although nothing in the statute requires reformation to take place immediately.

The "unborn widow" problem is solved by Civil Code Section 715.7 which provides that a person described as a spouse of a person in being at the beginning of the perpetuities period is considered as a "life in being" under the Rule, even if the spouse was not born yet.

Knowledgeable lawyers will also insert a perpetuities savings clause as appropriate to avoid violating the Rule, such as the following:

> Any trust created by this Will, or by the exercise of any power of appointment conferred by this Will, that has not terminated sooner shall terminate twenty-one (21) years after the death of the last survivor of *[named person or described class best suited to be measuring lives]* living at my death.

[See Halbach, *Rule Against Perpetuities,* in California Will Drafting Practice § 12.52, at 575 (Cal. Cont. Ed. Bar 1982).]

Overview of USRAP

The Uniform Act uses a 90-year wait-and-see period and prevents interests from being held invalid during the 90-year period. The 90-year waiting period was chosen by the Uniform Drafting Committee as an approximation of (or proxy for) the common law period of lives in being plus 21 years. The wait-and-see feature permits events to run their natural course. Cases and typical examples demonstrate that in most cases, there will be no need for litigation and that the reasonable desires of donors will be accomplished without the risk of being invalidated for a technical violation of the common law Rule. In the rare event that a contingent interest remains at the end of the 90-year period, *cy pres* is available to determine the appropriate distribution of the property in accordance with the plan of the donor as manifested in the governing instrument.

While interests may be validated by court action during the 90-year period, they may not be invalidated. In other words, the instrument is not reformed, nor are interests invalidated, at the beginning of the running of the estate plan. In some cases, a court may be called upon to apply deferred *cy pres* to interpret the instrument before the end of the 90-year period, such as when a class member is entitled to a distribution.

The Uniform Act is discussed further and compared to California law in the first 10 pages of the draft tentative recommendation following this memorandum and in the Background Study prepared by Charles Collier, Jr., attached as Exhibit 1.

Summary of Staff Conclusions

The staff recommends approval of USRAP. The main argument for adoption of the act is uniformity among the states. Ten states have adopted USRAP in the three years since its approval. The goal of uniformity may not be fully achieved, but USRAP offers the best hope for uniformity and may very well become the majority rule within lives in being. It is interesting to note that two states bordering on California -- Oregon and Nevada -- have adopted USRAP. We are also

impressed that USRAP has been approved by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers.

The staff is not convinced, however, that existing California law is in need of major repair. Reported cases are rare, and estimates of perpetuities litigation do not establish the need to take remedial action. Thus, we do not expect that USRAP would eliminate much unneeded litigation in California -- mainly because there does not seem to be much litigation. Nor do we expect that USRAP would result in added litigation. If a tentative recommendation is circulated, we should hear from practitioners statewide about whether they believe USRAP would solve any litigation problems or result in new ones.

The Uniform Act is neither a panacea nor a pox. On balance, the arguments back and forth between the proponents and opponents frequently demonstrate that there are at least two ways to look at almost anything. The staff does not believe there are any fatal flaws in USRAP. Any of the real problems that have been revealed, are relatively minor, and can be remedied. (Some of these problems are discussed in the notes following sections in the draft recommendation.)

Arguments For and Against USRAP

The following discussion summarizes the main points made in the materials included in the exhibits that accompany this memorandum. We have not attempted to analyze all of the arguments presented in the attached exhibits, nor have we cataloged all citations that could be listed for a particular argument. (Page references are to the page numbers at the bottom center of the exhibit pages.)

Is there a problem in California?

As to the question of whether there is a record of litigation resulting in the invalidation of dispositions, Professor Jesse Dukeminier writes that "perpetuities violations are so rare that wait-and-see legislation, with potential adverse consequences, is not justified." (Exhibit 7, at 231.) He notes that there are only two

reported cases of invalidation because of perpetuities violations in the 27 years since California law was revised. Professor Bloom argues that USRAP rests on the critical assumption that the common law Rule causes frequent invalidations. (Exhibit 4, at 141-45 [62 Wash. L. Rev. 33-37].) He concludes that the Rule does not cause frequent invalidations, if reported cases are the measure, and he also argues that settlements and cases where the issue is never raised or even discovered are also insignificant. Professor Bird says that existing law is "perfectly adequate" and that "litigation has been practically non-existent." (Exhibit 6, at 211.) The memorandum from Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section also supports the conclusion that there is little litigation in California. (See Exhibit 12, at 297-302.)

Professor Waggoner suggests that there are many more troublesome cases than are suggested by counting appellate decisions. (Exhibit 9, at 246.) Professor Langbein says that USRAP will eliminate the "scourge of innocuous blunders that defeat the expectations of ordinary persons." (Exhibit 5, at 203.) Charles Collier has reported that a number of perpetuity violations are handled at the trial court level and not appealed. (Exhibit 1, at 32-33.) We also suspect that many violations of the Rule are undetected, resulting in self-help wait-and-see.

As noted at the outset, the staff is concerned with the question of whether there is a problem meriting a legislative solution. It is clear that there is not a great deal of unnecessary litigation, nationwide or in California. On the other hand, we wonder how much "unnecessary" litigation or how many unjust results would be required to convince the opponents of USRAP that there is a problem. Put another way, if there is no problem, why do several of the anti-USRAP contingent propose schemes of their own devising? And why is the need for reform or refinement of the traditional rule so widely assumed? In this light, much of the dispute over the degree of undesirable litigation dissolves into the question of which reform should be adopted. (In this connection, see the remarks of Professor Niles in Exhibit 6, at 222.) Viewed as a contest between reform schemes, with the need for some reform generally conceded, we return to the argument for uniformity.

Should USRAP be enacted to achieve uniformity?

Uniformity is desirable to avoid the conflict of laws problems that may result when there is a question about which state's law will apply. Professor Halbach writes (Exhibit 5, at 197):

> Finally, I believe also that uniformity is important in perpetuities matters. Many estates from which trusts are funded, plus the effects of powers of appointment, involve multi-state sources or contacts. Without uniformity many and serious conflict of laws problems will result. It may be some years before all or nearly all of the states will act on a modern reform, but when the job is done we should not indefinitely have to cope (in planning, in administration and in court) with two basically inconsistent types of solutions.
>
> The need for perpetuities reform is quite generally recognized, as is the desirability of uniformity. Under the present circumstances it seems equally apparent -- even to an initial doubter like myself -- that the best solution is [USRAP].

Professor Kurtz also argues for uniformity based on USRAP, "not because it is the best reform, although it may be" but rather because "it may be the best (and perhaps only) solution that currently has the support of a broad spectrum of knowledgeable academics and thoughtful practitioners which has any possibility of being legislatively adopted nationally." (Exhibit 5, at 201.)

Professor Dukeminier urges the Commission not to adopt USRAP "just because it is a Uniform law." (Exhibit 7, at 226.) Professor Niles writes that there is "no need for California to be in a rush to gain uniformity" and suggests that New York is unlikely to accept USRAP. (Exhibit 6, at 222.) Professor Bloom asks rhetorically if "there is any reason to suspect that any state, let alone a significant number of states, will adopt" USRAP. (Exhibit 4, at 166.)

As noted above, the staff is persuaded most by the argument for uniformity. We would not recommend approval of USRAP if it had not been enacted by any other states, or only by a few. However, ten states have already enacted the Uniform Act. The predictions of Professor Bloom appear overly negative. We do not find persuasive the suggestion that uniformity is not a powerful argument simply because all states or the vast majority may not adopt the same rule. The advantage is incremental, becoming stronger as the number of

participating jurisdictions increases. It is also interesting to note that USRAP has been enacted both by states that had the common law Rule and by states that had some form of wait-and-see. (For the characterization of the law of all 50 states, see Bloom, Exhibit 4, at 165 [62 Wash. L. Rev. at 57].) Thus, the Uniform Act has been enacted in the common law states of Michigan, Minnesota, Montana, Nebraska, Oregon, and South Carolina, and in the wait-and-see states of Connecticut, Florida, Massachusetts, and Nevada.

Judicial hands-off

The Uniform Act, with wait-and-see and deferred *cy pres*, takes a judicial hands-off approach. This permits the achievement of the goals of the donor, testator, or trustor in the normal course of events notwithstanding any technical violations of the Rule. No policy of the Rule is violated in the usual case where a 25-year survival requirement is selected instead of a 21-year period. Proponents of USRAP point to the savings in litigation since immediate *cy pres* is not necessary.

The opponents, however, suggest that if litigation is not necessary at the beginning of the period under USRAP, it will result in litigation later on under the deferred *cy pres* feature of USRAP. (See Exhibit 4, at 151-55 [62 Wash. L. Rev. at 43-47].) Professor Dukeminier suggests that more litigation will result as a side effect of eliminating the right to invalidate offending dispositions, mainly because USRAP will preserve dispositions that have other litigation-breeding defects. (Exhibit 10, at 259.) This argument is highly speculative and difficult to test; it is not clear to the staff that the invalidating side of the Rule should be preserved in the hopes of tripping up incompetent drafters who might also make other annoying drafting decisions.

On the positive side, Professor Langbein writes that USRAP will eliminate the "scourge of innocuous blunders that defeat the expectations of ordinary persons." (Exhibit 5, at 203.) And Professor Smith says that USRAP "sweeps away . . . all the pitfalls which defeat reasonable expectations." (Exhibit 5, at 205.)

Professor Waggoner responds to the litigation-breeding assertion by arguing that USRAP will eliminate wasteful litigation, not purposive

litigation. (Exhibit 11, at 262.) In the case of a disposition to an open-ended class, such as the "issue of Nina," Professor Waggoner notes that litigation could be needed to determine the class membership issue even if there were no perpetuities problem. (Exhibit 11, at 266.)

Although the commentators have been highly imaginative in marshalling examples of how litigation can spring from USRAP, the staff is convinced that most cases will work themselves out during the 90-year wait-and-see period. Since almost all modern future interests are in trust, the rules for termination of trusts and virtual representation offer further curatives.

Is USRAP simpler to administer?

The proponents of USRAP have consistently argued that it will be simpler to administer than the traditional Rule, including variations such as the California statute with the right to immediate *cy pres* to reform the disposition.

The anti's, however, have seized on the length of the official commentary (and the version of that commentary included in the staff draft) to argue that USRAP is obviously not simple. If it were, why would it take so much paper to explain it? (See, e.g., Exhibit 4, at 156 [62 Wash. L. Rev. at 48]; Exhibit 7, at 232; Exhibit 10, at 259-60.) The staff confesses to feeling the same way upon first encountering USRAP. However, it is the nature of the perpetuities beast to engender much writing. The simple fact is that the vast bulk of the official commentary is a discussion of traditional perpetuities law, since the validating side of the traditional rule is retained under USRAP. Hence, the number of pages (which are far less than those in Gray's treatise) is not a gauge of the simplicity of USRAP.

Of course, there is an alternative, and that is to abolish the Rule Against Perpetuities entirely, and recommend some other scheme. In fact, Professor Dukeminier suggests this very approach as an alternative to USRAP (and also, apparently, to his own causal measuring lives scheme). (Exhibit 7, at 232.) Abolition of the Rule also surfaced in the discussions of Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. (Exhibit 12, at 301.)

At this point in the Commission's consideration of this topic, we have limited the options to two: adopt USRAP or do nothing. If the Commission decides not to recommend USRAP, it would be appropriate to consider some other scheme, refinements, or correctives -- assuming that there is sufficient reason for a nonuniform reform. And in that event, the simplest statute might be the best. We note that Professor Bloom suggests his own statutory reform to deal with problems he sees, and the staff believes that he proposes some good rules. (Exhibit 4, at 166-88 [62 Wash. L. Rev. at 58-79].) Professor Bird also recommends parts of the Bloom statute for consideration. (Exhibit 6, at 211) And Professor Niles has suggestions for consideration, including the Dukeminier measuring lives approach. (Exhibit 6, at 222.) However, the staff remains convinced that uniformity is the most important factor at this time and that USRAP is the only vehicle with a chance to achieve that goal.

Dead-hand control & longer trusts

Professor Niles is concerned that USRAP will extend dead hand control. (Exhibit 6, at 221.) Professor Dukeminier argues that lawyers under USRAP will draft 90-year trusts, particularly to save taxes to avoid generation skipping transfer tax, and concludes that USRAP "will extend the effective reach of the dead hand by about 50 percent." (See, generally, Exhibit 2; Exhibit 7, at 227-30.) Professor Bloom concurs in the suggestion that lawyers will draft 90-year savings clauses. (Exhibit 4, at 160; Exhibit 6, at 215.)

The argument is not as strong as it first appears. Professor Dukeminier recognizes that competent counsel can draft 100-year trusts now -- his objection is reduced to arguing that it should not be too easy to do so: "Because it is difficult to understand, the Rule against Perpetuities exerts a socially beneficial pressure against the easy creation of long-term trusts." (Exhibit 7, at 229.)

Professor McGovern, who opposes enactment of USRAP, does not believe that lawyers will draft 90-year trusts, since they do not draft the longest possible trusts now. (Exhibit 6, at 219.) Professor Waggoner argues that dead hand control will not generally be extended. (Exhibit 9, at 250.)

The staff was initially very concerned by this question, since on the face of it, 90 years looks like a long time. But when actual cases are examined, we find that the 90-year period is not out of line with actual experience. Remember that the 90-year period is a maximum, and that most dispositions should work themselves out, according to their terms, long before the expiration of 90 years. The staff is also not convinced by the argument that only those with the most expert legal counsel should have the opportunity to tie property up for a generation or two. Nor have we heard any horror stories from Idaho, South Dakota, and Wisconsin, states that have no Rule Against Perpetuities. Even if savings clauses are redrafted to use the 90-year figure, we wonder if there is any reason to believe that many people will seek to set up 90-year controls.

Is wait-and-see period akin to perpetuities savings clause?

Professor Fellows says that the 90-year wait-and-see period is no more arbitrary than standard perpetuities savings clauses. (Exhibit 5, at 194.) Professor Alexander says USRAP extends "the benefit of a well-drafted perpetuity savings clause to individuals who cannot afford counsel who are sophisticated in estates and trusts law." (Exhibit 5, at 189.)

However, Professor Bloom argues that a perpetuities savings clause is superior to the wait-and-see period because "people tailor dispositions based on actual family developments rather than on some abstract notion of equal waiting time." (Exhibit 4, at 157-61 [62 Wash. L. Rev. 49-53].) A standard perpetuities savings clause performs better because it ensures compliance with the Rule and usually terminates the trust "well before" the maximum allowable period. A savings clause will provide for a gift over whereas wait-and-see does not, necessitating court proceedings.

The staff believes that Professor Bloom has a point, but it should not be exaggerated. We do not believe that the wait-and-see period should be seen as a substitute for a savings clause. The argument of the proponents is that USRAP extends the benefits of a savings clause to those who do not have it. Of course, this point should not be exaggerated either.

Does USRAP result in uncertain property title?

Several commentators have suggested that USRAP would impair transferability of real property during the wait-and-see period. Professor Dukeminier argues that not knowing whether an interest is valid may cause serious inconvenience. (Exhibit 7, at 227.) Professor Fratcher agrees with this point. (Exhibit 7, at 216-17.) (However, Professor Waggoner suggests that Professor Fratcher is really concerned with the doctrine of infectious invalidity, which is abolished by comment under USRAP. See Exhibit 9(b), at 248.)

Professor Fellows, on the other hand, writes that USRAP does not increase uncertainty in property titles. (Exhibit 5, at 195.) Professor Waggoner points out that in most cases involving future interests, the trustee has power over the property, so the old problem of inalienability has largely disappeared. (Exhibit 1(1), at 39.) The Prefatory Note of USRAP contains this interesting analysis:

> One of the early objections to wait-and-see should be mentioned at this point, because it has long since been put to rest. It was once argued that wait-and-see could cause harm because it puts the validity of property interests in abeyance -- no one could determine whether an interest was valid or not. This argument has been shown to be false. Keep in mind that the wait-and-see element is applied only to interests that would be invalid were it not for wait-and-see. Such interests, otherwise invalid, are always nonvested future interests. It is now understood that wait-and-see does nothing more than affect that type of future interest with an *additional* contingency. To vest, the other contingencies must not only be satisfied -- they must be satisfied within a certain period of time. *If* that period of time -- the allowable waiting period -- is easily determined, as it is under the Uniform Act, then the additional contingency causes no more uncertainty in the state of the title than would have been the case had the additional contingency been originally expressed in the governing instrument. It should also be noted that only the status of the affected future interest in the trust or other property arrangement is deferred. In the interim, the other interests, such as the interests of current income beneficiaries, are carried out in the normal course without obstruction.

The staff concludes that this is not a significant problem. To the extent that there is a problem in limited situations, such as

donative options, we should be able to deal explicitly with them. There does not seem to be a general problem of uncertainty of title since future interests are almost exclusively in trust.

Cy pres

Cy pres is involved in both existing law and USRAP. It is termed immediate *cy pres* in California, because it is assumed that the litigation over the validity of the disposition will take place sooner rather than later and *cy pres* will be applied under Civil Code Section 715.5. Professor Niles cites immediate *cy pres* as the chief reason for preferring California law over wait-and-see, especially USRAP. (Exhibit 6, at 221.)

Professor Waggoner compares the operation of *cy pres* under California law and USRAP using two recent perpetuity cases in Exhibit 9(c), at 250-57. In sum, in a Mississippi case (*Anderson*) involving a trust to last for 25 years from the date of admission of the will to probate, he suggests that California courts would reform the instrument to reduce the 25-year period to 21 years in order to avoid violating the rule. USRAP however would leave the disposition alone. Litigation would be unnecessary and the courts would not be called upon to apply *cy pres*. (Professor Waggoner also discusses a more complicated Maryland case (*Arrowsmith*), where the result under immediate *cy pres* is not known, but it would involve the cost and delay of a lawsuit in any event.)

Professor Dukeminier concludes that USRAP will result in more, not less, litigation than under immediate *cy pres*, in part because USRAP will save badly drafted trusts which are litigation breeders. (Exhibit 10, at 259.) Professor McGovern also characterizes the litigation reduction argument for USRAP as a "mirage." (Exhibit 6, at 220.) Professor Dukeminier suggests that USRAP will open the door to litigation over who is included in a gift to a class, such as "for the issue of Nina," as illustrated by a recent Nebraska case (*Criss*). (Exhibit 10, at 259-60.) Professor Dukeminier argues that a California court under Civil Code Section 715.5 would close the class of issue as of the testator's death in order to avoid a violation of the Rule. He goes on to suggest that the trust would continue for 90 years under

USRAP and that questions of including adopted issue, illegitimate issue, stepchildren, children adopted out of the family, etc., will arise and spawn litigation.

Professor Waggoner disputes this conclusion, arguing that the court would close the class of issue as of the testator's death under USRAP, the same as under California law, by reforming the instrument to satisfy the Rule. (Exhibit 11, at 261-82.) He notes that USRAP does not cause additional litigation in this type of case, since the question of determining the class of issue would arise under any perpetuities scheme. It is also interesting to note that Nebraska adopted USRAP after *Criss* was decided.

The contest between immediate *cy pres* and deferred *cy pres* may be seen as close to a tossup, with both sides able to devise scenarios illustrating the success or failure of one or the other scheme. Much speculation is involved in this dispute, since we do not have a lot of actual cases to consider. The argument tends to have a hypothetical aura. When the dust settles, however, the staff is impressed by the arguments that problems can work themselves out under wait-and-see and that some litigation is necessary under any scheme.

Does deferred *cy pres* under USRAP present evidentiary problems?

If litigation is to occur under any scheme, then, the opponents of deferred *cy pres* argue that it is far better to litigate at the beginning than at the end of the period covered by the disposition. (See, e.g., Bloom, Exhibit 4, at 154 [62 Wash. L. Rev. 46]; Dukeminier, Exhibit 7, at 230.) Professor Bloom even suggests that "unborn lawyers" will constitute a "class of unintended beneficiaries" of deferred *cy pres*. Team 1 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section notes the concern that evidence of the donor's intent can evaporate after 90 years in cases where reform is necessary. (Exhibit 12, at 300.)

Several answers can be given to this concern. First, the need to construe an instrument after 90 years should be exceedingly rare, since most dispositions will have run according to their terms before the 90-year period expires. Second, Section 3 of USRAP (draft Section 21220) calls for the court to "reform a disposition in the manner that

most closely approximates the transferor's manifested plan of distribution." The manifested plan does not seem to include extrinsic evidence, although if there is continuing doubt on this point, it could be clarified in the statute or comment. Third, *cy pres* under USRAP is not necessarily deferred until the end of the maximum 90-year period. Litigation may occur under Section 3 of USRAP when the share of a class member is to take effect in "possession or enjoyment" or if a contingent interest is sure to vest, but not within the 90-year period.

Respectfully submitted,

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Staff Counsel

#L-3013

STATE OF CALIFORNIA

California Law Revision Commission

Staff Draft

TENTATIVE RECOMMENDATION

proposing the

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

January 1990

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Tentative Recommendation

Proposing the

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Background

The common law rule against perpetuities, as developed in England beginning in the 17th Century, invalidated attempts to create interests in property that would remain contingent for more than the lives of certain people alive when the interest was created plus 21 years. The rule is now most commonly known in Professor Gray's formulation: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."[1] A central purpose of the rule is to mediate between those who seek to tie up their property for generations into the future and future generations who wish to control the property, free of the dead hand.

In general, the rule permits a person to create property interests that will vest in his or her grandchildren and require them to survive until 21 years of age, but not to create interests that will vest only in great grandchildren.[2] The common law rule can operate harshly, however, since it invalidates a disposition if there is any conceivable possibility that it will violate the rule, regardless of whether it is likely to do so, and regardless of how reasonable the disposition appears. Individuals who draft their own wills or trusts without expert advice can easily run afoul of the rule, but many lawyers have also failed the test, notwithstanding the prominent position the rule enjoys in the law school curriculum.[3]

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1. J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942).

2. See Halbach, *Rule Against Perpetuities,* in California Will Drafting Practice § 12.30, at 566 (Cal. Cont. Ed. Bar 1982).

3. See, e.g., Lucas v. Hamm, 56 Cal. 2d 583, 592, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) ("[F]ew, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman").

The history of the rule against perpetuities in California is convoluted and confusing. From the early constitutional provision that "[n]o perpetuities shall be allowed except for eleemosynary purposes,"[4] the rule has developed through decades of judicial interpretation, backtracking, and refinement, and periodic legislative attempts at clarification.[5] California law includes the common law rule against perpetuities, with its lives in being plus 21 years,[6] as well as an alternative 60-year period in gross.[7] The harshness of judging the validity of nonvested interests at the time of their creation is mitigated by a *cy pres* provision permitting reform of instruments to avoid violation of the rule.[8] Knowledgeable lawyers will also insert a perpetuities savings clause as appropriate to avoid violating the rule against perpetuities.

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4. Former Cal Const. art. XX, § 9 (repealed 1970); now stated in Civ. Code § 715.

5. See generally 4 B. Witkin, Summary of California Law *Real Property*, §§ 377-404, at 568-92 (9th ed. 1987); Halbach, *Rule Against Perpetuities*, in California Will Drafting Practice §§ 12.1-12.54, at 547-79 (Cal. Cont. Ed. Bar 1982); Halbach, *id.*, §§ 12.1-12.54, at 215-20 (Cal. Cont. Ed. Bar Supp. 1988); Simes, *Perpetuities in California Since 1951, 18 Hastings L.J. 247 (1967)*; Taylor, *A Study Relating to the "Vesting" of Interests Under the Rule Against Perpetuities, 9 Cal. L. Revision Comm'n Reports 909, 910-15 (1969)*; Comment, *Rule Against Perpetuities: The Second Restatement Adopts Wait and See*, 19 Santa Clara L. Rev. 1063, 1081-91 (1979); Note, *California Revises the Rule Against Perpetuities--Again*, 16 Stan. L. Rev. 177-90 (1963).

6. Civ. Code § 715.2. The section is quoted in the text *infra*.

7. Civ. Code § 715.6 provides as follows:

> 715.6. No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code.

8. Civ. Code § 715.5.

National movements for reform of perpetuities law have culminated in the Uniform Statutory Rule Against Perpetuities[9], approved by the National Conference of Commissioners on Uniform State Laws in 1986.[10] In the three years since it was approved, the Uniform Statute has been enacted in ten states -- Connecticut, Florida, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, Oregon, and South Carolina[11] -- and is under consideration in others.

The Uniform Statute has two principal virtues. It provides a simple, easily administered rule and it offers the best hope for achieving uniformity among the states.

Summary of USRAP

The Uniform Statute retains the common law rule against perpetuities as a validating rule,[12] but suspends its operation as an invalidating rule for a 90-year wait-and-see period running from the

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9. Unif. Statutory Rule Against Perpetuities (1986), 8A U.L.A. 132 (Supp. 1989) [hereinafter cited as "USRAP" or "Uniform Statute"].

10. USRAP has also been approved by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers.

11. See 1989 Conn. Acts 44; Fla. Stat. Ann. § 689.225 (West Supp. 1989); 1989 Mass. Acts 668; Mich. Comp. Laws Ann. §§ 554.71-554.78 (West Supp. 1990); Minn. Stat. Ann. §§ 501A.01-501A.07 (West Supp. 1989); Mont. Code Ann. § 70-1-406 (19); Neb. Rev. Stat. §§ 76-2001 to 76-2008 (19); Nev. Rev. Stat. §§ 111.103-111.1035 (Supp. 1988); S.C. Code Ann. §§ 27-6-10 to 27-6-70 (Law. Co-op Supp. 1988).

12. The Prefatory Note to USRAP distinguishes between the validating and invalidating sides of the common law rule as follows:

> *Validating Side of the Common-law Rule:* A nonvested property interest is valid when it is created (initially valid) if it is then *certain* to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive.
>
> *Invalidating Side of the Common-law Rule:* A nonvested property interest is invalid when it is created (initially valid) if there is no such certainty.

creation of the interest.[13] The 90-year waiting period was chosen by the Uniform Drafting Committee as an approximation of (or proxy for) the common law period of lives in being plus 21 years.[14] On petition of an interested person, a court may exercise a *cy pres* power to reform the disposition to approximate the donative transferor's manifested plan of distribution. The right of reformation does not arise until it is necessary. Generally, a disposition that violates the common law rule is not in need of reformation until the 90-year period expires or, in the case of a class gift, when a member of a class is entitled to enjoyment of a share before the expiration of the 90-year period.[15]

The Uniform Statute would also make other changes which are discussed below and in the comments to the sections in the proposed legislation.

USRAP and California Law Compared

Statement of the Rule Against Perpetuities

Civil Code Section 715.2 provides the basic California rule in the following language:

> 715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities.

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13. For a fuller discussion, see the Prefatory Note to USRAP.

14. For background on the 90-year period, see Waggoner, *The Uniform Statutory Rule Against Perpetuities,* 21 Real Prop. Prob. & Tr. J. 569, 575-90 (1986); Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period,* 73 Cornell L. Rev. 157 (1988).

15. Reformation may also be had before the expiration of the 90-year period in the unlikely case where an interest can vest beyond the 90-year period but not before. See USRAP § 3(3) and comment.

The Uniform Statute provides a simplified form of this rule, holding that a "nonvested property interest is invalid" unless "when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive" or it "vests or terminates within 90 years after its creation."[16] Thus, the common law rule against perpetuities continues as a validating principle, but its invalidating side is postponed in operation for the 90-year waiting period. No major changes would be made in the validating side of the rule by substituting the language of the Uniform Statute for the California provision.[17]

Cy Pres

In 1963, California enacted a *cy pres* rule permitting reformation of a disposition of property that otherwise would violate the rule against perpetuities "if and to the extent" that it can be reformed or construed to comply with the rule and to give effect to the general intent of the creator of the interest "whenever that general intent can be ascertained."[18] Reformation can take place at any time after creation of the interest. Although the *cy pres* rule provides an opportunity to avoid some harsh applications of the rule against perpetuities, its reliance on judicial remedies is inefficient and expensive.

The Uniform Statute also provides a *cy pres* rule, as noted above, but makes resort to it unlikely because the 90-year waiting period should solve most of the problems before reformation would be necessary. Since the common law rule does not act to invalidate a disposition until the 90-year period has expired, the right of

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16. See USRAP § 1(a). Special applications of the rule are provided for powers of appointment. See USRAP § 1(b)-(c).

17. The subsidiary doctrines of the common law rule are approved or disapproved in a comment to Section 1 of USRAP. A revised form of this comment is set out in the Background to Probate Code Section 21201 of the proposed legislation *infra*.

18. Civ. Code § 715.5; see also Note, *California Revises the Rule Against Perpetuities -- Again,* 16 Stan. L. Rev. 177, 186-90 (1963).

reformation under the Uniform Statute does not generally arise until it becomes useful, i.e., at the end of the waiting period. However, in the case of a class gift, where a member of a class is entitled to enjoyment of a share before that time, the disposition may be reformed on petition of an interested person. The *cy pres* standard under the Uniform Statute differs from the California standard, providing for reformation in the manner that "most closely approximates the transferor's manifested plan of distribution."[19]

Exclusions from Rule

By common law and statute, some types of interests are excluded from the coverage of the rule against perpetuities. The Uniform Statute explicitly excludes a variety of interests and in some respects would change California law.

Commercial Transactions. The California rule has been applied to commercial transactions, e.g., where a lease is to commence on completion of construction.[20] The Uniform Statute does not apply to commercial (nondonative) transactions.[21] The period of a life in being plus 21 years is not relevant to commercial transactions.[22] It makes no sense to apply a rule based on family-oriented donative transfers to interests created by contract whose nature is determined by negotiations between the parties. Limitations on the duration of commercial interests is better handled directly.[23]

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19. USRAP § 3; see also Waggoner, *The Uniform Statutory Rule Against Perpetuities,* 21 Real Prop. Prob. & Tr. J. 569, 595-98 (1986).

20. See, e.g., Wong v. Di Grazia, 60 Cal. 2d 525, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); Haggerty v. Oakland, 161 Cal. App. 2d 407, 326 P.2d 957 (1958).

21. See USRAP § 4(1) and comment.

22. See Waggoner, *The Uniform Statutory Rule Against Perpetuities,* 21 Real Prop. Prob. & Tr. J. 569, 599-600 (1986).

23. See, e.g., Civ. Code §§ 717-719 (limitations on duration of leases), 882.020-882.040 (ancient mortgages and deeds of trust), 883.210-883.270 (termination of dormant mineral rights).

Charitable Dispositions. California law has always permitted perpetuities for eleemosynary purposes.[24] The Uniform Statute also excludes interests held by "a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision."[25]

Insurance and Retirement Plans. By statute, California exempts trusts of hospital service contracts, group life insurance, group disability insurance, group annuities, profit-sharing, and retirement plans from the rule against perpetuities.[26] The Uniform Statute exempts similar property interests from the statutory rule against perpetuities in different language.[27] The recommended legislation would continue much of the California language in addition to the exemption in the Uniform Statute.

Additional Exemptions. The Uniform Statute provides other explicit exemptions from the rule, including a fiduciary's administrative powers (as opposed to distributive powers),[28] a trustee's discretionary power to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in income and principal,[29] a power to appoint a fiduciary,[30] and any property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities.[31]

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24. Civ. Code § 715 (continuing former Cal. Const. art. XX, § 9); see also 4 B. Witkin, Summary of California Law *Real Property* § 399, at 587-88 (9th ed. 1987).

25. See USRAP § 4(5).

26. Civ. Code §§ 715.3, 715.4.

27. USRAP § 4(6).

28. USRAP § 4(2). This provision specifically lists the power to sell, lease, or mortgage property, and the power to determine principal and income.

29. USRAP § 4(4).

30. USRAP § 4(3).

31. USRAP § 4(7).

Prospective Application

The Uniform Statute would apply only to dispositions made after the operative date, except that the reformation provision would apply to pre-operative date dispositions.[32] This is not a major change in California law, since California already has a reformation provision.

Illustration

The operation of the common law, the California rules, and the Uniform Statute can be seen by way of an example: Suppose that A gives property in a testamentary trust to his daughter D for life, and the remainder to D's children who reach 25. Assume that D is alive at A's death.

This disposition would fail under the common law rule since the remainder interest could fail to vest within 21 years after the D's death.

Under California law, the interest could be saved by a petition to reform the disposition under Civil Code Section 715.5 to accomplish A's general intentions. The court could reduce the required age of D's children from 25 to 21 years.[33] Or, in appropriate circumstances, the will might be construed to provide that the remainder beneficiaries included only A's grandchildren alive at A's death.[34] Legal scholars have also urged that courts consider inserting an appropriate perpetuities saving clause in the course of reformation to preserve the 25-year contingency where possible.[35]

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32. USRAP § 5.

33. See, e.g., Estate of Ghiglia, 42 Cal. App. 3d 433, 442-43, 116 Cal. Rptr. 827 (1974) (required age reduced from 35 to 21 years).

34. See, e.g., Estate of Grove, 70 Cal. App. 3d 355, 363-65, 138 Cal. Rptr. 684 (1977).

35. See, e.g., Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo,* 34 UCLA L. Rev. 1023, 1071-72 (1987) (insert saving clause immediately when disposition found to violate rule); Restatement (Second) of Property (Donative Transfers) § 1.5 comment d & Reporter's Note 5 (1983) (reformation in age contingency situations at end of wait-and-see period).

Under the Uniform Statute, we would wait up to 90 years following A's death to see if the rule has been violated. In a normal case, this will be more than enough time and the property will pass as directed.[36] If the rule is violated at the end of the waiting period, such as where a grandchild was born after A's death and will not reach age 25 before the 90th anniversary of A's death, reformation would be appropriate under the Uniform Statute.[37]

Conclusion

The Commission recommends adoption of the Uniform Statute in California for a number of reasons.[38] The Uniform Statute (1) provides an easily administered rule, eliminating a number of complexities and ambiguities associated with the traditional rule, (2) offers the prospect for a significant degree of unity among the states, (3) eliminates the inappropriate coverage of commercial transactions from the rule, (4) reinforces the *cy pres* approach that is already a part of California law, and (5) avoids the need to litigate the validity of dispositions that will work out within the 90-year wait-and-see period.

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36. For a more detailed discussion of this type of case, see Example (3) in the comment to USAP § 3 (set out in revised form in the Background to Probate Code Section 21220 of the proposed legislation *infra*).

37. Reformation may take place under USRAP before the 90-year period has expired since some of A's grandchildren may be have reached age 25. These grandchildren would be entitled to petition for reformation and it would be appropriate for the court to hold the share of the grandchild under 25 until the 90th anniversary of A's death.

38. See also the study by the Commission's consultant on this subject, Charles A. Collier, Jr., *The Uniform Statutory Rule Against Perpetuities* (February 1989) (on file at Commission's office).

Probate Code §§ 21200-21231 (added). Uniform Statutory Rule Against Perpetuities and Related Provisions

Note. We have tentatively located USRAP in Division 11 of the new Probate Code concerning "Construction of Wills, Trusts, and Other Instruments." This seems logical, particularly since most of the trust statutes are in the Probate Code and perpetuities law relates mainly to trusts. There is also more room for USRAP here than in the Civil Code.

This draft also includes edited versions of the official comments from USRAP, which are set out in the Appendix. Much of the material in the official comments is important and useful, but other material is irrelevant or repetitious, or is directed toward those considering enactment of USRAP instead of to practitioners or courts seeking guidance after its enactment. Accordingly, the staff has edited these comments to eliminate nonrelevant material and to refer to the section numbers of the proposed draft, instead of to the Uniform Statute. This will make the relevant parts of the Uniform Statute comments readily accessible to California practitioners.

PART 2. PERPETUITIES

CHAPTER 1. UNIFORM STATUTORY RULE AGAINST PERPETUITIES

Article 1. General Provisions

§ 21200. Short title

21200. This chapter shall be known and may be cited as the Uniform Statutory Rule Against Perpetuities.

Comment. Section 21200 provides a short title for this chapter and is the same as Section 6 of the Uniform Statutory Rule Against Perpetuities (1986). As to the construction of uniform acts, see Section 2(b).

§ 21201. Common law rule against perpetuities superseded

21201. This chapter supersedes the common law rule against perpetuities.

Comment. Section 21201 is the same in substance as part of Section 9 of the Uniform Statutory Rule Against Perpetuities (1986). This chapter supersedes the common law rule against perpetuities, which was specifically incorporated into California law by former Civil Code Section 715.2. This chapter and Chapter 2 (commencing with Section 21230) also supersede the statutory provisions relating to perpetuities in former Civil Code Sections 715-716.5 and 1391.1-1391.2.

Background. For background on Section 21201, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 31 *infra*.

Note. The conclusive presumption of fertility -- the "fertile octogenarian" -- is a subsidiary common law rule that would be continued under this section. (See the discussion in the Appendix at page 32.) It should be remembered that the Commission modified this rule in the Trust Law as it relates to trust termination. Probate Code Section 15406 provides: "In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 15403 or 15404, the presumption of fertility is rebuttable."

§ 21202. Prospective application

21202. (a) Except as provided by subdivision (b), this chapter applies only to nonvested property interests and powers of appointment created on or after the operative date of this chapter. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the operative date of this chapter and is determined in a judicial proceeding, commenced on or after the operative date of this chapter, to violate this state's rule against perpetuities as that rule existed before the operative date of this chapter, a court on petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

Comment. Section 21202 is the same in substance as Section 5 of the Uniform Statutory Rule Against Perpetuities (1986). Under Section 21202, the new statutory rule against perpetuities applies only prospectively, except as provided in subdivision (b). The application of the reformation rule to preexisting interests is consistent with the reformation power under former Civil Code § 715.5.

Background (adapted from Prefatory Note to Uniform Statute). Section 21202 provides that the statutory rule against perpetuities applies only to nonvested property interests or powers of appointment created on or after this chapter's operative date. Although the statutory rule does not apply retroactively, Section 21202(b) authorizes a court to exercise its equitable power to reform

instruments that contain a violation of the former rule against perpetuities and to which the statutory rule does not apply because the offending property interest or power of appointment was created before the operative date of this chapter. Courts are urged to consider reforming such dispositions by judicially inserting a saving clause, since a saving clause would probably have been used at the drafting stage of the disposition had it been drafted competently.

For additional background on Section 21202, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 37 *infra*.

Note. The Uniform Statute takes a conservative approach and applies the 90-year waiting period and other aspects of the statutory rule only to nonvested interests created after the operative date of the new statute. It does, however, apply the reformation rule to interests that violate the state's preexisting perpetuities rule. In the interest of uniformity, the draft statute adopts the Uniform Statute's approach, but the Commission should consider whether the Uniform Statute should apply retroactively. The main effect would be to avoid the need to reform interests that violate the rule until 90 years after creation of the interest (or earlier in some cases discussed in draft Section 21220 and Comment). This approach would not invalidate any interest valid under prior law. It should not reopen any matters where the interest had been held invalid before the operative date. Nor would it disturb any settlements that had been made under prior law.

A distinct advantage of applying the new statute to all nonvested interests in existence on the operative date is that lawyers and judges will not have to keep two different bodies of law in mind. The Commission has taken the approach in other statutes of applying the new law to existing relationships to the extent possible. In this case, if the effect of retroactive application would be to invalidate interests valid under prior law, then it would not be appropriate. However, the effect of retroactive application in this statute would be to avoid invalidating existing interests and to avoid the need to commence judicial proceedings to reform the interest until the 90-year period had expired.

The following draft section would make USRAP apply to interests created before its operative date:

> *§ 21202 [alternative]. Application of chapter*
>
> *21202. (a) Except as provided in subdivision (b), this chapter applies to nonvested property interests and powers of appointment regardless of whether they were created before, on, or after the operative date of this chapter.*
>
> *(b) This chapter does not apply to any nonvested property interest or power of appointment the validity of which has been determined in a judicial proceeding or by a settlement among interested persons.*
>
> *(b) If a nonvested property interest or a power of appointment was created before the operative date of this chapter and is determined in a judicial proceeding, commenced on or after the operative date of this chapter, to violate this state's rule against perpetuities as that rule existed*

before the operative date of this chapter, a court on petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

Comment. Subdivision (a) of Section 21202 applies the new statutory rule against perpetuities to nonvested interests whether created before or after the operative date of this chapter, except as provided in subdivision (b). This differs from Section 5 of the Uniform Statutory Rule Against Perpetuities (1986).

Subdivision (b) is consistent with the first sentence of the general rule provided in Section 3(e). No liability attaches to actions taken under former law that would have been differently determined under this chapter. See Section 3(f). The application of this chapter to pending proceedings is governed by Section 3(h).

Article 2. Statutory Rule Against Perpetuities

§ 21205. Statutory rule against perpetuities as to nonvested property interests

21205. A nonvested property interest is invalid unless one of the following conditions is satisfied:

(a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.

(b) The interest either vests or terminates within 90 years after its creation.

Comment. Section 21205 is the same in substance as Section 1(a) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21205 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a nonvested property interest that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if it does not actually remain nonvested when the allowable 90-year waiting period expires.

For additional background on Section 21205, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 41 *infra*.

Note. Draft Sections 21205-21207 set out the basic statutory rule against perpetuities with the validating common law rule in subdivision (a) and the 90-year waiting period in subdivision (b). It should be noted that the 90-year period has been subject to some vigorous criticism. (See the article by Professor Dukeminier attached to Memorandum 90-22 as Exhibit 2.) The 90-year period was arrived at by adding the statistical life expectancy of a six-year-old (69.6) with 21 and rounding down. Professor Dukeminier disputes the selection of a six-year-old, and suggests that in actual cases, the youngest life in being might just as well be 20, 30, 40, or 50, in which case 90 years is overlong. He suggests that empirical studies of perpetuities cases would give a better number. In any event, Professor Dukeminier argues against a fixed statutory waiting period and prefers the lives-in-being approach which adjusts the period of the rule for the circumstances of the case. He is also concerned that the common law rule will fade and ultimately disappear since it has no invalidating function under USRAP. In this regime, Professor Dukeminier suggests, there will be a temptation to make family trusts last for the full 90-year period.

Professor Waggoner defends the 90-year period in his article attached as Exhibit 3 to Memorandum 90-22. He argues an empirical study of actual cases would not be useful because the facts are not sufficiently stated in the opinions. As for the length of the period, he also suggests that the increase in life expectancy results in an increase in the permissible period of the common law over the time period thought acceptable by commentators in earlier generations. Professor Waggoner concedes that a statutory waiting period does not replicate the self-adjusting function of the common law rule, but counters that this is outweighed by the advantages of USRAP -- the 90-year waiting period is "litigation free, easy to determine, and unmistakable." He also notes that the 90-year period is intended to provide a margin of safety, but that interests that vest in a shorter time will continue to do so without using the remainder of the 90 years.

Comment C.1 to Section 1 of USRAP notes that jurisdictions "adopting this Act are . . . strongly urged not to adopt a different period of time."

§ 21206. Statutory rule against perpetuities as to general power of appointment not presently exercisable because of condition precedent

21206. A general power of appointment not presently exercisable because of a condition precedent is invalid unless one of the following conditions is satisfied:

(a) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive.

(b) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

Comment. Section 21206 is the same in substance as Section 1(b) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21206 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

For additional background on Section 21206, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 52 *infra*.

§ 21207. Statutory rule against perpetuities as to nongeneral power of appointment or general testamentary power of appointment

21207. A nongeneral power of appointment or a general testamentary power of appointment is invalid unless one of the following conditions is satisfied:

(a) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive.

(b) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

Comment. Section 21207 is the same in substance as Section 1(c) of the Uniform Statutory Rule Against Perpetuities (1986). See also Sections 21230 (validity of trusts), 21231 (spouse as life in being).

Background (adapted from Prefatory Note to Uniform Statute). This article sets forth the statutory rule against perpetuities (statutory rule). The statutory rule and the other provisions of this part supersede the common law rule against perpetuities (common law rule) and replace the former statutory version. See Section 21201. Section 21205 deals with nonvested property interests; Sections 21206 and 21207 deal with powers of appointment.

Subdivision (a) of Section 21207 codifies the validating side of the common law rule. In effect, subdivision (a) provides that a power of appointment that is valid under the common law rule is valid under the statutory rule and can be declared so at its inception. In such a case, nothing would be gained and much would be lost by invoking a waiting period during which the validity of the interest or power is in abeyance.

Subdivision (b) establishes the wait-and-see rule by providing that an interest or a power of appointment that is not validated by subdivision (a), and hence would have been invalid under the common law rule, is nevertheless valid if the power ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

For additional background on Section 21207, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 52 *infra*.

§ 21208. Possibility of posthumous birth disregarded

21208. In determining whether a nonvested property interest or a power of appointment is valid under this article, the possibility that a child will be born to an individual after the individual's death is disregarded.

Comment. Section 21208 is the same in substance as Section 1(d) of the Uniform Statutory Rule Against Perpetuities (1986).

Background. For background on Section 21208, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 60 *infra*.

Article 3. Time of Creation of Interest

§ 21210. When nonvested property interest or power of appointment created

21210. Except as provided in Sections 21211 and 21212 and in subdivision (a) of Section 20202, the time of creation of a nonvested property interest or a power of appointment is determined by other applicable statutes or, if none, under general principles of property law.

Comment. Section 21210 is the same in substance as Section 2(a) of the Uniform Statutory Rule Against Perpetuities (1986), with the

addition of the reference to other statutory provisions. This section supersedes former Civil Code Section 1391.1(b).

Background (adapted from Prefatory Note to Uniform Statute). This article defines the time when, for purposes of this chapter, a nonvested property interest or a power of appointment is created. The period of time allowed by Article 2 (commencing with Section 21205) (statutory rule against perpetuities) is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 21202, with certain exceptions, provides that this chapter applies only to nonvested property interests and powers of appointment created on or after the operative date of this chapter.

For additional background on Section 21210, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 61 *infra*.

Note. Michigan also revised this provision of the Uniform Statute to refer to the "statutory or common law." See Mich. Stat. Ann. § 26.48(3) subd. (1).

§ 21211. Postponement of time of creation of nonvested property interest or power of appointment in certain cases

21211. For purposes of this chapter:

(a) If there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (1) a nonvested property interest or (2) a property interest subject to a power of appointment described in Section 21206 or 21207, the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(b) A joint power with respect to community property held by individuals married to each other is a power exercisable by one person alone.

Comment. Section 21211 is the same in substance as Section 2(b) of the Uniform Statutory Rule Against Perpetuities (1986). Section 21211(a) supersedes former Civil Code Sections 716 and 1391.1(a). The reference to the Uniform Marital Property Act in Section 2(b) of the Uniform Statutory Rule Against Perpetuities is not included in Section 21211(b) because it is unnecessary in light of the definition of community property in Section 28. See the Comment to Section 28.

Background (adapted from Prefatory Note to Uniform Statute). Section 21211 provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 21206 or 21207), the time of creation of the nonvested property interest or the power of appointment is postponed until the power to become unqualified beneficial owner ceases to exist. This is in accord with existing common law.

For additional background on Section 21211, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 62 *infra*.

§ 21212. Time of creation of nonvested property interest or power of appointment arising from transfer to trust or other arrangement

21212. For purposes of this chapter, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

Comment. Section 21212 is the same in substance as Section 2(c) of the Uniform Statutory Rule Against Perpetuities (1986).

Background (adapted from Prefatory Note to Uniform Statute). Section 21212 provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable trust. Arguably, at common law, each transfer starts the period of the rule running anew as to that transfer. This difficulty is avoided by Section 21212.

For additional background on Section 21212, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 66 *infra*.

Article 4. Reformation

§ 21220. Reformation

21220. On petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by the applicable provision in Article 2 (commencing with Section 21205), if any of the following conditions is satisfied:

(a) A nonvested property interest or a power of appointment becomes invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205).

(b) A class gift is not but might become invalid under the statutory rule against perpetuities provided in Article 2 (commencing with Section 21205), and the time has arrived when the share of any class member is to take effect in possession or enjoyment.

(c) A nonvested property interest that is not validated by subdivision (a) of Section 21205 can vest but not within 90 years after its creation.

Comment. Section 21220 is the same in substance as Section 3 of the Uniform Statutory Rule Against Perpetuities (1986). Section 21220 supersedes former Civil Code Section 715.5 (reformation or construction to avoid violation of rule against perpetuities).

Background (adapted from Prefatory Note to Uniform Statute). Section 21220 directs a court, on petition of an interested person, to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: (1) when a nonvested property interest or a power of appointment becomes invalid under the statutory rule; (2) when a class gift has not but still might become invalid under the statutory rule and the time has arrived when the share of a class member is to take effect in possession or enjoyment; and (3) when a nonvested property interest can vest, but cannot do so within the allowable 90-year waiting period. It is anticipated that the circumstances requisite to reformation under this section will rarely arise, and consequently that this section will seldom need to be applied.

For additional background on Section 21220, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 67 *infra*.

Note. The standard applicable under California law and the USRAP differ. Civil Code Section 715.5 saves dispositions if the instrument can be reformed or construed to "give effect to the general intent of the creator of the interest whenever that general intent can be ascertained." Section 715.5 also provides that it is to be liberally construed "to validate such interest to the fullest extent consistent with such ascertained intent." USRAP provides for reformation "in the manner that most closely approximates the transferor's manifested plan of distribution," but does set out any special rule concerning liberal construction.

It should also be noted that the USRAP reformation procedure generally applies only at the end of the 90-year waiting period, whereas Civil Code Section 715.5 may be invoked at any time. This is a consequence of the USRAP approach of postponing the invalidating side of the common law rule for 90 years and is one of the major changes worked by USRAP.

Article 5. Exclusions from Statutory Rule Against Perpetuities

§ 21225. Exclusions from statutory rule against perpetuities

21225. This chapter does not apply to any of the following:

(a) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (1) a premarital or

postmarital agreement, (2) a separation or divorce settlement, (3) a spouse's election, (4) or a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (5) a contract to make or not to revoke a will or trust, (6) a contract to exercise or not to exercise a power of appointment, (7) a transfer in satisfaction of a duty of support, or (8) a reciprocal transfer.

(b) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income.

(c) A power to appoint a fiduciary.

(d) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal.

(e) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision.

(f) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse.

(g) A property interest, power of appointment, or arrangement that was not subject to the common law rule against perpetuities or is excluded by another statute of this state.

(h) A trust created for the purpose of providing for its beneficiaries under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance, as defined in the Insurance Code.

Comment. Subdivisions (a)-(g) of Section 21225 are the same in substance as Section 4 of the Uniform Statutory Rule Against Perpetuities (1986). Subdivision (e) supersedes former Civil Code Section 715 (no perpetuities allowed except for eleemosynary purposes). Subdivision (h) restates former Civil Code Section 715.4 without substantive change.

Background (adapted from Prefatory Note to Uniform Statute). Section 21225 identifies the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law. All the exclusions from the common law rule recognized at common law and by statute in this state are preserved. In line with long-standing scholarly commentary, Section 21225(a) excludes nondonative transfers from the statutory rule. The rule against perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the rule -- a life in being plus 21 years -- is suitable for donative transfers only.

For additional background on Section 21225, adapted from the official comments to the Uniform Statutory Rule Against Perpetuities (1986), see the Appendix at page 73 *infra*.

Note. With some reluctance, we have continued the language of Civil Code Section 715.4 in draft Section 21225(h). This is the cautious approach since it is difficult to determine whether the uniform language in subdivision (f) covers all of the ground covered by Section 715.4.

CHAPTER 2. RELATED PROVISIONS

§ 21230. Validity of trusts

21230. (a) A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which nonvested property interests must vest, if the interest of all the beneficiaries must vest, if at all, within that time.

(b) If a trust is not limited in duration to the time within which nonvested property interests must vest, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond that time.

(c) If a trust has existed longer than the time within which nonvested property interests must vest, the following apply:

(1) The trust shall be terminated upon the request of a majority of the beneficiaries.

(2) The trust may be terminated by a court of competent jurisdiction on petition of the Attorney General or of any person who

would be affected the termination if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected by the termination.

Comment. Section 21230 restates former Civil Code Section 716.5 without substantive change. The phrase "future interests in property" has been replaced with "nonvested property interests" to conform to the terminology of the Uniform Statutory Rule Against Perpetuities (1986) in Chapter 1 (commencing with Section 21200). The rules governing the time within which nonvested property interests must vest are provided in Sections 21205-21207 (statutory rule against perpetuities). For a discussion of trust termination at the end of the perpetuities period, see the Background to Section 21201.

§ 21231. Spouse as life in being

21231. In determining the validity of a nonvested property interest pursuant to Article 2 (commencing with Section 21205) of Chapter 1, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at that time whether or not the individual so described was then in being.

Comment. Section 21231 restates former Civil Code Section 715.7 without substantive change.

Note. *Civil Code Section 715.7 was enacted in 1963 to repudiate the unborn widow rule. This section has the effect of validating interests in the usual case where the spouse is a life in being and also in the highly unusual case where the spouse is not a life in being. This provision would have a very small part to play under the Uniform Statute since it would save an otherwise invalid interest only at the end of the 90-year waiting period. Should this California reform be preserved to play this role, or should it be retired in the interest of uniformity?*

REPEALED SECTIONS AND CONFORMING REVISIONS

Heading for Article 3 (commencing with Section 715) (amended)

SEC. . The heading of Article 3 (commencing with Section 715) of Chapter 1 of Title 2 of Part 1 of Division 2 of the Civil Code is amended to read:

Article 3. ~~Restraints Upon Alienation~~ Duration of Leases

Civil Code § 715 (repealed). Perpetuities disallowed except for eleemosynary purposes

~~715. No perpetuities shall be allowed except for eleemosynary purposes.~~

Comment. Former Section 715 is superseded by Probate Code Section 21225(e).

Civil Code § 715.2 (repealed). Rule against perpetuities

~~715.2. No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common law rule against perpetuities.~~

Comment. Former Section 715.2 is superseded by the Uniform Statutory Rule Against Perpetuities in Probate Code Sections 21205-21207. See also Prob. Code § 21201 (common law rule against perpetuities superseded).

Note. The draft statute does not continue the provision in Section 715.2 relating to the permissible limits of the class of measuring lives. This was omitted in the interest of uniformity, but also because it does not seem very important in the face of a 90-year waiting period. However, the provision could be retained in Chapter 2 of the draft.

Civil Code § 715.3 (repealed). Rule against perpetuities as to profit-sharing and retirement plans

~~715.3. No trust heretofore or hereafter created forming part of a profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries or forming part of a retirement plan formed primarily for the purpose of providing benefits for employees on or after retirement shall be deemed invalid as violating Section 715.2 of this code; and the income arising from such property, real or personal, held in such trust may be permitted to accumulate until the fund is sufficient, in the opinion of the trustee or trustees thereof, to accomplish the purposes of the trust.~~

Comment. The exception to the rule against perpetuities in the first clause of former Section 715.3 is superseded by Probate Code Section 21225(f) (exclusion from coverage of Uniform Statutory Rule Against Perpetuities). The exception from prohibitions on accumulations in the second clause of former Section 715.3 is continued in Section 724(b.

Civil Code § 715.4 (repealed). Rule against perpetuities as to insurance trusts

~~715.4. No trust heretofore or hereafter created for the purpose of providing for the beneficiaries of such trust under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance, as defined in the Insurance Code, shall be deemed invalid as violating Section 715.2 of this code.~~

Comment. Former Section 715.4 is restated without substantive change in Probate Code Section 21225(h) (exclusion from coverage of Uniform Statutory Rule Against Perpetuities).

Civil Code § 715.5 (repealed). Reformation

~~715.5. No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code if and to the extent that it can be reformed or construed within the limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.~~

Comment. Former Section 715.5 is superseded by Probate Code Section 21220 (reformation under Uniform Statutory Rule Against Perpetuities).

Note. The liberal construction rule in the last sentence has not been explicitly continued in the draft statute, in the interest of uniformity. The reformation standard in USRAP differs from that stated in this section. However, in view of the length the USRAP comment goes to establish this same principle, it might be better to continue the rule as an additional provision in Chapter 2 or as part of draft Section 21220.

Civil Code § 715.6 (repealed). Vesting within 60 years

~~715.6. No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code.~~

Comment. Section 715.6 is superseded by the Uniform Statutory Rule Against Perpetuities, in particular, Probate Code Sections 21205-21207.

Civil Code § 715.7 (repealed). Spouse as life in being

~~715.7. In determining the validity of a future interest in real or personal property pursuant to Section 715.2 of this code, an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a "life in being" at such time whether or not the individual so described was then in being.~~

Comment. Former Civil Code Section 715.7 is restated without substantive change in Probate Code Section 21231.

Civil Code § 716 (repealed). Exclusion of time during which interest is destructible

~~716. The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included in determining the permissible period for the vesting of an interest within the rule against perpetuities.~~

Comment. Former Civil Code Section 716 is superseded by Probate Code Section 21211.

Civil Code § 716.5 (repealed). Validity of trusts

~~716.5. (a) A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interest of all the beneficiaries must vest, if at all, within that time.~~

~~(b) If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond that time.~~

~~(c) Whenever a trust has existed longer than the time within which future interests in property must vest under this title, the following shall apply:~~

~~(1) It shall be terminated upon the request of a majority of the beneficiaries.~~

~~(2) It may be terminated by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected thereby.~~

Comment. Section 716.5 is restated without substantive change in Probate Code Section 21230.

Civil Code § 722 (amended). Time limit on accumulations

722 Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules ~~prescribed in this Title in relation~~ relating to future interests.

Comment. Section 722 is amended to reflect relocation of statutes concerning perpetuities to the Probate Code. See Prob. Code §§ 21200-21231 (superseding former Civil Code §§ 715-716.5).

Civil Code § 724 (amended). Time limit on accumulations

724. (a) An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons objects or purposes, but may not extend beyond the time ~~in this title~~ permitted for the vesting of future interests.

(b) Notwithstanding subdivision (a), the income arising from real or personal property held in a trust forming part of a profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries or forming part of a retirement plan formed primarily for the purpose of providing benefits for employees on or after retirement may be permitted to accumulate until the fund is sufficient, in the opinion of the trustee or trustees, to accomplish the purposes of the trust.

Comment. Section 724 is amended to reflect the revision and relocation of the statutes concerning perpetuities to the Probate Code. See Prob. Code §§ 21200-21231 (superseding former Civil Code §§ 715-716.5). Subdivision (b) restates the last clause of former Section 715.3 relating to accumulations without substantive change.

Civil Code § 773 (amended). Limitations on future estates

773. Subject to the rules of this title, and of Part 1 of this division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed ~~in Section 715.2~~ by the statutory rule against perpetuities in Article 2 (commencing with Section 21205) of Chapter 1 of Part 2 of Division 11 of the Probate Code.

Comment. Section 773 is amended to incorporate the new statutory rule against perpetuities that superseded the rule provided by former Section 715.2.

Civil Code § 1391 (added). Applicable rule against perpetuities

1391. The statutory rule against perpetuities provided by Chapter 1 (commencing with Section 21200) of Part 2 of Division 11 of the Probate Code applies to powers of appointment governed by this part.

Comment. Section 1391 is a new section providing a cross-reference to the statutory rule against perpetuities.

Civil Code § 1391.1 (repealed). Beginning of permissible period for powers of appointment

~~1391.1. The permissible period under the applicable rule against perpetuities with respect to interests sought to be created by an exercise of a power of appointment begins:~~

~~(a) In the case of an instrument exercising a general power of appointment presently exercisable by the donee alone, on the date the appointment becomes effective.~~

~~(b) In all other situations, at the time of the creation of the power.~~

Comment. Subdivision (a) of former Section 1391.1 is superseded by Probate Code Section 21211(a). Subdivision (b) is superseded by Probate Code Section 21210.

Civil Code § 1391.2 (repealed). Facts and circumstances affecting validity of interests created by exercise of power of appointment

~~When the permissible period under the applicable rule against~~

~~perpetuities begins at the time of the creation of a power of appointment with respect to interests sought to be created by an exercise of the power, facts and circumstances existing at the effective date of the instrument exercising the power shall be taken into account in determining the validity of interests created by the instrument exercising the power.~~

Comment. Former Section 1391.2 is superseded by the statutory rule against perpetuities. See Prob. Code §§ 21206-21207 (statutory rule against perpetuities as to powers of appointment), 21220 (reformation). The second-look doctrine, codified in this section, is a part of the common law carried forward in the Uniform Statutory Rule Against Perpetuities (1986). See the Background to Prob. Code §§ 21206-21207.

Note. This section has not been continued in the draft statute in the interest of uniformity, and because it does not seem to be needed since USRAP would suspend the invalidating side of the common law rule for 90 years.

APPENDIX

BACKGROUND TO SECTION 21201

[Adapted from Comment G to Section 1 of the Uniform Statutory Rule Against Perpetuities (1986)]

As provided in Section 21201, this chapter supersedes the common law rule against perpetuities (common law rule) and the statutory provisions previously in effect, replacing them with the statutory rule against perpetuities (statutory rule) set forth in Article 2 (commencing with Section 21205) and by the other provisions in this chapter.

Unless excluded by Section 21225, the statutory rule applies to nonvested property interests and to powers of appointment over property or property interests that are nongeneral powers, general testamentary powers, or general powers not presently exercisable because of a condition precedent. The statutory rule does not apply to vested property interests. See, e.g., X's interest in Example (23) in the Background to this section. Nor does the statutory rule apply to presently exercisable general powers of appointment. See, e.g., G's power in Example (19) in the Background to Section 21206; G's power in Example (1) in the Background to Section 21211; A's power in Example (2) in the Background to Section 21211; X's power in Example (3) in the Background to Section 21211; A's noncumulative power of withdrawal in Example (4) in the Background to Section 21211.

G. Subsidiary Common Law Doctrines; Whether Superseded by this Chapter

The courts, in interpreting the common law rule, developed several subsidiary doctrines. This chapter does not supersede those subsidiary doctrines except to the extent the provisions of this chapter conflict with them. As explained below, most of these common law doctrines remain in full force or in force in modified form.

1. Constructional Preference for Validity

Professor Gray in his treatise on the common law rule against perpetuities declared that a will or deed is to be construed without regard to the rule, and then the rule is to be "remorselessly" applied to the provisions so construed. J. Gray, The Rule Against Perpetuities § 629 (4th ed. 1942). Some courts may still adhere to this proposition. Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is that where an instrument is ambiguous -- that is, where it is fairly susceptible to two or more constructions, one of which causes a rule violation and the other of which does not -- the construction that does not result in a rule violation should be adopted. The California rule favors construction for validity. See, e.g., Civil Code § 3541; Wong v. Di Grazia, 60 Cal. 2d 525, 539-40, 386 P.2d 817, 35 Cal. Rptr. 241 (1963); Estate of Phelps, 182 Cal. 752, 761, 190 P. 17 (1920); Estate of Grove, 70 Cal. App. 3d 355, 362-63, 138 Cal. Rptr. 684 (1977). Other cases supporting this view include: Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978); Davis v. Rossi, 326 Mo.

911, 34 S.W.2d 8 (1930); Watson v. Goldthwaite, 184 N.E.2d 340, 343 (Mass. 1962); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Drach v. Ely, 703 P.2d 746 (Kan. 1985).

The constructional preference for validity is not superseded by this chapter, but its role is likely to be different. The situation is likely to be that one of the constructions to which the ambiguous instrument is fairly susceptible would result in validity under Section 21205(a), 21206(a), or 21207(a), but the other construction does not necessarily result in invalidity; rather it results in the interest's validity being governed by Section 21205(b), 21206(b), or 21207(b). Nevertheless, even though the result of adopting the other construction is not as harsh as it is at common law, it is expected that the courts will incline toward the construction that validates the disposition under Section 21205(a), 21206(a), or 21207(a).

2. Conclusive Presumption of Lifetime Fertility

At common law, all individuals -- regardless of age, sex, or physical condition -- are conclusively presumed to be able to have children throughout their entire lifetimes. This principle is not superseded by this chapter, and in view of the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct. See, generally, Waggoner, *In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law*, 20 San Diego L. Rev. 763 (1983). Under this chapter, the main force of this principle is felt as in Example (7) in the Background to Section 21205, where it prevents a nonvested property interest from passing the test for initial validity under Section 21205(a).

For a California case approving the common law rule, see Fletcher v. Los Angeles Trust & Sav. Bank, 182 Cal. 177, 184, 187 P. 425 (1920).

3. Act Supersedes Doctrine of Infectious Invalidity

At common law, the invalidity of an interest can, under the doctrine of infectious invalidity, be held to invalidate one or more otherwise valid interests created by the disposition or even invalidate the entire disposition. The question turns on whether the general dispositive scheme of the transferor will be better carried out by eliminating only the invalid interest or by eliminating other interests as well. This is a question that is answered on a case-by-case basis. Several items are relevant to the question, including who takes the stricken interests in place of those the transferor designated to take. For the rule applied in California, see, e.g., Estate of Willey, 128 Cal. 1, 11, 60 P. 471 (1900) (severance allowed); Estate of Gump, 16 Cal. 2d 535, 547, 107 P.2d 17 (1940) (severance allowed); Estate of Van Wyck, 185 Cal. 49, 63, 196 P. 50 (1921) (severance denied); Sheean v. Michel, 6 Cal. 2d 324, 329, 57 P.2d 127 (1936) (severance denied).

The doctrine of infectious invalidity is superseded by Section 21220, under which the court, on petition of an interested person, is required to reform the disposition to approximate as closely as possible the transferor's manifested plan of distribution when an invalidity under the statutory rule occurs.

4. Separability.

The common law's separability doctrine is that when an interest is expressly subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests does not necessarily cause the other one to be invalid. This common law principle was established in Longhead v. Phelps, 2 Wm. Bl. 704, 96 Eng. Rep. 414 (K.B. 1770), and is followed in this country. L. Simes & A. Smith, The Law of Future Interests § 1257 (2d ed. 1956); 6 American Law of Property § 24.54 (A. Casner ed. 1952); Restatement of Property § 376 (1944). Under this doctrine, if property is devised "to B if X-event or Y-event happens," B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is invalid. B still has a valid interest -- the one contingent on the occurrence of Y-event.

The separability principle is not superseded by this chapter. As illustrated in the following example, its invocation will usually result in one of the interests being initially validated by Section 21205(a) and the validity of the other interest being governed by Section 21205(b).

> *Example (22) -- Separability case.* G devised real property "to A for life, then to A's children who survive A and reach 25, but if none of A's children survives A or if none of A's children who survives A reaches 25, then to B." G was survived by his brother (B), by his daughter (A), by A's husband (H), and by A's two minor children (X and Y).
>
> The remainder interest in favor of A's children who reach 25 fails the test of Section 21205(a) for initial validity. Its validity is, therefore, governed by Section 21205(b) and depends on each of A's children doing any one of the following things within 90 years after G's death: predeceasing A, surviving A and failing to reach 25, or surviving A and reaching 25.
>
> Under the separability doctrine, B has two interests. One of them is contingent on none of A's children surviving A. That interest passes Section 21205(a)'s test for initial validity; the validating life is A. B's other interest, which is contingent on none of A's surviving children reaching 25, fails Sections 21205(a)'s test for initial validity. Its validity is governed by Section 21205(b) and depends on each of A's surviving children either reaching 25 or dying under 25 within 90 years after G's death.
>
> Suppose that after G's death, A has a third child (Z). A subsequently dies, survived by her husband (H) and by X, Y, and Z. This, of course, causes B's interest that was contingent on none of A's children surviving A to terminate. If X, Y, and Z had all reached the age of 25 by the time of A's death, their interest would vest at A's death, and that would end the matter. If one or two, but not all three of them, had reached the age of 25 at A's death, B's other

interest -- the one that was contingent on none of A's surviving children reaching 25 -- would also terminate. As for the children's interest, if the after-born child Z's age was such at A's death that Z could not be alive and under the age of 25 at the expiration of the allowable waiting period, the class gift in favor of the children would be valid under Section 21205(b), because none of those then under 25 could fail either to reach 25 or die under 25 after the expiration of the allowable 90-year waiting period. If, however, Z's age at A's death was such that Z could be alive and under the age of 25 at the expiration of the allowable 90-year waiting period, the circumstances requisite to reformation under Section 21220(b) would arise, and the court would be justified in reforming G's disposition by reducing the age contingency with respect to Z to the age he would reach on the date when the allowable waiting period is due to expire. See Example (3) in the Background to Section 21220. So reformed, the class gift in favor of A's children could not become invalid under Section 21205(b), and the children of A who had already reached 25 by the time of A's death could receive their shares immediately.

5. The "All-or-Nothing" Rule with Respect to Class Gifts

The common law applies an "all-or-nothing" rule with respect to class gifts, under which a class gift stands or falls as a whole. The all-or-nothing rule, usually attributed to Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), is commonly stated as follows: If the interest of any potential class member might vest too remotely, the entire class gift violates the rule. Although this chapter does not supersede the basic idea of the much-maligned "all-or-nothing" rule, the evils sometimes attributed to it are substantially if not entirely eliminated by the wait-and-see feature of the statutory rule and by the availability of reformation under Section 21220, especially in the circumstances described in Section 21220(b)-(c). For illustrations of the application of the all-or-nothing rule under this chapter, see Examples (3), (4), and (6) in the Background to Section 21220.

For application and interpretation of the all-or-nothing rule California, see, e.g., Estate of Troy, 214 Cal. 53, 3 P.2d 9300 (1931); Estate of Grove, 70 Cal. App. 3d 355, 361-62, 138 Cal. Rptr. 684 (1977); Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

6. The Specific Sum Doctrine

The common law recognizes a doctrine called the specific sum doctrine, which is derived from Storrs v. Benbow, 3 De G.M. & G. 390, 43 Eng. Rep. 153 (Ch. 1853), and states: If a specified sum of money is to be paid to each member of a class, the interest of each class member is entitled to separate treatment and is valid or invalid under the rule on its own. The specific sum doctrine is not superseded by this chapter.

The operation of the specific sum doctrine under this chapter is illustrated in the following example.

Example (23) -- Specific sum case. G bequeathed "$10,000 to each child of A, born before or after my death, who attains

25." G was survived by A and by A's two children (X and Y). X but not Y had already reached 25 at G's death. After G's death a third child (Z) was born to A.

If the phrase "born before or after my death" had been omitted, the class would close as of G's death under the common law rule of construction known as the rule of convenience: The after-born child, Z, would not be entitled to a $10,000 bequest, and the interests of both X and Y would be valid upon their creation at G's death. X's interest would be valid because it was initially vested; neither the common law rule nor the statutory rule applies to interests that are vested upon their creation. Although the interest of Y was not vested upon its creation, it would be initially valid under Section 21205(a) because Y would be his own validating life; Y will either reach 25 or die under 25 within his own lifetime.

The inclusion of the phrase "before or after my death," however, would probably be construed to mean that G intended after-born children to receive a $10,000 bequest. See Earle Estate, 369 Pa. 52, 85 A.2d 90 (1951). Assuming that this construction were adopted, the specific sum doctrine allows the interest of each child of A to be treated separately from the others for purposes of the statutory rule. For the reasons cited above, the interests of X and Y are initially valid under Section 21205(a). The nonvested interest of Z, however, fails Section 21205(a)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could reach 25 or die under 25 more than 21 years after the death of the survivor of A, X, and Y. Under Section 21205(b), the validity of Z's interest depends on Z's reaching (or failing to reach) 25 within 90 years after G's death.

7. The Sub-Class Doctrine

The common law recognizes a doctrine called the sub-class doctrine, which is derived from Cattlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1318 (Ch. 1853), and states: If the ultimate takers are not described as a single class but rather as a group of subclasses, and if the share to which each separate subclass is entitled will finally be determined within the period of the rule, the gifts to the different subclasses are separable for the purpose of the rule. American Security & Trust Co. v. Cramer, 175 F. Supp. 367 (D.D.C. 1959); Restatement of Property § 389 (1944). The sub-class doctrine is not superseded by this chapter.

The operation of the sub-class doctrine under this chapter is illustrated in the following example.

Example (24) -- Sub-class case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to the children of such child." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. A now has died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the children of a child of A is treated separately from the others. This allows the remainder interest in favor of X's children and the remainder interest in favor of Y's children to be validated under Section 21205(a). X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the children of Z fails Section 21205(a)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could have children more than 21 years after the death of the survivor of A, X, and Y. Under Section 21205(b), the validity of the remainder interest in favor of Z's children depends on Z's dying within 90 years after G's death.

Note why both of the requirements of the sub-class rule are met. The ultimate takers are described as a group of sub-classes rather than as a single class: "children of the child so dying," as opposed to "grandchildren." The share to which each separate sub-class is entitled is certain to be finally determined within a life in being plus 21 years: As of A's death, who is a life in being, it is certain to be known how many children he had surviving him; since in fact there were three, we know that each sub-class will ultimately be entitled to one-third of the corpus, neither more nor less. The possible failure of the one-third share of Z's children does not increase to one-half the share going to X's and Y's children; they still are entitled to only one-third shares. Indeed, should it turn out that X has children but Y does not, this would not increase the one-third share to which X's children are entitled.

Example (25) -- General testamentary powers -- sub-class case. G devised property in trust, directing the trustee to pay income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to such persons as the one so dying shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. The general testamentary powers conferred on each of A's children are entitled to separate treatment under the principles of the sub-class doctrine. See above. Consequently, the powers conferred on X and Y, A's children who were living at G's death, are initially valid under Section 21207(a). But the general testamentary power conferred on Z, A's child who was born after G's death, fails the test of Section 21207(a) for initial validity. The validity of Z's power is governed by Section 21207(b). Z's death must occur within 90 years after G's death if any provision in Z's will purporting to exercise his power is to be valid.

8. Duration of Indestructible Trusts -- Termination of Trusts by Beneficiaries

The widely accepted view in American law is that the beneficiaries of a trust other than a charitable trust can compel its premature termination if all beneficiaries consent and if such termination is not expressly restrained or impliedly restrained by the existence of a "material purpose" of the settlor in establishing the trust. Restatement (Second) of Trusts § 337 (1959); 4 A. Scott, The Law of Trusts § 337 (3d ed. 1967). California law varies this rule by giving the court discretion in applying the material purposes doctrine, except as to a restraint on disposition of the beneficiaries interest. See Section 15403.

A trust that cannot be terminated by its beneficiaries is called an indestructible trust. It is generally accepted that the duration of the indestructibility of a trust, other than a charitable trust, is limited to the applicable perpetuity period. See Restatement (Second) of Trusts § 62 comment o (1959); Restatement (Second) of Property (Donative Transfers) § 2.1 & Legislative Note & Reporter's Note (1983); 1 A. Scott, The Law of Trusts § 62.10(2) (3d ed. 1967); J. Gray, The Rule Against Perpetuities § 121 (4th ed. 1942); L. Simes & A. Smith, The Law of Future Interests §§ 1391-93 (2d ed. 1956). In California this rule is provided by statute. See Section 21230 (continuing former Civil Code § 716.5). Nothing in this chapter supersedes this principle. One modification, however, is necessary: As to trusts that contain a nonvested property interest or power of appointment whose validity is governed by the wait-and-see element adopted in Section 21205(b), 21206(b), or 21207(b), the courts can be expected to determine that the applicable perpetuity period is 90 years.

BACKGROUND TO SECTION 21202

[Adapted from the Comment to Section 5 of the Uniform Statutory Rule Against Perpetuities (1986)]

1. Subdivision (a): Chapter Not Retroactive

This section provides that, except as provided in subdivision (b), the statutory rule against perpetuities and the other provisions of this chapter apply only to nonvested property interests or powers of appointment created on or after this chapter's operative date. With one exception, in determining when a nonvested property interest or a power of appointment is created, the principles of Article 3 (commencing with Section 21210) are applicable. Thus, for example, a property interest (or a power of appointment) created in a revocable inter vivos trust is created when the power to revoke terminates. See Example (1) in the Background to Section 21211.

The second sentence of subdivision (a) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. For purposes of this section only, a nonvested property interest (or a power of appointment) created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise of the power becomes irrevocable. Consequently, all the provisions of this chapter except Section 21202(b) apply to a nonvested property interest (or power of

appointment) created by a donee's exercise of a power of appointment where the donee's exercise, whether revocable or irrevocable, occurs on or after the operative date of this chapter. All the provisions of this chapter except Section 21202(b) also apply where the donee's exercise occurred before the operative date of this chapter if: (1) that pre-operative-date exercise was revocable and (2) that revocable exercise becomes irrevocable on or after the operative date of this chapter. This special rule applies to the exercise of all types of powers of appointment -- presently exercisable general powers, general testamentary powers, and nongeneral powers.

If the application of this special rule determines that the provisions of this chapter (except Section 21202(b)) apply, then for all such purposes, the time of creation of the appointed nonvested property interest (or appointed power of appointment) is determined by reference to Article 3 (commencing with Section 21210), without regard to the special rule contained in the second sentence of Section 21202(a).

If the application of this special rule of Section 21202(a) determines that the provisions of this chapter (except Section 21202(b)) do not apply, then Section 21202(b) is the only potentially applicable provision of this chapter.

Example (1) -- Testamentary power created before but exercised after the operative date of this chapter. G was the donee of a general testamentary power of appointment created by the will of his mother, M. M died in 1980. Assume that the operative date of the chapter is January 1, 1991. G died in 1992, leaving a will that exercised his general testamentary power of appointment.

Under the special rule in the second sentence of Section 21202(a), any nonvested property interest (or power of appointment) created by G in his will in exercising his general testamentary power was created (for purposes of Section 21202) at G's death in 1992, which was after the operative date of this chapter.

Consequently, all the provisions of this chapter apply (except Section 21202(b)). That point having been settled, the next step is to determine whether the nonvested property interests or powers of appointment created by G's testamentary appointment are initially valid under Section 21205(a), 21206(a), or 21207(a), or whether the wait-and-see element established in Section 21205(b), 21206(b), or 21207(b) apply. If the wait-and-see element does apply, it must also be determined when the allowable 90-year waiting period starts to run. In making these determinations, the principles of Article 3 (commencing with Section 21210) control the time of creation of the nonvested property interests (or powers of appointment); under Article 3 , since G's power was a general testamentary power of appointment, the common law relation back doctrine applies and the appointed nonvested property interests (and appointed powers of appointment) are created at M's death in 1980.

If G's testamentary power of appointment had been a nongeneral power rather than a general power, the same results as described above would apply.

Example (2) -- Presently exercisable nongeneral power created before but exercised after the operative date of this chapter. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable nongeneral power. If G exercised the power in 1992, after the operative date of this chapter (or, if a pre-operative-date revocable exercise of his power became irrevocable in 1992, after the operative date of this chapter), the same results as described above in Example (1) would apply.

Example (3) -- Presently exercisable general power created before but exercised after the operative date of this chapter. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable general power. If G exercised the power in 1992, after the operative date of this chapter (or, if a pre-operative-date revocable exercise of his power became irrevocable in 1992, after the operative date of this chapter), all the provisions of this chapter (except Section 21202(b)) apply; for such purposes, Article 3 (commencing with Section 21210) controls the date of creation of the appointed nonvested property interests (or appointed powers of appointment), without regard to the special rule of the second sentence of Section 21202(a). With respect to the exercise of a presently exercisable general power, it is possible -- indeed, probable -- that the special rule of the second sentence of Section 21202(a) and the rules of Article 3 agree on the same date of creation for their respective purposes, that date being the date the power was irrevocably exercised (or a revocable exercise thereof became irrevocable).

2. Subdivision (b): Reformation of Pre-existing Instruments

Although the statutory rule against perpetuities and the other provisions of this chapter do not apply retroactively, subdivision (b) recognizes a court's authority to exercise its equitable power to reform instruments that contain a violation of the common law rule against perpetuities (or of a statutory version or variation thereof) and to which the statutory rule does not apply because the offending nonvested property interest or power of appointment in question was created before the operative date of this chapter. This equitable power to reform is recognized only where the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the operative date of this chapter. Subdivision (b) constitutes statutory authority for a court to exercise its equitable reformation power.

3. Guidance as to How to Reform

Subdivision (b) is to be understood as authorizing a judicial insertion of a saving clause into the instrument. See Browder, *Construction, Reformation, and the Rule Against Perpetuities,* 62 Mich. L. Rev. 1 (1963); Waggoner, *Perpetuity Reform,* 81 Mich. L. Rev. 1718, 1755-59 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?,* 130 U. Pa. L. Rev. 521, 546-49 (1982). This method of reformation allows reformation to

achieve an after-the-fact duplication of a professionally competent product. Such a technique would have been especially suitable in the cases that have already arisen, for it probably would have allowed the dispositions in all of them to have been rendered valid without disturbing the transferor's intent at all. See Waggoner, *Perpetuity Reform,* 81 Mich. L. Rev. 1718, 1756 n. 103 (1983). The insertion of a saving clause grants a more appropriate opportunity for the property to go to the intended beneficiaries. Furthermore, it would also be a suitable technique in fertile octogenarian, unborn widow, and administrative contingency cases. A saving clause is one of the formalistic devices that a professionally competent lawyer would have used before the fact to ensure initial validity in these cases. Insofar as other violations are concerned, the saving clause technique also grants every appropriate opportunity for the property to go to the intended beneficiaries.

In selecting the lives to be used for the perpetuity-period component of the saving clause that in a given case is to be inserted after the fact, the principle to be adopted is the same one that ought to guide lawyers in drafting such a clause before the fact: The group selected should be appropriate to the facts and the disposition. While the exact make-up of the group in each case would be settled by litigation, the individuals designated in Section 1.3(2) of the Restatement (Second) of Property (Donative Transfers) (1983) as the measuring lives would be an appropriate referent for the court to consider. Care should be taken in formulating the gift-over component, so that it is appropriate to the dispositive scheme. Among possible recipients that the court might consider designating are: (1) the persons entitled to the income on the 21st anniversary of the death of the last surviving individual designated by the court for the perpetuity-period component and in the proportions thereof to which they are then so entitled; if no proportions are specified, in equal shares to the permissible recipients of income; or (2) the grantor's descendants per stirpes who are living 21 years after the death of the last surviving individual designated by the court for the perpetuity-period component; if none, to the grantor's heirs at law determined as if the grantor died 21 years after the death of the last surviving individual designated in the perpetuity-period component.

4. Violation Must be Determined in a Judicial Proceeding Commenced On or After the Effective Date of This Chapter

The equitable power to reform is recognized by Section 21202(b) only in situations where the violation of the former rule against perpetuities is determined in a judicial proceeding commenced on or after the operative date of this chapter. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

BACKGROUND TO SECTION 21205

[Adapted from Comments A-C to Section 1 of the Uniform Statutory Rule Against Perpetuities (1986)]

A. General Purpose

Sections 21205-21207 set forth the statutory rule against perpetuities (statutory rule). As provided in Section 21201, the statutory rule supersedes the common law rule against perpetuities (common law rule) and prior statutes. See the Comment to Section 21201.

1. The Common Law Rule's Validating and Invalidating Sides

The common law rule against perpetuities is a rule of initial validity or invalidity. At common law, a nonvested property interest is either valid or invalid as of its creation. Like most rules of property law, the common law rule has both a validating and an invalidating side. Both sides are derived from John Chipman Gray's formulation of the common law rule:

> No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942). From this formulation, the validating and invalidating sides of the common law rule are derived as follows:

> *Validating Side of the Common Law Rule.* A nonvested property interest is valid when it is created (initially valid) if it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive.
>
> *Invalidating Side of the Common Law Rule.* A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Notice that the invalidating side focuses on a lack of certainty, which means that invalidity under the common law rule is not dependent on actual post-creation events but only on possible post-creation events. Actual post-creation events are irrelevant, even those that are known at the time of the lawsuit. It is generally recognized that the invalidating side of the common law rule is harsh because it can invalidate interests on the ground of possible post-creation events that are extremely unlikely to happen and that in actuality almost never do happen, if ever.

2. The Statutory Rule Against Perpetuities

The essential difference between the common law rule and its statutory replacement is that the statutory rule preserves the common law rule's overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or other property arrangements, while eliminating the harsh potential of the common law

rule. The statutory rule achieves this result by codifying (in slightly revised form) the validating side of the common law rule and modifying the invalidating side by adopting a wait-and-see element. Under the statutory rule, interests that would have been initially valid at common law continue to be initially valid, but interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the allowable waiting period set forth in Section 21205(b). Thus, the Uniform Act recasts the validating and invalidating sides of the rule against perpetuities as follows:

> *Validating Side of the Statutory Rule:* A nonvested property interest is initially valid if, when it is created, it is then certain to vest or terminate (fail to vest) -- one or the other -- no later than 21 years after the death of an individual then alive. The validity of a nonvested property interest that is not initially valid is in abeyance. Such an interest is valid if it vests within the allowable waiting period after its creation.
>
> *Invalidating Side of the Statutory Rule:* A nonvested property interest that is not initially valid becomes invalid (and subject to reformation under Section 21220) if it neither vests nor terminates within the allowable waiting period after its creation.

As indicated, this modification of the invalidating side of the common law rule is generally known as the wait-and-see method of perpetuity reform. The wait-and-see method of perpetuity reform was approved by the American Law Institute as part of the Restatement (Second) of Property (Donative Transfers) §§ 1.1-1.6 (1983). For a discussion of the various methods of perpetuity reform, including the wait-and-see method and the Restatement (Second)'s version of wait-and-see, see Waggoner, *Perpetuity Reform,* 81 Mich. L. Rev. 1718 (1983).

B. Section 21205(a): Nonvested Property Interests That Are Initially Valid

1. Nonvested Property Interest

Section 21205 sets forth the statutory rule against perpetuities with respect to nonvested property interests. A nonvested property interest (also called a contingent property interest) is a future interest in property that is subject to an unsatisfied condition precedent. In the case of a class gift, the interests of all the unborn members of the class are nonvested because they are subject to the unsatisfied condition precedent of being born. At common law, the interests of all potential class members must be valid or the class gift is invalid. As pointed out in the Background to Section 21201, this so-called all-or-nothing rule with respect to class gifts is not superseded by this chapter, and so remains in effect under the statutory rule. Consequently, all class gifts that are subject to open are to be regarded as nonvested property interests for the purposes of this chapter.

2. Section 21205(a) Codifies the Validating Side of the Common Law Rule

The validating side of the common law rule is codified in Section 21205(a) and, with respect to powers of appointment, in Sections 21206(a) and 21207(a).

A nonvested property interest that satisfies the requirement of Section 21205(a) is initially valid. That is, it is valid as of the time of its creation. There is no need to subject such an interest to the waiting period set forth in Section 21205(b), nor would it be desirable to do so.

For a nonvested property interest to be valid as of the time of its creation under Section 21205(a), there must then be a certainty that the interest will either vest or terminate -- an interest terminates when vesting becomes impossible -- no later than 21 years after the death of an individual then alive. To satisfy this requirement, it must be established that there is no possible chain of events that might arise after the interest was created that would allow the interest to vest or terminate after the expiration of the 21-year period following the death of an individual in being at the creation of the interest. Consequently, initial validity under Section 21205(a) can be established only if there is an individual for whom there is a causal connection between the individual's death and the interest's vesting or terminating no later than 21 years thereafter.

The individual described in Sections 21205(a), 21206(a), and 21207(a) is often referred to as the "validating life," the term used throughout the Background Comments to this chapter.

3. Determining Whether There Is a Validating Life

The process for determining whether a validating life exists is to postulate the death of each individual connected in some way to the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible events? If one individual can be found for whom the answer is No, that individual can serve as the validating life. As to that individual there will be the requisite causal connection between his or her death and the questioned interest's vesting or terminating no later than 21 years thereafter.

In searching for a validating life, only individuals who are connected in some way to the transaction need to be considered, for they are the only ones who have a chance of supplying the requisite causal connection. Such individuals vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the nonvested property interest, and individuals related to them by blood or adoption, especially in the ascending and descending lines. There is no point in even considering the life of an individual unconnected to the transaction -- an individual from the world at large who happens to be in being at the creation of the interest. No such individual can be a validating life because there will be an invalidating chain of possible events as to every unconnected individual who might be proposed: Any such individual can immediately die after the creation of the nonvested property interest without causing any acceleration of the interest's vesting or termination. (The life expectancy of any unconnected individual, or even the probability that one of a number of new-born babies will live a long life, is irrelevant.)

Example (1) -- Parent of devisees as the validating life. G devised property "to A for life, remainder to A's children who attain 21." G was survived by his son (A), by his daughter (B), by A's wife (W), and by A's two children (X and Y).

The nonvested property interest in favor of A's children who reach 21 satisfies Section 21205(a)'s requirement, and the interest is initially valid. When the interest was created (at G's death), the interest was then certain to vest or terminate no later than 21 years after A's death.

The process by which A is determined to be the validating life is one of testing various candidates to see if any of them have the requisite causal connection. As noted above, no one from the world at large can have the requisite causal connection, and so such individuals are disregarded. Once the inquiry is narrowed to the appropriate candidates, the first possible validating life that comes to mind is A, who does in fact fulfill the requirement: Since A's death cuts off the possibility of any more children being born to him, it is impossible, no matter when A dies, for any of A's children to be alive and under the age of 21 beyond 21 years after A's death. (See the Background to Section 21208.)

A is therefore the validating life for the nonvested property interest in favor of A's children who attain 21. None of the other individuals who is connected to this transaction could serve as the validating life because an invalidating chain of possible post-creation events exists as to each one of them. The other individuals who might be considered include W, X, Y, and B. In the case of W, an invalidating chain of events is that she might predecease A, A might remarry and have a child by his new wife, and such child might be alive and under the age of 21 beyond the 21-year period following W's death. With respect to X and Y, an invalidating chain of events is that they might predecease A, A might later have another child, and that child might be alive and under 21 beyond the 21-year period following the death of the survivor of X and Y. As to B, she suffers from the same invalidating chain of events as exists with respect to X and Y. The fact that none of these other individuals can serve as the validating life is of no consequence, however, because only one such individual is required for the validity of a nonvested interest to be established, and that individual is A.

4. Rule of Section 21208 (Posthumous Birth)

See the Background to Section 21208.

5. Recipients as Their Own Validating Lives

It is well established at common law that, in appropriate cases, the recipient of an interest can be his or her own validating life. See, e.g., Rand v. Bank of California, 236 Or. 619, 388 P.2d 437 (1964). Given the right circumstances, this principle can validate interests that are contingent on the recipient's reaching an age in excess of 21, or are contingent on the recipient's surviving a

particular point in time that is or might turn out to be in excess of 21 years after the interest was created or after the death of a person in being at the date of creation.

> *Example (2) -- Devisees as their own validating lives.* G devised real property "to A's children who attain 25." A predeceased G. At G's death, A had three living children, all of whom were under 25.
>
> The nonvested property interest in favor of A's children who attain 25 is validated by Section 21205(a). Under Section 21208, the possibility that A will have a child born to him after his death (and since A predeceased G, after G's death) must be disregarded. Consequently, even if A's wife survived G, and even if she was pregnant at G's death or even if A had deposited sperm in a sperm bank prior to his death, it must be assumed that all of A's children are in being at G's death. A's children are, therefore, their own validating lives. (Note that Section 21208 requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death must be disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual.) Each one of A's children, all of whom under Section 21208 are regarded as alive at G's death, will either reach the age of 25 or fail to do so within his or her own lifetime. To say this another way, it is certain to be known no later than at the time of the death of each child whether or not that child survived to the required age.

6. Validating Life Can Be Survivor of Group

In appropriate cases, the validating life need not be individualized at first. Rather the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. It is common in such cases to say that the members of the group are the validating lives, but the true meaning of the statement is that the validating life is the member of the group who turns out to live the longest. As the court said in Skatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1697), "for let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."

> *Example (3) -- Case of validating life being the survivor of a group.* G devised real property "to such of my grandchildren as attain 21." Some of G's children are living at G's death.
>
> The nonvested property interest in favor of G's grandchildren who attain 21 is valid under Section 21205(a). The validating life is that one of G's children who turns out to live the longest. Since under Section 21208, it must be assumed that none of G's children will have post-death children, it is regarded as impossible for any of G's grandchildren to be alive and under 21 beyond the 21-year period following the death of G's last surviving child.

Example (4) -- Sperm bank case. G devised property in trust, directing the income to be paid to G's children for the life of the survivor, then to G's grandchildren for the life of the survivor, and on the death of G's last surviving grandchild, to pay the corpus to G's great-grandchildren then living. G's children all predeceased him, but several grandchildren were living at G's death. One of G's predeceased children (his son, A) had deposited sperm in a sperm bank. A's widow was living at G's death.

The nonvested property interest in favor of G's great-grandchildren is valid under Section 21205(a). The validating life is the last surviving grandchild among the grandchildren living at G's death. Under Section 21208, the possibility that A will have a child conceived after G's death must be disregarded. Note that Section 21208 requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death is disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual. Thus in this example, by disregarding the possibility that A will have a conceived-after-death child, G's last surviving grandchild becomes the validating life because G's last surviving grandchild is deemed to have been alive at G's death, when the great-grandchildren's interests were created.

Example (5) -- Child in gestation case. G devised property in trust, to pay the income equally among G's living children; on the death of G's last surviving child, to accumulate the income for 21 years; on the 21st anniversary of the death of G's last surviving child, to pay the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to X Charity. At G's death his child (A) was 6 years old, and G's wife (W) was pregnant. After G's death, W gave birth to their second child (B).

The nonvested property interests in favor of G's descendants and in favor of X Charity are valid under Section 21205(a). The validating life is A. Under Section 21208, the possibility that a child will be born to an individual after the individual's death must be disregarded for the purposes of determining validity under Section 21205(a). Consequently, the possibility that a child will be born to G after his death must be disregarded; and the possibility that a child will be born to any of G's descendants after their deaths must also be disregarded.

Note, however, that the rule of Section 21208 does not apply to the question of the entitlement of an after-born child to take a beneficial interest in the trust. The common law rule (sometimes codified) that a child in gestation is treated as alive, if the child is subsequently born viable, applies to this question. Thus, Section 21208 does not prevent B from being an income beneficiary under G's trust, nor does it prevent a descendant in gestation on the 21st anniversary of the death of G's last surviving child from

being a member of the class of G's "then-living descendants," as long as such descendant has no then-living ancestor who takes instead.

7. Different Validating Lives Can and in Some Cases Must Be Used

Dispositions of property sometimes create more than one nonvested property interest. In such cases, the validity of each interest is treated individually. A validating life that validates one interest might or might not validate the other interests. Since it is not necessary that the same validating life be used for all interests created by a disposition, the search for a validating life for each of the other interests must be undertaken separately.

8. Perpetuity Saving Clauses and Similar Provisions

Knowledgeable lawyers almost routinely insert perpetuity saving clauses into instruments they draft. Saving clauses contain two components, the first of which is the perpetuity-period component. This component typically requires the trust or other arrangement to terminate no later than 21 years after the death of the last survivor of a group of individuals designated therein by name or class. (The lives of corporations, animals, or sequoia trees cannot be used.) The second component of saving clauses is the gift-over component. This component expressly creates a gift over that is guaranteed to vest at the termination of the period set forth in the perpetuity-period component, but only if the trust or other arrangement has not terminated earlier in accordance with its other terms.

It is important to note that regardless of what group of individuals is designated in the perpetuity-period component of a saving clause, the surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of Section 21205(a), 21206(a), or 21207(a) for initial validity. By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death.

Example (6) -- Valid saving clause case. A testamentary trust directs income to be paid to the testator's children for the life of the survivor, then to the testator's grandchildren for the life of the survivor, corpus on the death of the testator's last living grandchild to such of the testator's descendants as the last living grandchild shall by will appoint; in default of appointment, to the testator's then-living descendants, per stirpes. A saving clause in the will terminates the trust, if it has not previously terminated, 21 years after the death of the testator's last surviving descendant who was living at the testator's death. The testator was survived by children.

> In the absence of the saving clause, the nongeneral power of appointment in the last living grandchild and the nonvested property interest in the gift-in-default clause in favor of the testator's descendants fail the test of Sections 21205(a) and 21207(a) for initial validity. That is, were it not for the saving clause, there is no validating life. However, the surviving member of the designated group becomes the validating life, so that the saving clause does confer initial validity on the nongeneral power of appointment and on the nonvested property interest under Sections 21205(a) and 21207(a).

If the governing instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common law courts have developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the governing instrument did not exist. See cases cited in Restatement (Second) of Property (Donative Transfers) Reporter's Note No. 3, at 45 (1983). See also Restatement (Second) of Property (Donative Transfers) § 1.3(1) comment a (1983); Restatement of Property § 374 & comment 1 (1944); 6 American Law of Property § 24.13 (A. Casner ed. 1952); 5A R. Powell, The Law of Real Property ¶ 766[5] (1985); L. Simes & A. Smith, The Law of Future Interests § 1223 (2d ed. 1956). If, for example, the designated group in Example (6) were the residents of X City (or the members of Y Country Club) living at the time of the testator's death, the saving clause would not validate the power of appointment or the nonvested property interest. Instead, the validity of the power of appointment and the nonvested property interest would be determined as if the provision in the governing instrument did not exist. Since without the saving clause the power of appointment and the nonvested property interest would fail to satisfy the requirements of Sections 21205(a) and 21207(a) for initial validity, their validity would be governed by Sections 21205(b) and 21207(b).

The application of the above common law doctrine, which is not superseded by this chapter and so remains in full force, is not limited to saving clauses. It also applies to trusts or other arrangements where the period thereof is directly linked to the life of the survivor of a designated group of individuals. An example is a trust to pay the income to the grantor's descendants from time to time living, per stirpes, for the period of the life of the survivor of a designated group of individuals living when the nonvested property interest or power of appointment in question was created, plus the 21-year period following the survivor's death; at the end of the 21-year period, the corpus is to be divided among the grantor's then-living descendants, per stirpes, and if none, to the XYZ Charity. If the group of individuals so designated is such that it would be impracticable to determine the death of the survivor, the validity of the disposition is determined as if the provision in the governing instrument did not exist. The term of the trust is therefore governed by the allowable 90-year period of Section 21205(b), 21206(b), or 21207(b) of the statutory rule.

9. Additional references

Restatement (Second) of Property (Donative Transfers) § 1.3(1) & comments (1983); Waggoner, *Perpetuity Reform,* 81 Mich. L. Rev. 1718, 1720-26 (1983).

C. Section 21205(b): Wait-and-See -- Nonvested Property Interests Whose Validity Is Initially in Abeyance

Unlike the common law rule, the statutory rule against perpetuities does not automatically invalidate nonvested property interests for which there is no validating life. A nonvested property interest that does not meet the requirements for validity under Section 21205(a) might still be valid under the wait-and-see provisions of Section 21205(b). Such an interest is invalid under Section 21205(b) only if in actuality it does not vest (or terminate) during the allowable waiting period. Such an interest becomes invalid, in other words, only if it is still in existence and nonvested when the allowable waiting period expires.

1. The 90-Year Allowable Waiting Period

Since a wait-and-see rule against perpetuities, unlike the common law rule, makes validity or invalidity turn on actual post-creation events, it requires that an actual period of time be measured off during which the contingencies attached to an interest are allowed to work themselves out to a final resolution. The statutory rule against perpetuities establishes an allowable waiting period of 90 years. Nonvested property interests that have neither vested nor terminated at the expiration of the 90-year allowable waiting period become invalid.

As explained in the Prefatory Note to the Uniform Statutory Rule Against Perpetuities (1986), the allowable period of 90 years is not an arbitrarily selected period of time. On the contrary, the 90-year period represents a reasonable approximation of -- a proxy for -- the period of time that would, on average, be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.

2. Technical Violations of the Common Law Rule

One of the harsh aspects of the invalidating side of the common law rule, against which the adoption of the wait-and-see element in Section 21205(b) is designed to relieve, is that nonvested property interests at common law are invalid even though the invalidating chain of possible events almost certainly will not happen. In such cases, the violation of the common law rule could be said to be merely technical. Nevertheless, at common law, the nonvested property interest is invalid.

Cases of technical violation fall generally into discrete categories, identified and named by Professor Leach in *Perpetuities in a Nutshell,* 51 Harv. L. Rev. 638 (1938), as the fertile octogenarian, the administrative contingency, and the unborn widow. The following three examples illustrate how Section 21205(b) affects these categories.

> *Example (7) -- Fertile octogenarian case.* G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving

child to pay the corpus of the trust to A's grandchildren." G was survived by A (a female who had passed the menopause) and by A's two adult children (X and Y).

The remainder interest in favor of G's grandchildren would be invalid at common law, and consequently is not validated by Section 21205(a). There is no validating life because, under the common law's conclusive presumption of lifetime fertility, which is not superseded by this chapter (see the Background to Section 21201), A might have a third child (Z), conceived and born after G's death, who will have a child conceived and born more than 21 years after the death of the survivor of A, X, and Y.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the grandchildren's remainder interest will become invalid under Section 21205(b) is negligible.

Example (8) -- Administrative contingency case. G devised property "to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate." G was survived by children and grandchildren.

The remainder interest in favor of A's grandchildren would be invalid at common law, and consequently is not validated by Section 21205(a). The final distribution of G's estate might not occur within 21 years of G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children and grandchildren who were living at G's death.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. Since it is almost certain that the final distribution of G's estate will occur well within this 90-year period, the chance that the grandchildren's interest will be invalid is negligible.

Example (9) -- Unborn widow case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then living descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever is A's spouse when he dies, if anyone, the remainder interest in favor of A's descendants would be invalid at common law, and consequently is not validated by Section 21205(a). There is no validating life because A's spouse might not be W; A's spouse might be someone who was conceived and born after G's

death; she might outlive the death of the survivor of A, W, X, and Y by more than 21 years; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, and Y.

Under Section 21205(b), however, the remote possibility of the occurrence of this chain of events does not invalidate the descendants remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the descendants remainder interest will become invalid under the statutory rule is small.

3. Age Contingencies in Excess of 21

Another category of technical violation of the common law rule arises in cases of age contingencies in excess of 21 where the takers cannot be their own validating lives (unlike Example (2), above). The violation of the common law rule falls into the technical category because the insertion of a saving clause would in almost all cases allow the disposition to be carried out as written. In effect, the statutory rule operates like the perpetuity-period component of a saving clause.

Example (10) -- Age contingency in excess of 21 case. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

The remainder interest in favor of A's children who reach 30 is a class gift. At common law, the interests of all potential class members must be valid or the class gift is totally invalid. Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817). This chapter does not supersede the all-or-nothing rule for class gifts (see the Background to Section 21201), and so the all-or-nothing rule continues to apply under this chapter. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would be invalid at common law and consequently is not validated by Section 21205(a).

Under Section 21205(b), however, the possibility of the occurrence of this chain of events does not invalidate the children's remainder interest. The interest becomes invalid only if an interest of a class member remains nonvested 90 years after G's death.

Although unlikely, suppose that at A's death Z's age is such that he could be alive and under the age of 30 at the expiration of the allowable waiting period. Suppose further that at A's death X or Y or both is over the age of 30. The court, upon the petition of an interested person, must under Section 21220 reform G's disposition. See Example (3) in the Background to Section 21220.

BACKGROUND TO SECTIONS 21206 AND 21207

[Adapted from Comments D-F to Section 1 of the Uniform Statutory Rule Against Perpetuities (1986)]

D. Sections 21206(a) and 21207(a): Powers of Appointment That Are Initially Valid

Sections 21206 and 21207 set forth the statutory rule against perpetuities with respect to powers of appointment. A power of appointment is the authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in or powers of appointment over property. Restatement (Second) of Property (Donative Transfers) § 11.1 (1986). The property or property interest subject to a power of appointment is called the "appointive property."

The various persons connected to a power of appointment are identified by a special terminology. The "donor" is the person who created the power of appointment. The "donee" is the person who holds the power of appointment, i.e., the powerholder. The "objects" are the persons to whom an appointment can be made. The "appointees" are the persons to whom an appointment has been made. The "takers in default" are the persons whose property interests are subject to being defeated by the exercise of the power of appointment and who take the property to the extent the power is not effectively exercised. Restatement (Second) of Property (Donative Transfers) § 11.2 (1986).

A power of appointment is "general" if it is exercisable in favor of the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate. A power of appointment that is not general is a "nongeneral" power of appointment. Restatement (Second) of Property (Donative Transfers) § 11.4 (1986).

A power of appointment is "presently exercisable" if, at the time in question, the donee can by an exercise of the power create an interest in or a power of appointment over the appointive property. Restatement (Second) of Property (Donative Transfers) § 11.5 (1986). A power of appointment is "testamentary" if the donee can exercise it only in the donee's will. Restatement of Property § 321 (1940). A power of appointment is "not presently exercisable because of a condition precedent" if the only impediment to its present exercisability is a condition precedent, i.e., the occurrence of some uncertain event. Since a power of appointment terminates on the donee's death, a deferral of a power's present exercisability until a future time (even a time certain) imposes a condition precedent that the donee be alive at that future time.

A power of appointment is a "fiduciary" power if it is held by a fiduciary and is exercisable by the fiduciary in a fiduciary capacity. A power of appointment that is exercisable in an individual capacity is a "nonfiduciary" power. As used in this chapter, the term "power of appointment" refers to "fiduciary" and to "nonfiduciary" powers, unless the context indicates otherwise.

Although Gray's formulation of the common law rule against perpetuities (see the Background to Section 21205) does not speak directly of powers of appointment, the common law rule is applicable to powers of appointment (other than presently exercisable general powers

of appointment). The principle of Sections 21206(a) and 21207(a) is that a power of appointment that satisfies the common law rule against perpetuities is valid under the statutory rule against perpetuities, and consequently it can be validly exercised, without being subjected to a waiting period during which the power's validity is in abeyance.

Two different tests for validity are employed at common law, depending on what type of power is at issue. In the case of a nongeneral power (whether or not presently exercisable) and in the case of a general testamentary power, the power is initially valid if, when the power was created, it is certain that the latest possible time that the power can be exercised is no later than 21 years after the death of an individual then in being. In the case of a general power not presently exercisable because of a condition precedent, the power is initially valid if it is then certain that the condition precedent to its exercise will either be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then in being. Sections 21206(a) and 21207(a) codify these rules. Under either test, initial validity depends on the existence of a validating life. The procedure for determining whether a validating life exists is essentially the same procedure explained in Part B, above, pertaining to nonvested property interests.

Example (11) -- Initially valid general testamentary power case. G devised property "to A for life, remainder to such persons, including A's estate or the creditors of A's estate, as A shall by will appoint." G was survived by his daughter (A).

A's power, which is a general testamentary power, is valid as of its creation under Section 21207(a). The test is whether or not the power can be exercised beyond 21 years after the death of an individual in being when the power was created (G's death). Since A's power cannot be exercised after A's death, the validating life is A, who was in being at G's death.

Example (12) -- Initially valid nongeneral power case. G devised property "to A for life, remainder to such of A's descendants as A shall appoint." G was survived by his daughter (A).

A's power, which is a nongeneral power, is valid as of its creation under Section 21207(a). The validating life is A; the analysis leading to validity is the same as applied in Example (11), above.

Example (13) -- Case of initially valid general power not presently exercisable because of a condition precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint." G was survived by his daughter (A), who was then childless.

The power in A's first born child, which is a general power not presently exercisable because of a condition precedent, is valid as of its creation under Section 21206(a). The power is subject to a condition precedent --

that A have a child — but this is a contingency that under subdivision (d) is deemed certain to be resolved one way or the other within A's lifetime. A is therefore the validating life: The power cannot remain subject to the condition precedent after A's death. Note that the latest possible time that the power can be exercised is at the death of A's first born child, which might occur beyond 21 years after the death of A (and anyone else who was alive when G died). Consequently, if the power conferred on A's first born child had been a nongeneral power or a general testamentary power, the power could not be validated by Section 21207(a); instead, the power's validity would be governed by Section 21207(b).

E. Sections 21206(b) and 21207(b): Wait-and-See — Powers of Appointment Whose Validity Is Initially in Abeyance

1. Powers of Appointment

Under the common law rule, a general power not presently exercisable because of a condition precedent is invalid as of the time of its creation if the condition might neither be satisfied nor become impossible to satisfy within a life in being plus 21 years. A nongeneral power (whether or not presently exercisable) or a general testamentary power is invalid as of the time of its creation if it might not terminate (by irrevocable exercise or otherwise) within a life in being plus 21 years.

Sections 21206(b) and 21207(b), by adopting the wait-and-see method of perpetuity reform, shift the ground of invalidity from possible to actual post-creation events. Under these subdivisions, a power of appointment that would have violated the common law rule, and therefore fails the tests in Section 21206(a) or 21207(a) for initial validity, is nevertheless not invalid as of the time of its creation. Instead, its validity is in abeyance. A general power not presently exercisable because of a condition precedent is invalid only if in actuality the condition neither is satisfied nor becomes impossible to satisfy within the allowable 90-year waiting period. A nongeneral power or a general testamentary power is invalid only if in actuality it does not terminate (by irrevocable exercise or otherwise) within the allowable 90-year waiting period.

Example (14) -- General testamentary power case. G devised property "to A for life, then to A's first born child for life, then to such persons, including the estate or the creditors of the estate of A's first born child, as A's first born child shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

Since the general testamentary power conferred on A's first born child fails the test of Section 21207(a) for initial validity, its validity is governed by Section 21207(b). If A has a child, such child's death must occur within 90 years of G's death for any provision in the child's will purporting to exercise the power to be valid.

Example (15) -- Nongeneral power case. G devised property "to A for life, then to A's first born child for life, then to such of G's grandchildren as A's first born child shall appoint; in default of appointment, to the children of G's late nephew, Q." G was survived by his daughter (A), who was then childless, by his son (B), who had two children (X and Y), and by Q's two children (R and S).

Since the nongeneral power conferred on A's first born child fails the test of Section 21207(a) for initial validity, its validity is governed by Section 21207(b). If A has a child, such child must exercise the power within 90 years after G's death or the power becomes invalid.

Example (16) -- General power not presently exercisable because of a condition precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint after reaching the age of 25; in default of appointment, to G's grandchildren." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

The power conferred on A's first born child is a general power not presently exercisable because of a condition precedent. Since the power fails the test of Section 21206(a) for initial validity, its validity is governed by Section 21206(b). If A has a child, such child must reach the age of 25 (or die under 25) within 90 years after G's death or the power is invalid.

2. Fiduciary Powers

Purely administrative fiduciary powers are excluded from the statutory rule under Section 21225(b)-(c), but the only distributive fiduciary power that is excluded is the power described in Section 21225(d). Otherwise, distributive fiduciary powers are subject to the statutory rule. Such powers are usually nongeneral powers.

Example (17) -- Trustee's discretionary powers over income and corpus. G devised property in trust, the terms of which were that the trustee was authorized to accumulate the income or pay it or a portion of it out to A during A's lifetime; after A's death, the trustee was authorized to accumulate the income or to distribute it in equal or unequal shares among A's children until the death of the survivor; and on the death of A's last surviving child to pay the corpus and accumulated income (if any) to B. The trustee was also granted the discretionary power to invade the corpus on behalf of the permissible recipient or recipients of the income.

The trustee's nongeneral powers to invade corpus and to accumulate or spray income among A's children are not excluded by Section 21225(d), nor are they initially valid under Section 21207(a). Their validity is, therefore, governed by Section 21207(b). Both powers become invalid

thereunder, and hence no longer exercisable, 90 years after G's death.

It is doubtful that the powers will become invalid, because the trust will probably terminate by its own terms earlier than the expiration of the allowable 90-year period. But if the powers do become invalid, and hence no longer exercisable, they become invalid as of the time the allowable 90-year period expires. Any exercises of either power that took place before the expiration of the allowable 90-year period are not invalidated retroactively. In addition, if the powers do become invalid, a court in an appropriate proceeding must reform the instrument in accordance with the provisions of Section 21220.

F. The Validity of the Donee's Exercise of a Valid Power

1. Donee's Exercise of Power

The fact that a power of appointment is valid, either because it (1) was not subject to the statutory rule to begin with, (2) is initially valid under Sections 21206(a) or 21207(a), or (3) becomes valid under Sections 21206(b) or 21207(b), means merely that the power can be validly exercised. It does not mean that any exercise that the donee decides to make is valid. The validity of the interests or powers created by the exercise of a valid power is a separate matter, governed by the provisions of this chapter. A key factor in deciding the validity of such appointed interests or appointed powers is determining when they were created for purposes of this chapter. Under Sections 21211 and 21212, as explained in the Background to those sections, the time of creation is when the power was exercised if it was a presently exercisable general power; and if it was a nongeneral power or a general testamentary power, the time of creation is when the power was created. This is the rule generally accepted at common law (see Restatement (Second) of Property (Donative Transfers) § 1.2, comment d (1983); Restatement of Property § 392 (1944)), and it is the rule adopted under this chapter (except for purposes of Section 21202 only, as explained in the Background to Section 21202).

Example (18) -- Exercise of a nongeneral power of appointment. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of M's descendants (except G). The trust was created by the will of G's mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his brother B's children for the life of the survivor, and upon the death of B's last surviving child, to pay the corpus of the trust to B's grandchildren. B predeceased M; B was survived by his two children, X and Y, who also survived M and G.

G's power and his appointment are valid. The power and the appointed interests were created at M's death when the power was created, not on G's death when it was exercised. See Sections 21210-21211. G's power passes Section 21207(a)'s test for initial validity: G himself is the validating life. G's appointment also passes Section

21205(a)'s test for initial validity: Since B was dead at M's death, the validating life is the survivor of B's children, X and Y.

Suppose that G's power was exercisable only in favor of G's own descendants, and that G appointed the identical interests in favor of his own children and grandchildren. Suppose further that at M's death, G had two children, X and Y, and that a third child, Z, was born later. X, Y, and Z survived G. In this case, the remainder interest in favor of G's grandchildren would not pass Section 21205(a)'s test for initial validity. Its validity would be governed by Section 21205(b), under which it would be valid if G's last surviving child died within 90 years after M's death.

If G's power were a general testamentary power of appointment, rather than a nongeneral power, the solution would be the same. The period of the statutory rule with respect to interests created by the exercise of a general testamentary power starts to run when the power was created (at M's death, in this example), not when the power was exercised (at G's death).

Example (19) -- Exercise of a presently exercisable general power of appointment. G was the life income beneficiary of a trust and the donee of a presently exercisable general power of appointment over the succeeding remainder interest. G exercised the power by deed, directing the trustee after his death to pay the income to G's children in equal shares for the life of the survivor, and upon the death of his last surviving child to pay the corpus of the trust to his grandchildren.

The validity of G's power is not in question: A presently exercisable general power of appointment is not subject to the statutory rule against perpetuities. G's appointment, however, is subject to the statutory rule. If G reserved a power to revoke his appointment, the remainder interest in favor of G's grandchildren passes Section 21205(a)'s test for initial validity. Under Sections 21210-21211, the appointed remainder interest was created at G's death. The validating life for his grandchildren's remainder interest is G's last surviving child.

If G's appointment were irrevocable, however, the grandchildren's remainder interest fails the test of Section 21205(a) for initial validity. Under Sections 21210-21211, the appointed remainder interest was created upon delivery of the deed exercising G's power (or when the exercise otherwise became effective). Since the validity of the grandchildren's remainder interest is governed by Section 21205(b), the remainder interest becomes invalid, and the disposition becomes subject to reformation under Section 21220, if G's last surviving child lives beyond 90 years after the effective date of G's appointment.

Example (20) -- Exercises of successively created nongeneral powers of appointment. G devised property to A for life, remainder to such of A's descendants as A shall appoint. At

his death, A exercised his nongeneral power by appointing to his child B for life, remainder to such of B's descendants as B shall appoint. At his death, B exercised his nongeneral power by appointing to his child C for life, remainder to C's children. A and B were living at G's death. Thereafter, C was born. A later died, survived by B and C. B then died survived by C.

A's nongeneral power passes Section 21207(a)'s test for initial validity. A is the validating life. B's nongeneral power, created by A's appointment, also passes Section 21207(a)'s test for initial validity. Since under Sections 21210-21211 the appointed interests and powers are created at G's death, and since B was then alive, B is the validating life for his nongeneral power. (If B had been born after G's death, however, his power would have failed Section 21207(a)'s test for initial validity; its validity would be governed by Section 21207(b), and would turn on whether or not it was exercised by B within 90 years after G's death.)

Although B's power is valid, his exercise may be partly invalid. The remainder interest in favor of C's children fails the test of Section 21205(a) for initial validity. The period of the statutory rule begins to run at G's death, under Sections 21210-21212. (Since B's power was a nongeneral power, B's appointment under the common law relation back doctrine of powers of appointment is treated as having been made by A. If B's appointment related back no further than that, of course, it would have been validated by Section 21205(a) because C was alive at A's death. However, A's power was also a nongeneral power, so relation back goes another step. A's appointment -- which now includes B's appointment -- is treated as having been made by G.) Since C was not alive at G's death, he cannot be the validating life. And, since C might have more children more than 21 years after the deaths of A and B and any other individual who was alive at G's death, the remainder interest in favor of his children is not initially validated by Section 21205(a). Instead, its validity is governed by Section 21205(b), and turns on whether or not C dies within 90 years after G's death.

Note that if either A's power or B's power (or both) had been a general testamentary power rather than a nongeneral power, the above solution would not change. However, if either A's power or B's power (or both) had been a presently exercisable general power, B's appointment would have passed Section 21205(a)'s test for initial validity. (If A had the presently exercisable general power, the appointed interests and power would be created at A's death, not G's; and if the presently exercisable general power were held by B, the appointed interests and power would be created at B's death.)

2. Common Law "Second-Look" Doctrine

As indicated above, both at common law and under this chapter (except for purposes of Section 21202 only, as explained in the Background to that section), appointed interests and powers established

by the exercise of a general testamentary power or a nongeneral power are created when the power was created, not when the power was exercised. In applying this principle, the common law recognizes a so-called doctrine of second-look, under which the facts existing on the date of the exercise are taken into account in determining the validity of appointed interests and appointed powers. E.g., Warren's Estate, 320 Pa. 112, 182 A. 396 (1930); In re Estate of Bird, 225 Cal. App. 2d 196, 37 Cal. Rptr. 288 (1964). The common law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by this chapter. The following example, which is a variation of Example (18) above, illustrates how the second-look doctrine operates at common law and how the situation would be analyzed under this chapter.

> *Example (21) -- Second-look case.* G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of G's descendants. The trust was created by the will of his mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his children for the life of the survivor, and upon the death of his last surviving child, to pay the corpus of the trust to his grandchildren. At M's death, G had two children, X and Y. No further children were born to G, and at his death X and Y were still living.
>
> The common law solution of this example is as follows: G's appointment is valid under the common law rule. Although the period of the rule begins to run at M's death, the facts existing at G's death can be taken into account. This second look at the facts discloses that G had no additional children. Thus the possibility of additional children, which existed at M's death when the period of the rule began to run, is disregarded. The survivor of X and Y, therefore, becomes the validating life for the remainder interest in favor of G's grandchildren, and G's appointment is valid. The common law's second-look doctrine would not, however, save G's appointment if he actually had one or more children after M's death and if at least one of these after-born children survived G.
>
> Under this chapter, if no additional children are born to G after M's death, the common law second-look doctrine can be invoked as of G's death to declare G's appointment then to be valid under Section 21205(a); no further waiting is necessary. However, if additional children are born to G and one or more of them survives G, Section 21205(b) applies and the validity of G's appointment depends on G's last surviving child dying within 90 years after M's death.

3. Additional References

Restatement (Second) of Property (Donative Transfers) § 1.2 comments d, f, g, & h; § 1.3 comment g; § 1.4 comment *l* (1983).

BACKGROUND TO SECTION 21208

[Adapted from Comment B to Section 1 of the Uniform Statutory Rule Against Perpetuities (1986)]

The rule established in Section 21208 plays a significant role in the search for a validating life. Section 21208 declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purposes of determining the validity of an interest (or power of appointment) under Section 21205(a), 21206(a) or 21207(a). The rule of Section 21208 does not apply, for example, to questions such as whether or not a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest -- as a member of a class or otherwise. Neither Section 21208, nor any other provision of this chapter, supersedes the widely accepted common law principle, sometimes codified, that a child in gestation (a child sometimes described as a child *en ventre sa mere*) who is later born alive is regarded as alive at the commencement of gestation.

The limited purpose of Section 21208 is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as Example (1) in the Background to Section 21205 -- "to A for life, remainder to A's children who reach 21." When the common law rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop the fetus to viability -- advances in medical science unanticipated when the common law rule was in its developmental stages -- having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 21205(a) on the interest of A's children in the above example. The rule of Section 21208, however, does ensure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that Section 21208 subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With Section 21208 in place, the third component of the common law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in Section 21205(a),

21206(a), or 21207(a) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in Example (1) in the Background to Section 21205 it in fact turns out that A does leave sperm on deposit at a sperm bank and if in fact A's wife does become pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. *Cf.* Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26, at 2-3 (Tent. Draft No. 9, 1986). Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective is Section 21208's rule requiring the possibility of post-death children to be disregarded.

BACKGROUND TO SECTION 21210

[Adapted from the Comment to Section 2(a) of the Uniform Statutory Rule Against Perpetuities (1986)]

General Principles of Property Law; When Nonvested Property Interests and Powers of Appointment Are Created

Under Sections 21205-21207, the period of time allowed by the statutory rule against perpetuities is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 21202, with certain exceptions, provides that this chapter applies only to nonvested property interests and powers of appointment created on or after the operative date of this chapter.

Except as provided in Sections 21211 and 21212, and in the second sentence of Section 21202(a) for purposes of that section only, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law.

Since a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent's death.

With respect to a nonvested property interest or a power of appointment created by inter vivos transfer, the time when the interest or power is created is the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed.

With respect to a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the exercised power was a general power presently exercisable, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

BACKGROUND TO SECTION 21211

[Adapted from the Comment to Section 2(b) of the Uniform Statutory Rule Against Perpetuities (1986)]

1. Postponement, for Purposes of This Chapter, of the Time When a Nonvested Property Interest or a Power of Appointment Is Created in Certain Cases

The reason that the significant date for purposes of this chapter is the date of creation is that the unilateral control of the interest (or the interest subject to the power) by one person is then relinquished. In certain cases, all beneficial rights in a property interest (including an interest subject to a power of appointment) remain under the unilateral control of one person even after the delivery of the deed or even after the decedent's death. In such cases, under Section 21211, the interest or power is created, for purposes of this chapter, when no person, acting alone, has a power presently exercisable to become the unqualified beneficial owner of the property interest (or the property interest subject to the power of appointment).

> *Example (1) -- Revocable inter vivos trust case.* G conveyed property to a trustee, directing the trustee to pay the net income therefrom to himself (G) for life, then to G's son A for his life, then to A's children for the life of the survivor of A's children who are living at G's death, and upon the death of such last surviving child, the corpus of the trust is to be distributed among A's then-living descendants, per stirpes. G retained the power to revoke the trust.
>
> Because of G's reservation of the power to revoke the trust, the creation for purposes of this chapter of the nonvested property interests in this case occurs at G's death, not when the trust was established. This is in accordance with common law, for purposes of the common law rule against perpetuities. Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958).

The rationale that justifies the postponement of the time of creation in such cases is as follows. A person, such as G in the above example, who alone can exercise a power to become the unqualified beneficial owner of a nonvested property interest is in effect the owner of that property interest. Thus, any nonvested property interest subject to such a power is not created for purposes of this chapter until the power terminates (by release, expiration at the death of the donee, or otherwise). Similarly, as noted above, any property interest or power of appointment created in an appointee by the irrevocable exercise of such a power is created at the time of the donee's irrevocable exercise.

For the date of creation to be postponed under Section 21211, the power need not be a power to revoke, and it need not be held by the settlor or transferor. A presently exercisable power held by any person acting alone to make himself the unqualified beneficial owner of the nonvested property interest or the property interest subject to a

power of appointment is sufficient. If such a power exists, the time when the interest or power is created, for purposes of this chapter, is postponed until the termination of the power (by irrevocable exercise, release, contract to exercise or not to exercise, expiration at the death of the donee, or otherwise). An example of such a power that might not be held by the settlor or transferor is a power, held by any person who can act alone, fully to invade the corpus of a trust.

An important consequence of the idea that a power need not be held by the settlor for the time of creation to be postponed under this section is that it makes postponement possible even in cases of testamentary transfers.

> *Example (2) -- Testamentary trust case.* G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall appoint; in default of appointment, the property to remain in trust to pay the income to A's children for the life of the survivor, and upon the death of A's last surviving child, to pay the corpus to A's grandchildren." A survived G.
>
> If A exercises his presently exercisable general power, any nonvested property interest or power of appointment created by A's appointment is created for purposes of this chapter when the power is exercised. If A does not exercise the power, the nonvested property interests in G's gift-in-default clause are created when A's power terminates (at A's death). In either case, the postponement is justified because the transaction is the equivalent of G's having devised the full remainder interest (following A's income interest) to A and of A's having in turn transferred that interest in accordance with his exercise of the power or, in the event the power is not exercised, devised that interest at his death in accordance with G's gift-in-default clause. Note, however, that if G had conferred on A a nongeneral power or a general testamentary power, A's power of appointment, any nonvested property interest or power of appointment created by A's appointment, if any, and the nonvested property interests in G's gift-in-default clause would be created at G's death.

2. Unqualified Beneficial Owner of the Nonvested Property Interest or the Property Interest Subject to a Power of Appointment

For the date of creation to be postponed under Section 21211, the presently exercisable power must be one that entitles the donee of the power to become the unqualified beneficial owner of the nonvested property interest (or the property interest subject to a nongeneral power of appointment, a general testamentary power of appointment, or a general power of appointment not presently exercisable because of a condition precedent). This requirement was met in Example (2), above, because A could by appointing the remainder interest to himself become the unqualified beneficial owner of all the nonvested property interests in G's gift-in-default clause. In Example (2) it is not revealed whether A, if he exercised the power in his own favor, also had the right as sole beneficiary of the trust to compel the

termination of the trust and possess himself as unqualified beneficial owner of the property that was the subject of the trust. Having the power to compel termination of the trust is not necessary. If, for example, the trust in Example (2) was a spendthrift trust or contained any other feature that under Section 15403 would prevent A as sole beneficiary from compelling termination of the trust, A's presently exercisable general power over the remainder interest would still postpone the time of creation of the nonvested property interests in G's gift-in-default clause because the power enables A to become the unqualified beneficial owner of such interests.

Furthermore, it is not necessary that the donee of the power have the power to become the unqualified beneficial owner of all beneficial rights in the trust. In Example (2), the property interests in G's gift-in-default clause are not created for purposes of this chapter until A's power expires (or on A's appointment, until the power's exercise) even if someone other than A was the income beneficiary of the trust.

3. Presently Exercisable Power

For the date of creation to be postponed under Section 21211, the power must be presently exercisable. A testamentary power does not qualify. A power not presently exercisable because of a condition precedent does not qualify. If the condition precedent later becomes satisfied, however, so that the power becomes presently exercisable, the interests or powers subject thereto are not created, for purposes of this chapter, until the termination of the power. The common law decision of Fitzpatrick v. Mercantile Safe Deposit Co., 220 Md. 534, 155 A.2d 702 (1959), appears to be in accord with this proposition.

> *Example (3) -- General power in unborn child case.* G devised property "to A for life, then to A's first-born child for life, then to such persons, including A's first-born child or such child's estate or creditors, as A's first-born child shall appoint." There was a further provision that in default of appointment, the trust would continue for the benefit of G's descendants. G was survived by his daughter (A), who was then childless. After G's death, A had a child, X. A then died, survived by X.
>
> As of G's death, the power of appointment in favor of A's first-born child and the property interests in G's gift-in-default clause would be regarded as having been created at G's death because the power in A's first-born child was then a general power not presently exercisable because of a condition precedent.
>
> At X's birth, X's general power became presently exercisable and excluded from the statutory rule. X's power also qualifies as a power exercisable by one person alone to become the unqualified beneficial owner of the property interests in G's gift-in-default clause. Consequently, the nonvested property interests in G's gift-in-default clause are not created, for purposes of this chapter, until the termination of X's power. If X exercises his presently exercisable general power, before or after A's death, the appointed interests or powers are created, for purposes of this chapter, as of X's exercise of the power.

4. Partial Powers

For the date of creation to be postponed under Section 21211, the person must have a presently exercisable power to become the unqualified beneficial owner of the full nonvested property interest or the property interest subject to a power of appointment described in Section 21206 or 21207. If, for example, the subject of the transfer was an undivided interest such as a one-third tenancy in common, the power qualifies even though it relates only to the undivided one-third interest in the tenancy in common; it need not relate to the whole property. A power to become the unqualified beneficial owner of only part of the nonvested property interest or the property interest subject to a power of appointment, however, does not postpone the time of creation of the interests or powers subject thereto, unless the power is actually exercised.

Example (4) -- "5 and 5" power case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall by will appoint;" in default of appointment, the governing instrument provided for the property to continue in trust. A was given a noncumulative power to withdraw the greater of $5,000 or 5% of the corpus of the trust annually. A survived G. A never exercised his noncumulative power of withdrawal.

G's death marks the time of creation of: A's testamentary power of appointment; any nonvested property interest or power of appointment created in G's gift-in-default clause; and any appointed interest or power created by a testamentary exercise of A's power of appointment over the remainder interest. A's general power of appointment over the remainder interest does not postpone the time of creation because it is not a presently exercisable power. A's noncumulative power to withdraw a portion of the trust each year does not postpone the time of creation as to all or the portion of the trust with respect to which A allowed his power to lapse each year because A's power is a power over only part of any nonvested property interest or property interest subject to a power of appointment in G's gift-in-default clause and over only part of any appointed interest or power created by a testamentary exercise of A's general power of appointment over the remainder interest. The same conclusion has been reached at common law. See Ryan v. Ward, 192 Md. 342, 64 A.2d 258 (1949).

If, however, in any year A exercised his noncumulative power of withdrawal in a way that created a nonvested property interest (or power of appointment) in the withdrawn amount (for example, if A directed the trustee to transfer the amount withdrawn directly into a trust created by A), the appointed interests (or powers) would be created when the power was exercised, not when G died.

5. Incapacity of the Donee of the Power

The fact that the donee of a power lacks the capacity to exercise it, by reason of minority, mental incompetency, or any other reason,

does not prevent the power held by such person from postponing the time of creation under Section 21211, unless the governing instrument extinguishes the power (or prevents it from coming into existence) for that reason.

6. Joint Powers -- Community Property; Marital Property

For the date of creation to be postponed under Section 21211, the power must be exercisable by one person alone. A joint power does not qualify, except that, under Section 21211(b), a joint power over community property (or over marital property under a Uniform Marital Property Act held by individuals married to each other, pursuant to the definition of community property in Section 46) is, for purposes of this chapter, treated as a power exercisable by one person acting alone. See Restatement (Second) of Property (Donative Transfers) § 1.2 comment b & illustrations 5, 6, & 7 (1983) for the rationale supporting the enactment of the bracketed sentence and examples illustrating its principle.

BACKGROUND TO SECTION 21212

[Adapted from the Comment to Section 2(c) of the Uniform Statutory Rule Against Perpetuities (1986)]

No Staggered Periods

For purposes of this chapter, Section 21212 in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. The purpose of Section 21212 is to avoid the administrative difficulties that would otherwise result where subsequent transfers are made to an existing irrevocable trust. Without Section 21212, the allowable period under the statutory rule would be marked off in such cases from different times with respect to different portions of the same trust.

> *Example (5) -- Series of transfers case.* In Year One, G created an irrevocable inter vivos trust, funding it with $20,000 cash. In Year Five, when the value of the investments in which the original $20,000 contribution was placed had risen to a value of $30,000, G added $10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth $20,000) and securities (worth $80,000). At G's death, the value of the investments in which the original $20,000 contribution and the subsequent $10,000 contribution were placed had risen to a value of $50,000.
>
> Were it not for Section 21212, the allowable period under the statutory rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of Section 21212 is that the allowable period under the statutory rule starts running only once -- in Year One -- with respect to the entire trust. This result is defensible

not only to prevent the administrative difficulties inherent in recognizing staggered periods. It also is defensible because if G's inter vivos trust had contained a perpetuity saving clause, the perpetuity-period component of the clause would be geared to the time when the original contribution to the trust was made; this clause would cover the subsequent contributions as well. Since the major justification for the adoption by this chapter of the wait-and-see method of perpetuity reform is that it amounts to a statutory insertion of a saving clause, Section 21212 is consistent with the theory of this chapter.

BACKGROUND TO SECTION 21220

[Adapted from the Comment to Section 3 of the Uniform Statutory Rule Against Perpetuities (1986)]

1. Reformation

This section requires a court, on petition of an interested person, to reform a disposition whose validity is governed by the wait-and-see element of Section 21205(b), 21206(b), or 21207(b) so that the reformed disposition is within the limits of the 90-year period allowed by those sections, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: First, when (after the application of the statutory rule) a nonvested property interest or a power of appointment becomes invalid under the statutory rule; second, when a class gift has not but still might become invalid under the statutory rule and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment; and third, when a nonvested property interest can vest, but cannot do so within the allowable 90-year period under the statutory rule.

It is anticipated that the circumstances requisite to reformation will seldom arise, and consequently that this section will be applied infrequently. If, however, one of the three circumstances arises, the court in reforming is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. In reforming, the court is urged not to invalidate any vested interest retroactively (the doctrine of infectious invalidity having been superseded by this chapter, as indicated in the Background to Section 21201). The court is also urged not to reduce an age contingency in excess of 21 unless it is absolutely necessary, and if it is deemed necessary to reduce such an age contingency, not to reduce it automatically to 21 but rather to reduce it no lower than absolutely necessary. See Example (3) below; Waggoner, *Perpetuity Reform,* 81 Mich. L. Rev. 1718, 1755-59 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?,* 130 U. Pa. L. Rev. 521, 546-49 (1982).

2. Judicial Sale of Land Affected by Future Interests

Although this section -- except for cases that fall under subdivisions (b) or (c) -- defers the time when a court is directed to

reform a disposition until the expiration of the allowable 90-year waiting period, this section is not to be understood as preventing an earlier application of other remedies. In particular, in the case of interests in land not in trust, the principle, codified in many states, is widely recognized that there is judicial authority, under specified circumstances, to order a sale of land in which there are future interests. See 1 American Law of Property §§ 4.98-.99 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests §§ 1941-46 (2d ed. 1956); see also Restatement of Property § 179, at 485-95 (1936); L. Simes & C. Taylor, Improvement of Conveyancing by Legislation 235-38 (1960). Nothing in Section 21220 should be taken as precluding this type of remedy, if appropriate, before the expiration of the allowable 90-year waiting period.

3. *Duration of the Indestructibility of Trusts -- Termination of Trusts by Beneficiaries*

As noted in the Background to Section 21201, it is generally accepted that a trust cannot remain indestructible beyond the period of the rule against perpetuities. Under this chapter, the period of the rule against perpetuities applicable to a trust whose validity is governed by the wait-and-see element of Section 21205(b), 21206(b), or 21207(b) is 90 years. The result of any reformation under Section 21220 is that all nonvested property interests in the trust will vest in interest (or terminate) no later than the 90th anniversary of their creation. In the case of trusts containing a nonvested property interest or a power of appointment whose validity is governed by Section 21205(b), 21206(b), or 21207(b), courts can therefore be expected to adopt the rule that no purpose of the settlor, expressed in or implied from the governing instrument, can prevent the beneficiaries of a trust other than a charitable trust from compelling its termination after 90 years after every nonvested property interest and power of appointment in the trust was created.

4. *Subdivision (a): Invalid Property Interest or Power of Appointment*

Subdivision (a) is illustrated by the following examples.

> *Example (1) -- Multiple generation trust.* G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children for the life of the survivor, then to A's grandchildren for the life of the survivor, and on the death of A's last surviving grandchild, the corpus of the trust is to be divided among A's then living descendants per stirpes; if none, to" a specified charity. G was survived by his child (A) and by A's two minor children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by his children (X, Y, and Z) and by three grandchildren (M, N, and O).
>
> There are four interests subject to the statutory rule in this example: (1) the income interest in favor of A's children, (2) the income interest in favor of A's grandchildren, (3) the remainder interest in the corpus in favor of A's descendants who survive the death of A's last surviving grandchild, and (4) the alternative remainder interest in the corpus in favor of the specified charity. The first interest is initially valid under Section 21205(a);

A is the validating life for that interest. There is no validating life for the other three interests, and so their validity is governed by Section 21205(b).

If, as is likely, A and A's children all die before the 90th anniversary of G's death, the income interest in favor of A's grandchildren is valid under Section 21205(b).

If, as is also likely, some of A's grandchildren are alive on the 90th anniversary of G's death, the alternative remainder interests in the corpus of the trust then become invalid under Section 21205(b), giving rise to Section 21220(a)'s prerequisite to reformation. A court would be justified in reforming G's disposition by closing the class in favor of A's descendants as of the 90th anniversary of G's death (precluding new entrants thereafter), by moving back the condition of survivorship on the class so that the remainder interest is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and by redefining the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

Example (2) -- Sub-class case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child the proportionate share of corpus of the one so dying shall go to the descendants of such child surviving at such child's death, per stirpes." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the descendants of a child of A is treated separately from the others. Consequently, the remainder interest in favor of X's descendants and the remainder interest in favor of Y's descendants are valid under Section 21205(a): X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the descendants of Z is not validated by Section 21205(a) because Z, who was not alive when the interest was created, could have descendants more than 21 years after the death of the survivor of A, X, and Y. Instead, the validity of the remainder interest in favor of Z's descendants is governed by Section 21205(b), under which its validity depends on Z's dying within 90 years after G's death.

Although unlikely, suppose that Z is still living 90 years after G's death. The remainder interest in favor of Z's descendants will then become invalid under the statutory rule, giving rise to subdivision (a)'s prerequisite to reformation. In such circumstances, a court would be justified in reforming the remainder interest in favor of Z's descendants by making it indefeasibly vested as of the 90th anniversary of G's death. To do this, the court would reform

the disposition by eliminating the condition of survivorship of Z and closing the class to new entrants after the 90th anniversary of G's death.

5. Subdivision (b): Class Gifts Not Yet Invalid

Subdivision (b), which, upon the petition of an interested person, requires reformation in certain cases where a class gift has not but still might become invalid under the statutory rule, is illustrated by the following examples.

Example (3) -- Age contingency in excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

Since the remainder interest in favor of A's children who reach 30 is a class gift, at common law (Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817)) and under this chapter (see the Background to Section 21201) the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. There is no validating life, and the class gift is therefore not validated by Section 21205(a).

Under Section 21205(b), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under the age of 30 on the 90th anniversary of G's death, the class gift is valid. (Note that at Z's birth it would have been known whether or not Z could be alive and under the age of 30 on the 90th anniversary of G's death; nevertheless, even if it was then certain that Z could not be alive and under the age of 30 on the 90th anniversary of G's death, the class gift could not then have been declared valid because, A being alive, it was then possible for one or more additional children to have later been born to or adopted by A.)

Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he could be alive and under the age of 30 on the 90th anniversary of G's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the statutory rule because Z might die under the age of 30 within the remaining part of the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death.

Consequently, the prerequisites to reformation set forth in subdivision (b) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on reaching the age he can reach if he lives to the 90th anniversary of G's death. This would render Z's interest valid so far as the statutory rule against perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Example (4) -- Case where subdivision (b) applies, not involving an age contingency in excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who graduate from an accredited medical school or law school." G was survived by A, by A's spouse (H), and by A's two minor children (X and Y).

As in Example (3), the remainder interest in favor of A's children is a class gift, and the common law principle is not superseded by this chapter by which the interests of all potential class members must be valid or the class gift is totally invalid. Although X and Y will either graduate from an accredited medical or law school, or fail to do so, within their own lifetimes, there is at G's death the possibility that A will have an after-born child (Z), who will graduate from an accredited medical or law school (or die without having done either) more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would not be valid under the common law rule and is, therefore, not validated by Section 21205(a).

Under Section 21205(b), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death.

Suppose in fact that there is an afterborn child (Z), and that at A's death Z was a freshman in college. Suppose further that at A's death X had graduated from an accredited law school and that Y had graduated from an accredited medical school. Z's interest and hence the class gift as a whole is not yet invalid under Section 21205(b) because the 90-year period following G's death has not yet expired; but the class gift might become invalid because Z might be alive but not a graduate of an accredited medical or law school 90 years after G's death. Consequently, the prerequisites to reformation set forth in Section 21220(b) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on graduating from an accredited medical or law school within 90 years after G's death. This would render Z's interest valid so far as the

Section 21205(b) is concerned and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to graduate from an accredited medical or law school within the allowed time under the disposition as so reformed, the remaining one-third share would be divided equally between X and Y or their successors in interest.

6. Subdivision (c): Interests that Can Vest But Not Within the Allowable 90-Year Period

In exceedingly rare cases, an interest might be created that can vest, but not within the allowable 90-year period of the statutory rule. This may be the situation when the interest was created (See Example (5)), or it may become the situation at some time thereafter (see Example (6)). Whenever the situation occurs, the court, upon the petition of an interested person, is required by subdivision (c) to reform the disposition within the limits of the allowable 90-year period.

Example (5) -- Case of an interest, as of its creation, being impossible to vest within the allowable 90-year period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the allowable 90-year period of Section 21205(b). The interest would violate the common law rule, and hence is not validated by Section 21205(a), because there is no validating life. In these circumstances, a court is required by Section 21220(c) to reform G's disposition within the limits of the allowable 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

Note that the circumstance that triggers the direction to reform the disposition under this subdivision is that the nonvested property interest still can vest, but cannot vest within the allowable 90-year period of Section 21205(b). It is not necessary that the interest be certain to become invalid under that subdivision. For the interest to be certain to become invalid under Section 21205(b), it would have to be certain that it can neither vest nor terminate within the allowable 90-year period. In this example, the interest of G's descendants might terminate within the allowable period (by all of G's descendants dying within 90 years of G's death). If this were to happen, the interest of XYZ Charity would be valid because it would have vested within the allowable period. However, it was thought desirable to require reformation without waiting to see if this would happen: The only way that G's descendants, who

are G's primary set of beneficiaries, would have a chance to take the property is to reform the disposition within the limits of the allowable 90-year period on the ground that their interest cannot vest within the allowable period and subdivision (c) so provides.

Example (6) -- Case of an interest after its creation becoming impossible to vest within the allowable 90-year period. G devised property in trust, with the income to be paid to A. The corpus of the trust was to be divided among A's children who reach 30, each child's share to be paid on the child's 30th birthday; if none reaches 30, to the XYZ Charity. G was survived by A and by A's two children (X and Y). Neither X nor Y had reached 30 at G's death.

The class gift in favor of A's children who reach 30 would violate the common law rule against perpetuities and, thus, is not validated by Section 21205(a). Its validity is therefore governed by Section 21205(b).

Suppose that after G's death, and during A's lifetime, X and Y die and a third child (Z) is born to or adopted by A. At A's death, Z is living but her age is such that she cannot reach 30 within the remaining part of the 90-year period following G's death. As of A's death, it has become the situation that Z's interest cannot vest within the allowable period. The circumstances requisite to reformation under subdivision (c) have arisen. An appropriate result would be for the court to lower the age contingency to the age Z can reach 90 years after G's death.

7. Additional References

For additional discussion and illustrations of the application of some of the principles of this section, see the comments to Restatement (Second) of Property (Donative Transfers) § 1.5 (1983).

BACKGROUND TO SECTION 21225

[Adapted from the Comment to Section 4 of the Uniform Statutory Rule Against Perpetuities (1986)]

Section 21225 lists seven exclusions from the statutory rule against perpetuities (statutory rule). Some are declaratory of existing law; others are contrary to existing law. Since the common law rule against perpetuities and the Civil Code perpetuities provisions are superseded by this chapter, a nonvested property interest, power of appointment, or other arrangement excluded from the statutory rule by this section is not subject to the rule against perpetuities, statutory or otherwise.

A. Subdivision (a): Nondonative Transfers Excluded

1. Rationale

In line with long-standing scholarly commentary, subdivision (a) excludes (with certain enumerated exceptions) nonvested property

interests and powers of appointment arising out of a nondonative transfer. The rationale for this exclusion is that the rule against perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule -- a life in being plus 21 years -- is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Sections 21205-21207 because that period represents an approximation of the period of time that would be produced, on average, by using a statutory list identifying actual measuring lives and adding a 21-year period following the death of the survivor.

No general exclusion from the common law rule against perpetuities is recognized for nondonative transfers, and so subdivision (a) is contrary to existing common law. (But see Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986), pointing out the inappropriateness of the period of a life in being plus 21 years to cases of commercial and governmental transactions and noting that the rule against perpetuities can invalidate legitimate transactions in such cases.)

Subdivision (a) is therefore inconsistent with decisions holding the common law rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction, as they almost always are: options (e.g., Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985)); preemptive rights in the nature of a right of first refusal (e.g., Atchison v. City of Englewood, 170 Colo. 295, 463 P.2d 297 (1969); Robroy Land Co., Inc. v. Prather, 24 Wash. App. 511, 601 P.2d 297 (1969)); leases to commence in the future, at a time certain or on the happening of a future event such as the completion of a building (e.g., Southern Airways Co. v. DeKalb County, 101 Ga. App. 689, 115 S.E.2d 207 (1960)); nonvested easements; top leases and top deeds with respect to interests in minerals (e.g., Peveto v. Starkey, 645 S.W.2d 770 (Tex. 1982)); and so on.

2. Consideration Does Not Necessarily Make the Transfer Nondonative

A transfer can be supported by consideration and still be donative in character and hence not excluded from the statutory rule. A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the statutory rule.

3. Some Transactions Not Excluded Even If Considered Nondonative

Some types of transactions -- although in some sense supported by consideration and hence arguably nondonative -- arise out of a domestic situation, and should not be excluded from the statutory rule. To avoid uncertainty with respect to such transactions, subdivision (a) specifies that nonvested property interests or powers of appointment arising out of any of the following transactions are not excluded by subdivision (a)'s nondonative-transfers exclusion: a premarital or

postmarital agreement; a separation or divorce settlement; a spouse's election, such as the "widow's election" in community property states; an arrangement similar to any of the foregoing arising out of a prospective, existing, or previous marital relationship between the parties; a contract to make or not to revoke a will or trust; a contract to exercise or not to exercise a power of appointment; a transfer in full or partial satisfaction of a duty of support; or a reciprocal transfer. The term "reciprocal transfer" is to be interpreted in accordance with the reciprocal transfer doctrine in the tax law (see United States v. Estate of Grace, 395 U.S. 316 (1969)).

4. Other Means of Controlling Some Nondonative Transfers Desirable

Some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded by subdivision (a) from the statutory rule because, as noted above, the period of a life in being plus 21 years — actual or by the 90-year proxy -- is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

B. Subdivisions (b)-(g): Other Exclusions

1. Subdivision (b) -- Administrative Fiduciary Powers

Fiduciary powers are subject to the statutory rule against perpetuities, unless specifically excluded. Purely administrative fiduciary powers are excluded by subdivisions (b) and (c), but distributive fiduciary powers are generally speaking not excluded. The only distributive fiduciary power excluded is the one described in subdivision (d).

The application of subdivision (b) to fiduciary powers can be illustrated by the following example.

> *Example (1).* G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children for the life of the survivor, and on the death of A's last surviving child to pay the corpus to B. The trustee is granted the discretionary power to sell and to reinvest the trust assets and to invade the corpus on behalf of the income beneficiary or beneficiaries.
>
> The trustee's fiduciary power to sell and reinvest the trust assets is a purely administrative power, and under subdivision (b) of this section is not subject to the statutory rule.
>
> The trustee's fiduciary power to invade corpus, however, is a nongeneral power of appointment that is not excluded from the statutory rule. Its validity, and hence its exercisability, is governed by Sections 21205-21207. Since the power is not initially valid under Section 21207(a), Section 21207(b) applies and the power ceases to be exercisable 90 years after G's death.

2. Subdivision (c) -- Powers to Appoint a Fiduciary

Subdivision (c) excludes from the statutory rule against perpetuities powers to appoint a fiduciary (a trustee, successor trustee, or co-trustee, a personal representative, successor personal representative, or co-personal representative, an executor, successor executor, or co-executor, etc.). Sometimes such a power is held by a fiduciary and sometimes not. In either case, the power is excluded from the statutory rule.

3. Subdivision (d) -- Certain Distributive Fiduciary Power

The only distributive fiduciary power excluded from the statutory rule against perpetuities is the one described in subdivision (d); the excluded power is a discretionary power of a trustee to distribute principal before the termination of a trust to a beneficiary who has an indefeasibly vested interest in the income and principal.

> *Example (2).* G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children; each child's share of principal is to be paid to the child when he or she reaches 40; if any child dies under 40, the child's share is to be paid to the child's estate as a property interest owned by such child. The trustee is given the discretionary power to advance all or a portion of a child's share before the child reaches 40. G was survived by A, who was then childless.
>
> The trustee's discretionary power to distribute principal to a child before the child's 40th birthday is excluded from the statutory rule against perpetuities. (The trustee's duty to pay the income to A and after A's death to A's children is not subject to the statutory rule because it is a duty, not a power.)

4. Subdivision (e) -- Charitable or Governmental Gifts

Subdivision (e) codifies the common law principle that a nonvested property interest held by a charity, a government, or a governmental agency or subdivision is excluded from the rule against perpetuities if the interest was preceded by an interest that is held by another charity, government, or governmental agency or subdivision. See L. Simes & A. Smith, The Law of Future Interests §§ 1278-87 (2d ed. 1956); Restatement (Second) of Property (Donative Transfers) § 1.6 (1983); Restatement of Property § 397 (1944).

> *Example (3).* G devised real property "to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City."
>
> The nonvested property interest held by Y City (an executory interest) is excluded from the statutory rule under subdivision (e) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District.

The exclusion of charitable and governmental gifts applies only in the circumstances described. If a nonvested property interest held by a charity is preceded by a property interest that is held by a

noncharity, the exclusion does not apply; rather, the validity of the nonvested property interest held by the charity is governed by the other sections of this chapter.

> *Example (4).* G devised real property "to A for life, then to such of A's children as reach 25, but if none of A's children reaches 25, to X Charity."
>
> The nonvested property interest held by X Charity is not excluded from the statutory rule.

If a nonvested property interest held by a noncharity is preceded by a property interest that is held by a charity, the exclusion does not apply; rather, the validity of the nonvested property interest in favor of the noncharity is governed by the other sections of this chapter.

> *Example (5).* G devised real property "to the City of Sidney so long as the premises are used for a public park, and upon the cessation of such use, to my brother, B."
>
> The nonvested property interest held by B is not excluded from the statutory rule by subdivision (e).

5. Subdivision (f) -- Trusts for Employees and Others; Trusts for Self-Employed Individuals

Subdivision (f) excludes from the statutory rule against perpetuities nonvested property interests and powers of appointment with respect to a trust or other property arrangement, whether part of a "qualified" or "unqualified" plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner-employees), independent contractors, or their beneficiaries or spouses. The exclusion granted by this subdivision does not, however, extend to a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse.

6. Subdivision (g) -- Pre-existing Exclusions from the Common Law Rule Against Perpetuities

Subdivision (g) ensures that all property interests, powers of appointment, or arrangements that were excluded from the common law rule against perpetuities or are excluded by another statute of this state are also excluded from the statutory rule against perpetuities. Possibilities of reverter and rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination) are not subject to the common law rule against perpetuities, and so are excluded from the statutory rule.

LIST OF EXHIBITS

Note: Most of these materials were previously distributed with Memorandum 89-53 and its six supplements. We are redistributing them now because the Commission did not consider the substance of USRAP or the opposition to it at the July 1989 meeting when Memorandum 89-53 was presented.

Professor Bloom concludes his article (reproduced as Exhibit 4) with the following lines:

> It is one thing to write a law review article arguing about wait-and-see. It is quite another to burden society with it.

In consideration of these words, the staff apologizes in advance for burdening the Commission with these law review articles.

EXHIBIT 1

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

by

Charles A. Collier, Jr.

FEBRUARY 1989

CALIFORNIA LAW REVISION COMMISSION
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THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

The National Conference of Commissioners on Uniform State Laws in August of 1986 approved and recommended for enactment in all states the Uniform Statutory Rule Against Perpetuities ("USRAP"). The House of Delegates of the American Bar Association approved the act as has the Board of Regents of the American College of Probate Counsel and the Board of Governors of the American College of Real Estate Lawyers.

This report is submitted to the Law Revision Commission in connection with its consideration of whether the Uniform Statutory Rule Against Perpetuities should be enacted in California.

Common-Law Rule Against Perpetuities

The generally accepted statement of the common-law rule is as follows:

> "No interest is good unless it must vest if at all not later than 21 years after some life in being at the creation of the interest." John Chipman Gray, The Rule Against Perpetuities, Section 201 (4th Ed. 1942).

The rule against perpetuities has its origins in English law. The rule limits the period of time property interests can be in suspense, that is, non-vested.

Under the common-law rule against perpetuities, the validity or invalidity of a non-vested property interest is determined for all times on the basis of the facts existing when the interest is created. There must be certainty at the time of creation that an interest will vest within the period of the rule or the interest is invalid under the common-law rule. Among the more commonly cited examples of dispositions which can be rendered invalid because of remote possibilities that the interest will not vest are: (1) a woman who is no longer able to give birth to a child adopting additional children ("fertile octogenarian"), (2) the settlement of an estate taking more than 21 years to complete ("administrative contingency"), and (3) a married individual in his or her middle or late years survives the spouse and then marries a person born after the transfer ("the after-born widow"). In most situations, these remote possibilities would not actually occur. This often produces harsh results. Since the common-law rule requires certainty at the time of creation that the non-vested interest will vest within the period of the rule, a number of interests have been held invalid, even though the remote contingencies never occurred that might have prevented vesting. That is, the non-vested interest in fact vested within the period of the rule, although the actual vesting was not certain upon creation of the interest.

California Law

Civil Code Section 715.2 states the California version of the common-law rule against perpetuities as follows:

"§ 715.2. Rule against perpetuities; vesting of interest in property

No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities."

Civil Code Section 715.6 provides as follows:

"No interest in real or personal property which must vest, if at all, not later than 60 years after the creation of the interest violates Section 715.2 of this code."

California eliminated the contingency of the after-born widow mentioned under the common-law rule by enactment of Civil Code Section 715.7, which states that for purposes of determining the validity of a future interest in real or personal property an individual described as a spouse is deemed a life in being at the time of the creation whether or not in fact living at that time.

California further has a fairly liberal statute dealing with the reformation of interests, so as not to violate the rule against perpetuities. Civil Code Section 715.5. Section 716.5 states that a trust may extend beyond the period of the common-law rule against perpetuities so long as all interests vest within that time. That section gives the beneficiaries a right to terminate a trust where all interests are vested if its duration exceeds the period of the common-law rule against perpetuities.

Restatement, 2d, Property (Donative Transfers)

The American Law Institute in 1981 approved the Restatement, Property 2d (Donative Transfers). The Restatement adopted a wait-and-see approach to the rule against perpetuities. That is, a disposition of property does not violate the rule if, in fact, the non-vested interest vests within the period of the rule. This departs from the common-law rule which requires initial certainty as to vesting. Adoption of a

wait-and-see approach to the rule against perpetuities has been advocated by legal scholars for several decades to eliminate the harsh results caused by the common-law rule which requires initial certainty as to vesting. The Restatement approach takes into account the actual events or occurrences during the normal period of the rule against perpetuities in determining whether the interest is valid. The common-law concept of initial certainty of vesting within the period of the rule is replaced by the actual events which occur within the period of the rule.

The basic formulation of the Restatement position is in Section 1.1 and Section 1.4. Section 1.1 states:

> "The period of the rule against perpetuities in donative transfers is 21 years after lives in being (the measuring lives) at the time the period of the rule begins to run."

Section 1.4 provides:

> "Except as provided in Section 1.6 [dealing with charitable bequests] a donative transfer of an interest in property fails, if the interest does not vest within the period of the rule against perpetuities."

In the introduction to Chapter 1 of the Restatement, the following comment is made with reference to the wait-and-see approach:

> "Most non-vested interests that conceivably might vest too remotely, so far as the rule against perpetuities is concerned, will not in fact vest too remotely, if given an opportunity to vest."

Although the wait-and-see approach is at this time a minority view in the United States, with its adoption by the Restatement, Property 2d, Donative Transfers, the wait-and-see approach to the rule against perpetuities is expected to become the majority view.

Drafting for the Rule Against Perpetuities

In preparing wills which contain testamentary trusts and in preparing inter vivos trusts which continue after the death of the grantor, it is common practice in California and in other jurisdictions to include language dealing with the rules against perpetuities.

A typical clause found in the will is as follows:

> "Perpetuities Savings Clause - Spouse and Descendants: All trusts created by this will or by the exercise of any power of appointment shall terminate twenty-

one (21) years after the last death of my spouse and descendants living at my death. The trustee shall distribute the principal and undistributed income of a terminated trust to the then-living income beneficiaries of that trust in the same proportion that the beneficiaries are entitled to receive income when the trust terminates. If at the time of such termination the trust does not fix the rights to income, then the trustee shall distribute the trust by right of representation to the persons who in the trustee's reasonable judgment are entitled to receive trust payments." California Will Drafting, Willmaster System, Block 11.3-1 (CEB).

A typical clause for a revocable trust is as follows:

"Unless terminated earlier in accordance with other provisions of this instrument, all trusts created under this instrument shall terminate 21 years after the death of the last survivor of ... [name or describe class of those best suited to be measuring lives] ... living on the date of the death of the first settlor to die. The principal and undistributed income of a terminated trust shall be distributed to the income beneficiaries of that trust in the same proportion that the beneficiaries are entitled to receive income when the trust terminates. If at the time of termination the rights to income are not

fixed by the terms of the trust, distribution under this clause shall be made, by right of representation, to the persons who are then entitled or authorized, in the trustee's discretion, to receive trust payments." Drafting California Revocable Living Trusts, Second Edition, page 257 (CEB).

These clauses provide that, if an interest has not in fact vested within the period of the common-law rule against perpetuities, the trust at the expiration of that period will terminate, thereby vesting that interest and avoiding an actual violation of the rule. Under these clauses, the interests, therefore, must vest with certainty within the period of the rule against perpetuities.

How Long to Wait and See?

The most controversial aspect of the wait-and-see approach to the rule against perpetuities is determining the appropriate means of measuring the period during which to wait and see if the interests actually vest.

The Restatement, Property 2d (Donative Transfers), Section 1.3, defines the measuring lives as follows:

"(1) If an examination of the situation with respect to a donative transfer as of the time the period of the rule against perpetuities begins to run reveals a life or

lives in being within 21 years after whose deaths the non-vested interest in question will necessarily vest, if it ever vests, such life or lives are the measuring lives for purposes of the rule against perpetuities so far as such non-vested interest is concerned and such non-vested interest cannot fail under the rule. A provision that terminates a non-vested interest if it has not vested within 21 years after the death of the survivor of a reasonable number of persons named in the instrument of transfer and in being when the period of the rule begins to run is within this subsection.

(2) If no measuring life with respect to a donative transfer is produced under subsection (1), the measuring lives for purposes of the rule against perpetuities as applied to the non-vested interest in question are:

(a) The transferor if the period of the rule begins to run in the transferor's lifetime; and

(b) Those individuals alive when the period of the rule begins to run, if reasonable in number, who have beneficial interests vested or contingent in the property in which the non-vested interest in question exists and the parents and grandparents

alive when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists, and

(c) The donee of a non-fiduciary power of appointment alive when the period of the rule begins to run if the exercise of such power could affect the non-vested interest in question.

A child in gestation when the period of the rule begins to run who is later born alive is treated as a life in being at the time the period of the rule begins and, hence, may be a measuring life."

An alternate approach vigorously advocated by Professor Jesse Dukeminier, a Professor of Law at UCLA, is the causal relationship concept. It states that the wait-and-see period "shall not be measured by any lives whose continuance does not have a causal relationship to the vesting or failure of the interest." A number of states, including Kentucky, Alaska, Nevada, New Mexico and Rhode Island, have adopted a wait-and-see approach with the causal relationship test for the applicable lives in being. Generally, see Dukeminier, Perpetuities: The Measuring Lives, 85 Colum. L. Rev. 1648-1701 (1985). Professor Dukeminier argues that the Restatement

formulation of measuring lives contains various ambiguities and advocates the causal relationship concept of lives in being. After considering both the Restatement concept of measuring lives (Restatement, Property 2d (Donative transfers), Section 1.3) and the causal relationship approach advocated by Professor Dukeminier, the Drafting Committee for USRAP adopted a third and, it is believed, a much simpler approach to measuring a period of wait and see by adopting a period of 90 years in which the interest must either vest or terminate after its creation.

The relative merits of the causal relationship concept advocated by Professor Dukeminier and the 90 years from creation adopted by the Drafting Committee have been the subject of a number of law review articles written respectively by Professor Dukeminier and by Professor Lawrence Waggoner, the Reporter on the Uniform Statutory Rule Against Perpetuities. These articles are lengthy and very scholarly in their nature. These include Dukeminier, Perpetuities: The Measuring Lives, 85 Colum. L. Rev. 1648 (1985); Waggoner, Perpetuities: A Perspective on Wait and See, 85 Colum. L. Rev. 1714 (1985); Waggoner, A Rejoinder, 85 Colum. L. Rev. 1739 (1985); Dukeminier, A Modern Guide to Perpetuities, 74 Calif. L. Rev. 1867 (1986); Dukeminier, The Uniform Statutory Rule Against Perpetuities; 90 Years in Limbo, 34 UCLA L. Rev. 1023 (1987); Waggoner, Perpetuities: A Progress Report on the Draft

Uniform Statutory Rule Against Perpetuities, No. 20, U. Miami Inst. on Est. Plan. 7-26; Waggoner, The Uniform Statutory Rule Against Perpetuities, Real Property, Probate & Trust Law Journal, Item 21, No. 4 (1986), p. 569. Attached hereto as Exhibit 1 is a copy of Professor Waggoner's article on the Uniform Statutory Rule Against Perpetuities published in the Real Property, Probate & Trust Law Journal. That article gives an overview of the Uniform Act and sets forth statistical information as to the basis of the selection of 90 years as a reasonable time to wait and see if interests actually vest.

As discussed by Professor Waggoner at pages 575 and 576 of Exhibit 1 hereto, using measuring lives has various difficulties both in drafting language to identify those persons who can be measuring lives, including instances where individuals who are not measuring lives initially might later become measuring lives by becoming beneficiaries, by becoming ancestors or descendants of beneficiaries through adoption, marriage, assignment or other changes in interest, etc. Further, because of the wait-and-see approach, the lives of individuals identified as the measuring lives would have to be traced to determine who is the survivor and when the survivor dies. The measuring lives group would not be a static group. Births, deaths, adoptions, divorces, assignments and devises over a long period of time would impact on the measuring lives. Any

such tracing under a measuring lives concept is difficult and, as a practical matter, might mean that no effort actually would be made to trace those lives. Consequently, any perpetuities violation may not be recognized.

The Drafting Committee believed that the wait-and-see approach should be made as simple as possible to understand and apply and, therefore, adopted the concept of a fixed period of time measured by years rather than an ever-changing group of measuring lives or causally related lives.

In Exhibit 1 attached hereto at pages 582-585 are a series of charts showing the approximate period that would be covered by a properly drafted perpetuities savings clause referring to children and grandchildren of the testator or grantor. These charts indicated that a grandchild on average would be perhaps six years of age and that six-year-old grandchild would have a life expectancy of about 69.5 years based upon current actuarial tables. Adding 21 years to such a life would produce a result of approximately 95 or 96 years (six years of age plus a life expectancy of a six-year old of 69.5 years plus 21 years). The period of 90 years was arrived at as a reasonable approximation of the period covered by normal measuring lives, that is, children and grandchildren, plus 21 years. Although Professor Dukeminier argues in his article in 34 UCLA L. Rev., supra, that the 90-year period is unduly long

and will create 90-year trusts, the Drafting Committee made inquiries in the State of Wisconsin, which has no rule against perpetuities in its law, and found that there was no tendency of trusts from other jurisdictions to move into Wisconsin to avoid the limitation of the rule against perpetuities nor was there any practice among Wisconsin lawyers, so far as could be ascertained, to write documents creating trusts in perpetuity. Notwithstanding Civil Code Section 715.6, lawyers in California do not normally draft 60-year trusts.

In short, the Drafting Committee felt that the 90-year period was clear, simple to administer, avoided difficult drafting problems in identifying measuring lives and eliminated all of the tracing problems that might be involved in waiting to see what occurred over a period of time measured either by the common-law rule (lives in being plus 21 years), the measuring lives concept of the Restatement, or lives causally related.

Uniform Statutory Rule Against Perpetuities

Attached hereto, made a part hereof and marked Exhibit 2, is a short article which appeared in Probate and Property, a magazine published by the Real Property, Probate and Trust Law Section, American Bar Association, written by one of the consultants to the Drafting Committee. Attached hereto, made a part hereof and marked Exhibit 3, is the Uniform Statutory

Rule Against Perpetuities without the comments. Attached hereto, made a part hereof and marked Exhibit 4, is the Uniform Statutory Rule Against Perpetuities with the Official Comments.

Why the Law Revision Commission Should Recommend Enactment of the Uniform Statutory Rule Against Perpetuities in California

The following are reasons why it is appropriate for the California Law Revision Commission to recommend enactment of the Uniform Statutory Rule Against Perpetuities in California:

1. The Uniform Act has been approved by the National Conference of Commissioners on Uniform State Laws, the House of Delegates of the American Bar Association on recommendation of the Council of the ABA Section of Real Property, Probate and Trust Law, by the Board of Regents of the American College of Probate Counsel, the Board of Governors of the American College of Real Estate Lawyers and others.

2. It has already been enacted in Minnesota, Nevada, South Carolina, Florida and Michigan. Enactment in other jurisdictions is anticipated.

3. USRAP adopts the wait-and-see approach to the rule against perpetuities. The wait-and-see concept has been adopted in a number of jurisdictions (prior to USRAP),

including Kentucky, Florida, Mississippi, New Hampshire, Ohio, Pennsylvania, South Dakota, Vermont and Virginia (see Dukeminier, supra, 85 Colum. L. Rev. 1648, Notes 28, 30-37).

4. USRAP adopts the wait-and-see approach of the Restatement, Property 2d (Donative Transfers).

5. USRAP eliminates the complexities and ambiguities found in measuring lives or lives causally connected with the property interests by adopting a flat period of 90 years for vesting or termination of interests.

6. USRAP is limited to donative transfers and thereby excludes commercial transactions (Section 4), thereby clarifying the law as to the extent to which the rule against perpetuities may relate to non-donative situations.

7. USRAP allows reformation in a manner most closely approximating the transferor's manifest plan of distribution, if the interest would not otherwise vest or terminate within 90 years (Section 3). California already, of course, has a reformation section, Section 715.5.

8. Any non-vested interest that is valid under the common-law rule against perpetuities is valid under USRAP, (Section 1(a)(1)).

9. Adoption of USRAP will increase uniformity among the states as to the rule against perpetuities.

10. From an administrative point of view, the flat period of 90 years in which an interest must vest or terminate makes it very easy for a trustee, for example, to calendar that date to make sure that all interests have vested or terminated.

11. As a practical matter, most interests created by a normal testamentary trust or inter vivos trust will according to their own terms vest or terminate well in advance of the 90 years. Further, where there is a properly drafted perpetuity savings clauses in a trust or will, there again would be no violation of the rule. The 90 years is an approximation of the period normally encompassed by such a perpetuity savings clause.

12. California already has a section (Civil Code Section 715.6) which states that, if the property must vest, if at all, not later than 60 years from creation, it is valid. USRAP extends this to 90 years and refers to interests that do in fact vest within that time rather than those which must vest within 60 years of creation.

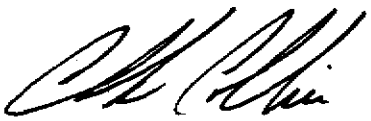
13. USRAP and the general wait-and-see approach lessens the harsh and unintended effects of the rule against

perpetuities and allows a grantor's or testator's dispositive plans to be carried out, subject to an outer limitation of time.

14. USRAP is prospective only in its application (Section 5) but does allow a court upon petition of an interested party to reform an instrument that violates the state's rule against perpetuities prior to enactment of USRAP.

Enactment of the Uniform Statutory Rule Against Perpetuities, it is believed, would be beneficial and would update the California rules relating to perpetuities in light of the changes in the Restatement, Property 2d (Donative Transfers), and other trends to adopt the wait-and-see approach with a clear, simple time period to wait and see if the non-vested interests in fact actually vest or terminate.

Respectfully submitted,



Charles A. Collier Jr., Consultant

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES*

Lawrence W. Waggoner†

EDITOR'S SYNOPSIS: *This article discusses the new Uniform Statutory Rule Against Perpetuities, the reasons for the wait-and-see provision, and the operation of each section of the Act.*

When the National Conference of Commissioners on Uniform State Laws recently approved the Uniform Statutory Rule Against Perpetuities, it may at long last have made perpetuity reform achievable in this country. Coming, as it does, on the heels of the 1981 promulgation of the Restatement (Second) of Property (Donative Transfers), which adopts the same general type of perpetuity reform, and having been unanimously endorsed by the House of Delegates of the American Bar Association, the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers, the Uniform Act deserves serious consideration for adoption by the various state legislatures.

I. GENERAL THEORY OF THE UNIFORM ACT

The Uniform Statutory Rule Against Perpetuities (Statutory Rule)[1] alters the Common-law Rule Against Perpetuities (Common-law Rule) by installing a

†James V. Campbell Professor of Law, University of Michigan Law School. The author was the Reporter for the Uniform Statutory Rule Against Perpetuities. Portions of this article have been adapted from the Prefatory Note and Comments to the Uniform Act.

The members of the Drafting Committee for the Uniform Act were: Henry M. Kittleson of the Florida bar, Chairman; Frank W. Daykin of the Nevada bar, Drafting Liaison; Robert H. Henry of the Oklahoma bar; Justice Marian P. Opala of the Supreme Court of Oklahoma; Francis J. Pavetti of the Connecticut bar; Phillip Carroll of the Arkansas bar, President of the Conference and Ex Officio member of the Committee; Michael P. Sullivan of the Minnesota bar, Chairman of the Executive Committee of the Conference and Ex Officio member of the Committee; Professor William J. Pierce of the University of Michigan Law School, Executive Director of the Conference; and John W. Wagster of the Tennessee bar, Chairman of Division B of the Conference and Ex Officio member of the Committee.

The members of the Review Committee were: Chief Justice Norman Krivosha of the Supreme Court of Nebraska, Chairman; Stephen G. Johnakin of the Virginia bar; and Dean Robert A. Stein of the University of Minnesota Law School.

The Advisors to the Drafting Committee were: Charles A. Collier, Jr., Esq., of the American Bar Association; James M. Pedowitz, Esq., of the American Bar Association Section of Real Property, Probate and Trust Law; Ray E. Sweat, Esq., of the American College of Real Estate Lawyers; and Raymond H. Young, Esq., of the American College of Probate Counsel.

[1]Also referred to herein either as the Uniform Act or as USRAP.

workable wait-and-see element. Under the Common-law Rule, the validity or invalidity of a nonvested property interest is determined, once and for always, on the basis of the facts existing *when the interest was created*. Like most rules of property law, the Common-law Rule has two sides—a validating side and an invalidating side. Both sides are evident from, but not explicit in, John Chipman Gray's formulation of the Common-law Rule:

> No [nonvested[2] property] interest[3] is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.[4]

With its validating and invalidating sides explicitly separated, the Common-law Rule is as follows:

> *Validating Side of the Common-law Rule:* A nonvested property interest is valid when it is created (initially valid) if it is then *certain* to vest or terminate[5] no later than 21 years after the death of an individual then alive.
>
> *Invalidating Side of the Common-law Rule:* A nonvested property interest is invalid when it is created (initially invalid) if there is *no* individual then alive with respect to whom there is no such certainty.

The invalidating side of the Common-law Rule has long been noted for its harshness. By focusing on a lack of *certainty*, invalidity is made dependent on *possible* post-creation events, *not* on *actual* post-creation events. In the peculiar world of the Common-law Rule, every chain of possible post-creation events that can be imagined, no matter how fanciful, is taken seriously—even those that have become impossible by the time of the lawsuit. A *single* chain of imagined events that could postpone vesting (or termination) beyond the permissible period spoils the transferor's disposition.

Consequently, validity is withheld from interests that are likely to, and in fact would (if given the chance), vest well within the period of a life in being plus 21 years. This is what makes the *invalidating* side of the Common-law Rule so harsh: It can invalidate interests on the ground of post-creation events that, though possible, are extremely unlikely to happen and, in actuality, almost never do happen. Reasonable dispositions can be rendered invalid because of such remote possibilities as a woman who has passed the menopause giving

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[2]The Uniform Act uses the term "nonvested" property interest rather than "contingent" property interest because the Restatement (Second) of Property switched over to the term "nonvested." Although "contingent" is still the more traditional term, this Article uses the term "nonvested" for the sake of consistency with the Uniform Act and the Restatement (Second).

[3]All the authorities agree that a vested interest is not subject to the Rule Against Perpetuities. E.g., J. GRAY, THE RULE AGAINST PERPETUITIES § 205 (4th ed. 1942) [hereinafter referred to as J. GRAY].

[4]J. GRAY, *supra* note 3, at § 201.

[5]A property interest terminates when vesting becomes impossible. In the following example, B's interest terminates if and when he predeceases A: "to A for life, remainder to B if B survives A."

birth to (or adopting) additional children,[6] the probate of an estate taking more than 21 years to complete,[7] or a married individual in his or her middle or late years later becoming remarried to a person born after the transfer.[8] None of these dispositions offends the public policy of preventing transferors from tying up property in long-term or even perpetual family trusts. In fact, each disposition seems quite reasonable and violates the Common-law Rule on technical grounds only.

A. *The Wait-and-See Reform Movement*

The prospect of invalidating such interests led some decades ago to thoughts about reforming the Common-law Rule. Because the chains of events that make such interests invalid are so unlikely to happen, it was rather natural to propose that the criterion be shifted from *possible* post-creation events to *actual* post-creation events. Instead of invalidating an interest because of what *might* hap-

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[6]This is the so-called fertile-octogenarian type of case, illustrated by the following example:

Fertile-Octogenarian Case. G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving child to pay the corpus of the trust to A's grandchildren." G was survived by his daughter A (who had passed the menopause) and by A's two adult children (X and Y).

The remainder interest in favor of A's grandchildren is invalid at common law. Under the common-law's conclusive presumption of lifetime fertility, A *might* have or adopt a third child (Z), who was conceived and born after G's death and who will in turn have a child conceived and born more than 21 years after the death of the survivor of A, X, Y, and anyone else who was living at G's death.

[7]This is the so-called administrative-contingency type of case, illustrated by the following example:

Administrative-Contingency Case. G devised property "to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate." G was survived by children and grandchildren.

The remainder interest in favor of G's grandchildren is invalid at common law. The final distribution of G's estate *might* not occur within 21 years after G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children, grandchildren, and anyone else who was living at G's death.

[8]This is the so-called unborn-widow type of case, illustrated by the following example:

Unborn-Widow Case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then-living descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever, if anyone, is A's spouse when he dies, the remainder interest in favor of A's descendants is invalid at common law. A's spouse *might* not be W; A's spouse might be someone who was conceived and born after G's death; she might outlive by more than 21 years the death of the survivor of A, W, X, Y, and anyone else who was living at G's death; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, Y, and anyone else who was living at G's death.

pen, waiting to see what *does* happen seemed then and still seems now to be more sensible.[9]

The Uniform Statutory Rule Against Perpetuities follows the lead of the American Law Institute's Restatement (Second) of Property (Donative Transfers) Section 1.3 (1983) in adopting the approach of waiting to see what does happen. This approach is known as the wait-and-see method of perpetuity reform.

In line with the Restatement (Second), the Uniform Act does not alter the *validating* side of the Common-law Rule. Consequently, dispositions that would have been valid under the Common-law Rule, *including those that are rendered valid because of a perpetuity saving clause,* remain valid as of their creation. *The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.* In the absence of a documented case for changing the validating side of the Rule, the last thing the bar needs, wants, or would tolerate is perpetuity reform that requires new learning to be incorporated into the planning aspect of the practice.

Under the Uniform Act, as well as under the Restatement (Second), the wait-and-see element is applied only to interests that fall prey to the *invalidating* side of the Common-law Rule. Interests that would be invalid at common law are saved from being rendered *initially invalid*. They are, as it were, given a second chance: Such interests are valid if they actually vest within the allowable waiting period, and become invalid only if they remain in existence but still nonvested at the expiration of the allowable waiting period.

In consequence, the Uniform Act recasts the validating and invalidating sides of the Rule Against Perpetuities as follows:

> *Validating Side of the Statutory Rule:* A nonvested property interest is initially valid if, when it is created, it is then *certain* to vest or terminate no later than 21 years after the death of an individual then alive. A nonvested property interest that is not *initially* valid is not necessarily invalid. Such an interest is valid if it vests within the allowable waiting period after its creation.
>
> *Invalidating Side of the Statutory Rule:* A nonvested property interest that is not *initially* valid becomes invalid (but is subject to reformation to make it valid) if it neither vests nor terminates within the allowable waiting period after its creation.

Shifting the focus from possible to actual post-creation events has great attraction. It eliminates the harsh consequences of the Common-law Rule's approach of invalidating interests because of what *might* happen, without sacrificing the basic policy goal of preventing property from being tied up for too long a time in very long-term or even perpetual family trusts or other arrangements.

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[9]See, e.g., Hansen v. Stoecker, 699 P.2d 871, 874–75 (Alaska 1985) ("We are persuaded [by the RESTATEMENT (SECOND) OF PROPERTY and other authorities] that the wait-and-see approach should be adopted as the common law rule against perpetuities in Alaska.").

One of the early objections to wait-and-see should be mentioned at this point, because it has long since been put to rest. It was once argued that wait-and-see could cause harm because it puts the validity of property interests in abeyance—no one could determine whether an interest was valid or not. This argument has been shown to be false. Keep in mind that the wait-and-see element is applied only to interests that would be invalid were it not for wait-and-see. Such interests, otherwise invalid, are always nonvested future interests. It is now understood that wait-and-see does nothing more than affect that type of future interest with an *additional* contingency. To vest, the other contingencies must not only be satisfied—they must be satisfied within a certain period of time. *If* that period of time—the allowable waiting period—is easily determined, as it is under the Uniform Act, then the additional contingency causes no more uncertainty in the state of the title than would have been the case had the additional contingency been originally expressed in the governing instrument. It should also be noted that only the status of the affected future interest in the trust or other property arrangement is deferred. In the interim, the other interests, such as the interests of current income beneficiaries, are carried out in the normal course without obstruction.

B. *The Allowable Waiting Period: The Conventional Approach*

Despite its attraction, wait-and-see has not been widely adopted. The greatest controversy over wait-and-see concerns how to determine the allowable waiting period—the time allotted for the contingencies to be validly worked out to a final resolution.

The conventional assumption has always been that the allowable waiting period should be determined by reference to so-called measuring lives who are in being at the creation of the interest; the allowable waiting period under this assumption expires 21 years after the death of the last surviving measuring life. The controversy has raged over who the measuring lives should be and how the law should identify them. Competing methods have been advanced,[10] rather stridently on occasion.

The Drafting Committee of the Uniform Act began its work in 1984 operating on the conventional assumption, and in fact presented a draft to the Conference for first reading in the summer of 1985 that utilized the measuring-lives method.

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[10] *E.g.*, Allan, *Perpetuities: Who Are the Lives In Being?*, 81 LAW Q. REV. 106 1965 (favoring a statutory-list-of-measuring-lives approach similar to that adopted in the English Perpetuities and Accumulations Act, 1964); Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) [hereinafter referred to as Dukeminier] (favoring a "causal-relationship" formula approach similar to that adopted in Ky. Rev. Stat. § 381.216 and a few other American states); Maudsley, *Perpetuities: Reforming the Common-Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355 (1975) (favoring a statutory-list-of-measuring-lives approach similar to that adopted in the English Act and subsequently in the RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.3(2) (1983)).

C. *The Saving-Clause Principle of Wait-and-See*

The measuring lives selected in that earlier draft were patterned after the measuring lives listed in the Restatement (Second), which adopts the saving-clause principle of wait-and-see. Under the saving-clause principle, the measuring lives are those individuals who might appropriately have been selected in a well-drafted perpetuity saving clause.

A perpetuity saving clause typically contains two components, the *perpetuity-period component* and the *gift-over component*. The perpetuity-period component expressly requires interests in the trust or other arrangement to vest (or terminate) no later than 21 years after the death of the last survivor of a group of individuals designated in the governing instrument by name or class. The gift-over component expressly creates a gift over that is guaranteed to vest at the expiration of the period established in the perpetuity-period component, but only if the interests in the trust or other arrangement have neither vested nor terminated earlier in accordance with their other terms.

In most cases, the saving clause not only avoids a violation of the Common-law Rule; it also, in a sense, over-insures the client's disposition against the gift over from ever taking effect, because the period of time determined by the perpetuity-period component provides a margin of safety. Its length is sufficient to exceed—usually by a substantial margin—the time when the interests in the trust or other arrangement actually vest (or terminate) by their own terms. The clause, therefore, is usually a formality that validates the disposition without affecting the substance of the disposition at all.

In effect, the perpetuity-period component of the saving clause constitutes a privately established wait-and-see rule. Conversely, the principle supporting the adoption and operation of wait-and-see is that it provides, in effect, a saving clause for dispositions that violate the Common-law Rule, dispositions that, had they been competently drafted, would have included a saving clause to begin with. This is the principle embraced by the Uniform Act and the principle reflected in the Restatement (Second).[11] The allowable waiting period under wait-and-see is the equivalent of the perpetuity-period component of a well-conceived saving clause.

The Uniform Act and the Restatement (Second) round out the saving clause by providing the near-equivalent of a gift-over component via a provision for judicial reformation of a disposition in case the interest is still in existence and nonvested when the allowable waiting period expires.[12]

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[11] See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) Introductory Note to Ch. 1 at 13 (1983) ("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.").

[12] See text accompanying notes 42–49 *infra*.

D. *The Allowable Waiting Period: Why the Uniform Act Foregoes the Use of Actual Measuring Lives and Uses a Proxy Instead*

The Uniform Act departs from and, in the judgement of the Drafting Committee, improves on the Restatement (Second)—and other existing wait-and-see statutes and proposals—in one very important particular. The Uniform Act foregoes the use of *actual* measuring lives and instead determines the allowable waiting period by reference to a reasonable approximation of—a proxy for—the period of time that would, *on average*, be produced through the use of a set of actual measuring lives plus 21 years. The proxy utilized in the Uniform Act is a flat period of 90 years. The rationale for this period is discussed below.

The use of a proxy, such as the flat 90-year period utilized in the Uniform Act, is greatly to be preferred over the conventional approach of using actual measuring lives plus 21 years. The conventional approach has serious disadvantages: wait-and-see measuring lives are difficult to describe in statutory language and they are difficult to identify and trace so as to determine which one is the survivor and when he or she died.

Drafting Problems. Drafting statutory language that unambiguously identifies actual measuring lives under a wait-and-see statute is immensely more difficult than drafting an actual perpetuity saving clause. An actual perpetuity saving clause can be tailored on a case-by-case basis to the terms and beneficiaries of each trust or other property arrangement. A statutory saving clause, however, cannot be redrafted for each new disposition. It must be drafted so that one size fits all. As a result of the difficulty of drafting such a one-size-fits-all clause, the list of measuring lives established in the Restatement (Second) contains ambiguities, at least at the fringe.[13]

Although the Restatement (Second)'s list could be improved to reduce if not eliminate these ambiguities, the resulting statutory language would be complex and difficult to understand.[14] The language would need to specify

[13]See Dukeminier, *supra* note 10, at 1681–1701.

[14]There is no more vivid way of demonstrating this point than to urge the reader to look at the statutory language that would have been necessary to eliminate the ambiguities contained in the Restatement (Second)'s list. This statutory language is set forth in Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 U. MIAMI INST. ON EST. PLAN. 7–26 n.18 (1986) [hereinafter referred to as Progress Report].

The USRAP Drafting Committee also considered, but did not adopt, another approach—identifying wait-and-see measuring lives by the proposed statutory language of "persons in being when the interest is created who can affect the vesting of the interest." This "causal-relationship" formula approach is advocated in Dukeminier, *supra* note 10. The "causal-relationship" approach was not adopted because, among other reasons, it would shift to the courts the unwelcome task of divining who the measuring lives are on a case-by-case basis, in an environment in which the exact meaning of "persons . . . who can affect the vesting of the interest" is disputable: Not even perpetuity scholars, to say nothing of nonexperts in the field, can agree on its precise meaning.

whether and in what circumstances individuals who were not measuring lives at first might later become measuring lives by, for example, becoming beneficiaries, or becoming ancestors or descendants of beneficiaries, through adoption, marriage, or assignment of or succession to a beneficial interest. Conversely, the statutory language would need to specify whether and in what circumstances individuals who were once measuring lives might later lose that status, by being adopted out of the family, by divorce, or by assigning or devising their beneficial interests to another.

Tracing Problems. Quite apart from the difficulty of drafting unambiguous and uncomplicated statutory language, another serious problem connected to the actual-measuring-lives approach is that it imposes a costly administrative burden. The Common-law Rule uses the life-in-being-plus-21-years period in a way that does not require the actual tracing of individuals' lives, deaths, marriages, adoptions, and so on. Wait-and-see imposes this burden, however, if measuring lives are used to determine the allowable waiting period. It is one thing to write a statute specifying the measuring lives. It is another to apply the actual-measuring-lives approach in practice. No matter what method is used in the statute for selecting the measuring lives and no matter how unambiguous the statutory language is, actual individuals must be identified as the measuring lives and their lives must be traced to determine who the survivor is and when the survivor dies. The administrative burden is increased if the measuring lives are not a static group, determined only once at the beginning, but instead are a rotating group. Adding to the administrative burden is the fact that the perpetuity question will often be raised for the first time long after the interest or power was created. The task of going back in time to reconstruct not only the facts existing when the interest or power was created, but facts occurring thereafter as well may not be worth the effort. In short, not only would births and deaths need to be monitored, but adoptions, divorces, and possibly assignments and devises over a long period of time. Monitoring and reconstructing such events to determine the survivor and the time of the survivor's death imposes an administrative burden wise to avoid. The proxy approach makes it feasible to do just that.

Possibility of Dead-Hand Control Continuing, By Default, Beyond the Permissible Period. The administrative burden of tracing actual measuring lives and the possible uncertainty of their exact make-up, especially at the fringe, combine to make the expiration date of the allowable waiting period less than certain in many cases. By making perpetuity challenges more costly to mount and more problematic in result, this might have the effect of allowing dead-hand control to continue, by default, well beyond the allowable period. Determining the allowable period by using a proxy eliminates this possibility.

This and other arguments against this formula approach are given in more detail in Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985), and Waggoner, *A Rejoinder*, 85 COLUM. L. REV. 1739 (1985). *See also* notes 17 and 39 *infra*.

Expiration of the allowable waiting period under the proxy adopted by the Uniform Act—a flat 90 years—is easy to determine and unmistakable.

Allowable Waiting Period Performs a Margin-of-Safety Function, Not a Precisely Self-adjusting Function. If the use of actual measuring lives plus 21 years generated an allowable waiting period that precisely self-adjusted to each situation, there might be objection to replacing the actual-measuring-lives approach with a flat period of 90 years, which obviously cannot replicate such a function. That is not the function performed by the actual-measuring-lives approach, however. That is, the actual-measuring-lives approach is not scientifically designed to generate an allowable waiting period that expires at a natural or logical stopping point along the continuum of each disposition, thereby mysteriously pinpointing the precise time before which actual vesting ought to be allowed and beyond which it ought not to be permitted. Instead, the actual-measuring-lives approach functions in a rather different way: It generates a period of time that almost always *exceeds* the time of actual vesting in cases in which actual vesting ought to be permitted. The actual-measuring-lives approach, therefore, performs a margin-of-safety function, which is a function that *can* be replicated by the use of a proxy such as the flat 90-year period under the Uniform Act.

To illustrate these points, consider the following two examples:

Example 1—Corpus to Grandchildren Contingent on Reaching an Age in Excess of 21. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren, remainder in corpus to G's grandchildren who reach age 30; if none reaches 30, to a specified charity.

Example 2—Corpus to Descendants Contingent on Surviving Last Living Grandchild. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren for the life of the survivor, and on the death of G's last living grandchild, corpus to G's descendants then living, per stirpes; if none, to a specified charity.

In both examples, assume that G's family is typical, with two children, four grandchildren, eight great-grandchildren, and so on.[15] Assume further that one or more of the grandchildren are living at G's death, but that one or more are conceived and born thereafter. All of the grandchildren living at G's death were then under the age of 30.

As is typical of cases that violate the Common-law Rule and to which wait-and-see applies, these examples contain two revealing features: (i) they include beneficiaries born *after* the trust or other arrangement was created, and (ii) in the normal course of events, the final vesting of the interests will coincide with

[15]The latest Census Bureau statistics on fertility rates indicate an average number of children per woman of 1.8, down from 2.5 in 1970 and considerably down from the high of 3.8 in 1957. See U.S. Bureau of the Census, Estimates of the Population of the United States and Components of Change: 1970 to 1985, Table B, at 3 (1986).

the death of the youngest of these after-born beneficiaries (as in Example 2) or with some event occurring during the lifetime of that youngest after-born beneficiary (such as reaching a certain age in excess of 21, as in Example 1).

Because the allowable waiting period is measured by reference to the lives of individuals who must be in being at the creation of the interests, the key players in these dispositions—the after-born beneficiaries—cannot be counted among the measuring lives. Accept, for the moment, a proposition that will be developed later:[16] conferring validity on these examples fits well within the policy of the Rule, for the reason that the after-born beneficiaries in both of these examples are members of the same generation as (or an older generation than) that of the youngest of the measuring lives. On this assumption, it is clear that an allowable waiting period measured by the lifetime of individuals in being at the creation of the interest 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. Because of its tack-on 21-year part, the period usually expires at some time *after* that beneficiary's death. In Example 2, the period of 21 years following the death of the last survivor of the descendants who were in being at G's death is normally more than sufficient to cover the death of the last survivor of the grandchildren born after G's death.

Thus the actual-measuring-lives approach performs a margin-of-safety function.[17] A proxy for this period performs this function just as well. In fact, in one respect it performs it more reliably because, unlike the actual-measuring-lives approach, the flat 90-year period cannot be cut short by irrelevant events. A key element in the supposition that the tack-on 21-year part of the period is usually ample to cover the births, lives, and deaths of the after-born beneficiaries when it is appropriate to do so is that the measuring lives will live out their statistical life expectancies. This will not necessarily happen, however. They may all die prematurely, thus cutting the allowable waiting period short—possibly too short to cover these post-creation events. Plainly, no rational connection exists between the premature deaths of the measuring lives and the time properly allowable, in Example 1, for the youngest *after-born* grandchild to reach 30 or, in Example 2, for the death of that youngest *after-born* grandchild to occur. A proxy eliminates the possibility of a waiting period cut short by irrelevant events.[18]

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[16]See text accompanying notes 31–38 *infra*.

[17]This is the function performed by the actual-measuring-lives approach whether the measuring lives are determined by the "statutory list" method or by the "causal-relationship-formula" method. See note 10 *supra* and note 39 *infra*.

[18]Even if the measuring lives do not die prematurely, it is still possible that the margin of safety will be exceeded. But it would require unlikely events. The after-born members of the appropriate generation must be born an abnormally long time after G's death (as can happen in the case of second families) or one or more of the after-born members of that generation must outlive his or her life expectancy by an abnormally long period of time—or some combination of the two events

Consequently, on this count, too, a flat 90-year period is to be preferred: it performs the same margin-of-safety function as the actual-measuring-lives approach, performs it more reliably, and performs it with a remarkable ease in administration, certainty in result, and absence of complexity as compared with the uncertainty and clumsiness of identifying and tracing actual measuring lives.

E. *Rationale of the Allowable 90-year Waiting Period*

The myriad problems associated with the actual-measuring-lives approach are swept aside by shifting away from actual measuring lives and adopting instead a 90-year waiting period as representing a reasonable approximation of—a proxy for—the period of time that would, on average, be produced by identifying and tracing an actual set of measuring lives and then tacking on a 21-year period following the death of the survivor. The selection of 90 years as the period of time reasonably approximating the period that would be produced, on average, by using the set of actual measuring lives identified in the Restatement (Second) or the earlier draft of the Uniform Act is based on a statistical study suggesting that the youngest measuring life, on average, is about 6 years old.[19] The remaining life expectancy of a 6-year-old is reported as between 69 and 70 years.[20] In the interest of arriving at an end number that is a multiple of five, the Uniform Act utilizes 69 years as an appropriate measure of the remaining life expectancy of a 6-year-old, which—with the 21-year tack-on period added—yields an allowable waiting period of 90 years.

The adoption of a flat period of 90 years rather than the use of actual measuring lives is an evolutionary step in the development and refinement of the wait-and-see doctrine. Far from revolutionary, it is well within the tradition of that doctrine. The 90-year period makes wait-and-see simple, fair, and workable.

F. *Policy of the Rule*

One question remains. Does the Uniform Act authorize excessive dead-hand control? Any concern that it does must be put in a proper perspective: *First*, the fact that the allowable waiting period under the wait-and-see element of the Uniform Act is 90 years does not mean that *all* trusts or other property arrangements will last for the full 90 years, or even come close to doing so.[21]

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must occur. Even the flat 90-year period can prove too short in these circumstances. However, were the margin of safety to be exceeded in a given case, the Uniform Act provides for reformation of the nonvested interest to make it valid. See text accompanying notes 42–49 *infra*.

[19]See the table published in Progress Report, *supra* note 14, at 7–17.

[20]69.6 years is reported in U.S. Bureau of the Census, Statistical Abstract of the United States: 1986, Table 108, at 69 (106th ed. 1985), up slightly from the 69.3 years reported in the Statistical Abstract for 1985.

[21]Even in a state that enacts the Uniform Act, lawyers might be reluctant to establish trusts geared to the 90-year period or to use a saving clause geared to the 90-year period, for fear that the law of a state that had not enacted the Uniform Act might apply.

Nor does it seem thinkable that USRAP will prompt responsible lawyers, professional fiduciaries, or financial planners to counsel the creation of trusts that last even longer—80 or 90 years *beyond* the

As with a perpetuity saving clause, most trusts or other property arrangements will terminate by their own terms far earlier, leaving the perpetuity period established by the Uniform Act to extend unused into the future long after the interests have vested and the trust or other arrangement has been distributed.[22] *Second*, the Uniform Act does not authorize an increase in aggregate dead-hand control beyond that which is already possible by competent drafting—through the use of perpetuity saving clauses—under the full rigor of the Common-law Rule. Because only a fraction of trusts and other property arrangements are incompetently drafted,[23] the modest increase in aggregate dead-hand

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expiration of the allowable perpetuity period, or around 170 or 180 years in total. To be sure, USRAP does not change the focus of the Common-law Rule, which is on vesting in interest within the allowable perpetuity period, not vesting in possession. Any suggestion that this preserves a "loophole" should not be taken seriously, however. To take maximum advantage of such a "loophole" requires a trust to be structured so that income interests in favor of very young descendants vest in interest at the expiration of the allowable perpetuity period but continue on for another 80 or 90 years thereafter. Although in skilled hands, it is possible to establish such a trust, even under the full rigor of the Common-law Rule, as well as under USRAP, the problem is: Who is to be designated to take the remainder interest in the corpus when the extended income interests finally terminate? If the remainder interest in the corpus is also to be valid, it too must vest in interest at or before the allowable perpetuity period expires. This precludes the use of any gift that remains subject to a contingency or subject to open beyond the perpetuity period, including the most attractive candidate for the remainder interest—the transferor's descendants living at the termination of the extended income interests. Vesting the remainder interest in the "estates" of the income beneficiaries is no solution, either: Such a designation is ambiguous and thus would invite litigation over its meaning. See Browder, *Trusts and the Doctrine of Estates*, 72 MICH. L. REV. 1507, 1524–28 (1974); Fox, *Estates: A Word To Be Used Cautiously, If At All*, 81 HARV. L. REV. 992 (1968); Annot., 10 A.L.R.3d 483 (1966). If the ambiguity is resolved by interpreting the word "estate" as conferring a testamentary or a nongeneral power of appointment on each income beneficiary, the power of appointment cannot be valid beyond the allowable perpetuity period. See USRAP § 1(c) and Comment thereto. If the ambiguity is resolved by interpreting the word "estate" as granting to each income beneficiary either the remainder interest outright or a presently exercisable general power to appoint the remainder interest, then the remainder interest or general power is valid, but includible in each income beneficiary's gross estate under I.R.C. § 2033 or § 2041. More importantly, perhaps, each income beneficiary—at any time after the expiration of the allowable perpetuity period—can immediately terminate the trust and obtain possession of his or her proportionate share of the corpus. See Part G of the Comment to Section 1 of USRAP. Any notion, therefore, that USRAP will encourage the deliberate and widespread establishment of 170 or 180-year trusts is fanciful and can safely be disregarded.

[22]See text at 574 *supra* and the discussion of Example (1), text at 586 *infra*. See *also* note 39 *infra*.

[23]The number of reported appellate cases raising perpetuity claims is not large, though drawing conclusions about the frequency of violations of the Common-law Rule from the number of reported appellate decisions is misleading. Many perpetuity violations go undetected or unlitigated, making it largely a matter of luck as to which ones are cut down and which ones escape. See, e.g. Fruehwald, *Rule Against Perpetuities Savings Clauses*, 30 Ind. B.A. Res Gestae 378 (1987) ("After reviewing the [Indiana] Supreme Court's decision in *Merrill* [*v. Wimmer*, 481 N.E.2d 1294 (Ind. 1983)], this author had an opportunity to review some wills and trusts prepared by various Indiana practitioners. . . . While it was not surprising that several of the documents this author reviewed violated the [R]ule, it was surprising that so few of the documents contained 'savings clauses' designed to save the bequest if the [R]ule was violated."). Furthermore, the number of perpetuities violations that are detected and litigated may not be accurately reflected by the number of reported appellate decisions. Charles A.

control that would be effected under USRAP is hardly significant in terms of national policy.

If excessive dead-hand control is a problem, it is not USRAP that is or would be the root cause, but the Common-law Rule itself, especially the feature of the Common-law Rule that allows the use of perpetuity saving clauses to validate otherwise invalid interests such as those in Examples 1 and 2, above.[24] Do either or both of those examples, whether they are rendered valid through a perpetuity saving clause or through the wait-and-see element of USRAP, violate the *policy* of the Rule?

It may help to visualize what is at stake if these examples are reintroduced and fitted into a wider array of hypothetical family situations than considered earlier. I return to Example 1 first because: (i) I believe readers will recognize it as more typical of the desires of donors than Example 2; and (ii) it is difficult to argue that this example represents excessive dead-hand control, no matter what standard is used to judge excessiveness.

Example 1—Corpus to Grandchildren Contingent on Reaching an Age in Excess of 21. G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren, remainder in corpus to G's grandchildren who reach age 30; if none reaches 30, to a specified charity.

Consider how G's disposition plays out in the context of four hypothetical families charted on the following pages. Each family is the same and typical,[25] in that there are two children (A and B), four grandchildren (V, X, Y, and Z), eight great-grandchildren (K, L, M, N, P, Q, R, and S), and so on. The difference among the families comes in the spread between generations. The first family (Family I) has the smallest spread; in that family, the children are born when the parents are 20 and 25 respectively. The fourth family (Family IV) is the most spread out; there, child-bearing has been deferred until the parents are 35 and 40. The second and third families (Families II and III) fall between the other two: The parents are 25 and 30 when their children are born in Family II and 30 and 35 in Family III. Few if any actual families will duplicate any of these four hypothetical families, of course. But in various combinations, and taking due account of the fact that the number of offspring and the timing of the child-bearing will vary widely from one family to another and within the same family at each generation and from one descending line to another, they do in the aggregate sufficiently resemble actual families to make the charts

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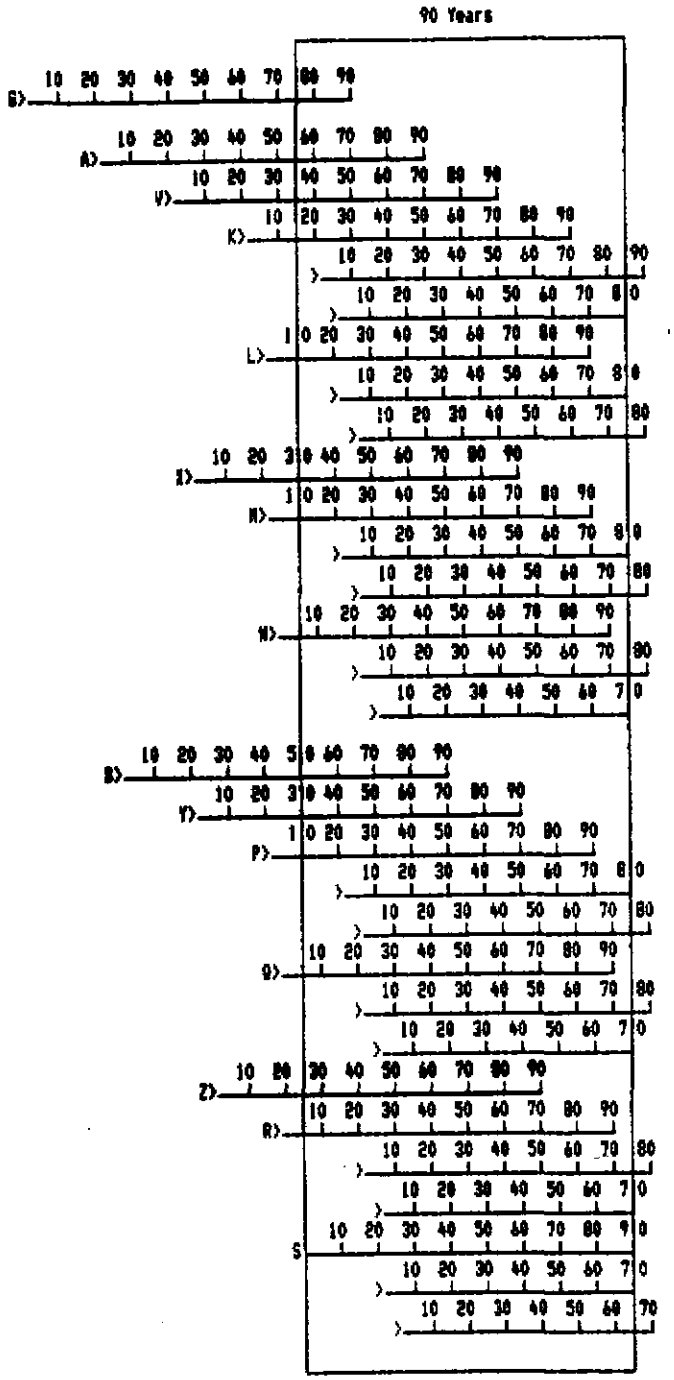
Collier, Jr., Esq., the American Bar Association Advisor to the USRAP Drafting Committee, represented to the Committee that in Los Angeles County a number of perpetuity violations have been reformed, without appeal, by the lower courts under the California reformation statute, Cal. Civ. Code § 715.5. Notice, too, that perpetuity violations can occur even if a saving clause is inserted, as in the not uncommon case of *irrevocable* inter vivos trusts that improperly gear the perpetuity-period component of the clause to lives in being at the settlor's death.

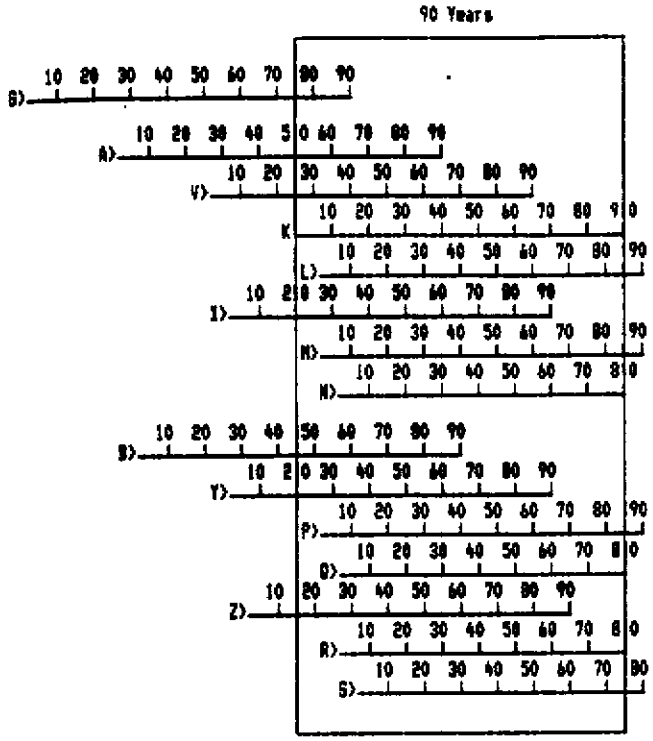
[24] Text at 577 *supra*.

[25] See note 15 *supra*.

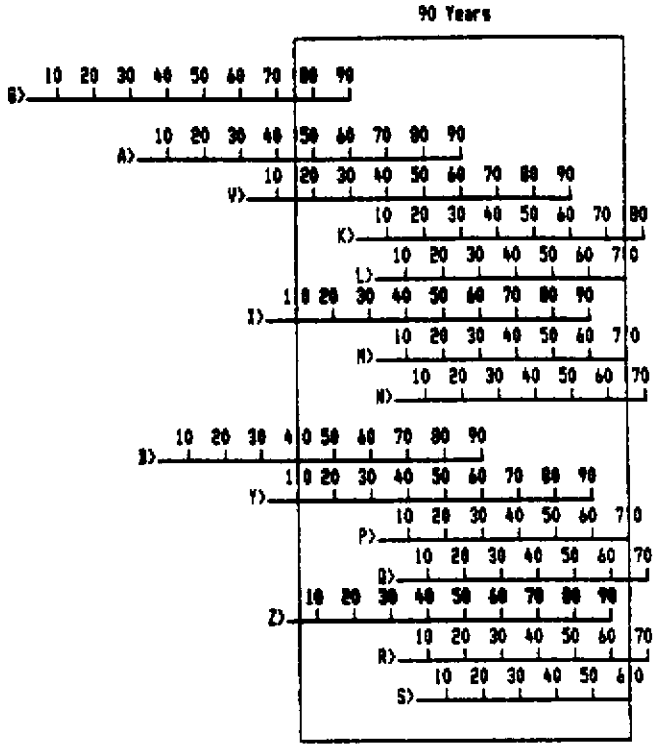
FAMILY I: Parents Are 20 and 25 When Children Are Born



FAMILY II: Parents Are 25 and 30 When Children Are Born



FAMILY III: Parents Are 30 and 35 When Children Are Born



FAMILY IV: Parents Are 35 and 40 When Children Are Born

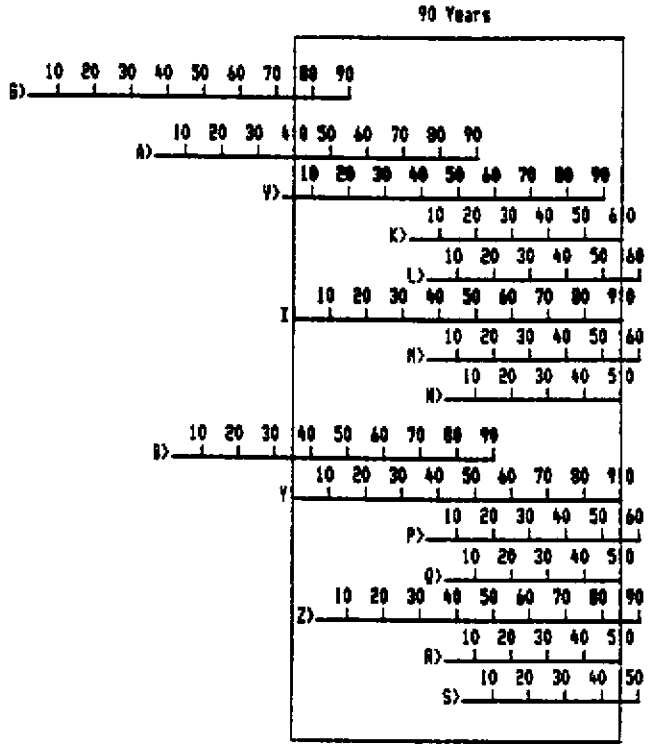


EXHIBIT 1

highly illuminating. To help visualize how the Uniform Act will apply, superimposed on each chart is the 90-year allowable waiting period, measured from G's hypothesized death at age 75—the assumption being, for purposes of this exercise, that G lives out a statistical life expectancy, but no longer.

Hypothesizing that G's death will occur at age 75, the preceding charts show that G's youngest grandchild, Z, will reach 30 within: (i) 5 years after G's death in Family I, (ii) 15 years after G's death in Family II, (iii) 25 years after G's death in Family III, and (iv) 35 years after G's death in Family IV.[26] No matter what standard is applied to gauge excessive dead-hand control, it would be hard to make out a case that this trust violates the policy of the Rule. Yet the grandchildren's remainder interest would violate the Common-law Rule and be invalid without a saving clause or, in its absence, without a wait-and-see element such as would be effected under the Uniform Act. This example also provides a good illustration of how the period determined by the perpetuity-period component of a saving clause or the 90-year waiting period under the Uniform Act extends unused into the future long after the nonvested interests have vested (or terminated) and the trust has been distributed.

Example 2, to which I now return, is less frequently created, but does pose a more serious question concerning excessive dead-hand control.

> *Example 2—Corpus to Descendants Contingent on Surviving Last Living Grandchild.* G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren for the life of the survivor, and on the death of G's last living grandchild, corpus to G's descendants then living, per stirpes; if none, to a specified charity.

Hypothesizing that G dies at age 75 and that each of G's grandchildren lives out a normal life expectancy of 75 years, Z will be the last living grandchild. The trust will terminate and the remainder interests in the corpus will vest (or terminate): (i) 50 years after G's death in Family I, (ii) 60 years after G's death in Family II, (iii) 70 years after G's death in Family III, and (iv) 80 years after G's death in Family IV. A perpetuity saving clause or, in its absence, the Uniform Act's 90-year allowable waiting period, would grant validity to this trust. Does the validity of this trust offend the policy of the Rule by representing excessive dead-hand control?

With the exception of a small number of individuals, I have detected no enthusiasm among either the academic community or the community of practicing lawyers for tightening up the Common-law Rule to preclude the trust's

[26]Because the corpus of the trust is not distributable until the death of G's last living child, the trust itself will last a little longer. If we assume that G's children live out their life expectancies of 75 years, B will be G's last living child, and will die: (i) 25 years after G's death in Family I, (ii) 30 years after G's death in Family II, (iii) 35 years after G's death in Family III, and (iv) 40 years after G's death in Family IV. Note the import of this: Even in Family IV, the most spread out of the four families, the interest of each grandchild, in the ordinary course of events, vests (or terminates) within the lifetimes of G's children, who were lives in being at G's death.

validation. In fact, scholars have trouble identifying the policy of the Rule Against Perpetuities, now that the major impact of the Rule—at least as far as nondonative transfers are concerned—falls on trusts in which the trustee has the power to buy and sell the assets in the trust. It can no longer be thought that the main function of the Rule is to protect alienability of land or other property from the indirect restraint effected by nonvested future interests.

Lewis M. Simes captured what is often cited as the modern policy served by the Rule in his now well-known formulation: The Rule, he wrote, "strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy."[27] In putting Simes' fair balance into somewhat more concrete terms, the "clear, obvious, natural line" observed by Sir Arthur Hobhouse, writing about dead-hand control over a century ago, "between those persons and events which the Settlor knows and sees, and those which he cannot know and see"[28] has a certain appeal.

How do perpetuity saving clauses and, in their absence, the Uniform Act's 90-year allowable waiting period, fare in the light of this standard? If the standard can be taken to mean that donors should be allowed to exert control through the youngest generation of descendants they knew and saw, or at least one or more but not necessarily all of whom they knew and saw,[29] both effectuate this standard well. Certainly, by this standard, the Example 2 trust fits well within the policy of the Rule. Before he died, G had the opportunity to know and see all four of his grandchildren in Families I, II, and III, and to know and see three of his four grandchildren in Family IV (or at least to know and see one of them and to anticipate the imminent birth of two of the others).

To be sure, this standard is imprecisely effectuated by perpetuity saving clauses and by the allowable waiting period under wait-and-see, whether

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[27] Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 723 (1955). The Restatement (Second) of Property (Donative Transfers) Introductory Note to Part I at 8 (1983), picks up on his theme by stating that "the rule against perpetuities provides an adjustment or balance between the desire of the current owner of property to prolong indefinitely into the future his control over the devolution and use thereof and the desire of the person who will in the future become the owner of the affected land or other thing to be free of the dead hand."

[28] A. HOBHOUSE, THE DEAD HAND 188 (1880). Quoting Hobhouse is not to suggest that his book indicates support for the conclusions I draw from his quotation. It is true that Hobhouse went on to say: "I submit, then, that the proper limit of Perpetuity is that of lives in being at the time when the settlement takes effect." *Id.* But Hobhouse apparently had something quite different in mind, a rule much more restrictive than was apparently acceptable then and one that would hardly be acceptable today: "[t]hat land should not be settled on anybody not in existence when the Settlement takes effect." That is, future interests wholly or partly in favor of unborn persons—class gifts subject to open—should be prohibited. "[E]ach generation in turn," he urged, "should be absolute Owner of its possessions, and not share the ownership with the Dead or with the Unborn." *Id.* at 190–91.

[29] The plausible function of the tack-on 21-year part of the period is to allow the inclusion of after-born members of a generation occupied by lives *in being at the creation of the interest*. See text at 578 *supra*.

measured by actual measuring lives or by the 90-year proxy of the Uniform Act.[30] The expiration of the period is not scientifically designed to self-adjust so that it coincides in each case with the death of the last living member of the youngest generation of descendants known and seen by the donor. To point this out, however, does not mean that the period or its proxy works poorly. In fact, it works well because its length is sufficient to provide a margin of safety: With respect to almost all if not all dispositions that seek to go through the lives of that youngest known-and-seen generation, actual vesting will occur prior to the expiration of the period.[31] The period, in other words, is almost never underpermissive.

Obviously, there is a cost of having an imprecise period that performs a margin-of-safety rather than a precisely self-adjusting function: It will sometimes be overpermissive. That is, an imprecise period that in almost all if not all cases extends beyond the death of the last living member of the youngest known-and-seen generation[32] will of necessity be generous enough to allow some donors in some cases to extend control through or into generations completely unknown and unseen by them.[33] Perpetuity saving clauses and, in

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[30]See text at 577–8 *supra* concerning how the allowable waiting period under wait-and-see performs a margin-of-safety rather than a precisely self-adjusting function. This discussion, of course, also applies to the period of time determined by the perpetuity-period component of a saving clause.

[31]See notes 18 and 29 *supra*.

[32]As the following chart shows, life expectancies increased dramatically during the first half of this century, and have been inching slowly upwards since then. In sheer numbers of years, it therefore takes longer for a whole generation of descendants to die out than ever was thought possible at an earlier time.

Year of Birth	*Life Expectancy at Birth*
1982	75
1980	74
1970	71
1960	70
1950	68
1940	63
1930	60
1920	54
1910	50
1900	47

Sources: U.S. Bureau of the Census, Statistical Abstract of the United States: 1986, Tables 106 and 108 at 68–69 (106th ed. 1985); U.S. Bureau of the Census, Historical Statistics of the United States, Table B 107–115 at 55 (Part 1, 1975).

A word of caution about the years of life expectancy depicted above: They represent the average number of years that members of a hypothetical cohort would live if they were subject throughout their lives to the age-specific mortality rates observed at the time of their births. This is the most usual measure of the comparative longevities of different populations, but it does shorten the reported years of life expectancy if there are relatively large numbers of deaths occurring in the first year of life. This factor declines in importance as infant mortality decreases.

[33]For example, suppose G in any of the four charted families dies prematurely enough so that his

their absence, their proxy, the 90-year allowable waiting period under the Uniform Act, allow excessive dead-hand control only if one asserts the view that the line delimited by the youngest known-and-seen generation must never, ever, be allowed to be crossed[34]—and can justify such a view by substantiating the precise harm caused by those few individual cases in which it is crossed.

The study cited earlier[35] suggests that, on average, the youngest descendant that donors know and see before they die is a 6-year old. The preceding charts show that that youngest descendant seldom is a child.[36] Seldom also will that youngest descendant be at the other extreme, a great-great-grandchild.[37] More likely, he or she is a grandchild, perhaps a great-grandchild.[38]

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death occurs before *any* of his grandchildren are born. (This would mean that G died before age 40 in Family I, before age 50 in Family II, before age 60 in Family III, and before age 70 in Family IV.) A perpetuity saving clause could nevertheless confer validity on G's trust in Examples 1 and 2. The lives used to determine the perpetuity-period component of the clause need not be limited to G's descendants living at G's death but can be tailored to include the descendants of G's parents or grandparents living at G's death. This would normally sweep in some very young descendants. Similarly, because the Uniform Act is based on averages, G's premature death would not reduce the 90-year allowable waiting period. The prospect of the line being exceeded in such cases should cause no undue concern, however, because the younger and more prematurely G dies, the likelihood of his actually creating either disposition diminishes. The actual creation of such dispositions is much more likely when G's will was executed after or shortly before and in anticipation of when the birth or conception of his first grandchild, V, is anticipated to be imminent, not far off in the distant future.

[34]A perpetuity period that is neither overpermissive nor underpermissive could easily be invented for cases in which the trust or other property arrangement fits conveniently within generational lines, as in cases like Examples 1 and 2 above. Doing so, however, would require replacing the traditional period of lives in being plus 21 years with a generational scheme. That is, the Rule Against Perpetuities could be wholly revised to allow nonvested property interests to remain nonvested through a specified generation (including its after-born members), but no longer. The specified generation could be identified as the youngest generation containing at least one living member at the time of the transfer. Such a generational scheme would be complex and would require revising even the validating side of the Common-law Rule, which in turn would require new learning on the part of lawyers, even lawyers expert in estate planning. The major source of the complexity would come about from trying to devise a generational scheme that would adapt to situations in which the trust does not fit conveniently into generational lines.

[35]Progress Report, *supra* note 14.

[36]In all four families, G must die prematurely for this to happen—5 or more years prematurely in Family IV, 15 or more years prematurely in Family III, 25 or more years prematurely in Family II, and 35 or more years prematurely in Family I.

[37]G must outlive his life expectancy in all four families for this to happen—5 or more years beyond his life expectancy even in Family I. (Great-great-grandchildren are not even depicted in the charts for Families II, III, and IV, but for the record G must live 25 or more years beyond his life expectancy in Family II, 45 or more years beyond his life expectancy in Family III, and 65 or more years beyond his life expectancy in Family IV.)

[38]To take the two outer families first, the youngest descendant in Family I if G dies at age 75 would be a new-born great-grandchild (S); G must die 15 or more years prematurely for that youngest descendant to be a grandchild. In Family IV, at the other extreme, G's youngest descendant will be a pair of new-born grandchildren (X and Y) if G dies at age 75; G must outlive his life expectancy by 30 or more years for that youngest descendant to be a great-grandchild. As for the in-between families, Families II and III, G's dying at age 75 would mean that the youngest des-

Whatever the generation, even with respect to the small fraction of donors who, like G in Example 2, seek to exert maximum or near-maximum control, both the Uniform Act and perpetuity saving clauses preserve in an acceptable way the line between descendants donors knew and saw and those they never knew and saw, by providing a period of time long enough to cover the former in nearly all if not all cases while, on average, excluding the latter.[39]

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cendant is a new-born great-grandchild (K) in Family II and a 5-year old grandchild (Z) in Family III.

[39]It is doubtful that it can be demonstrated that, on average, a "causal-relationship" formula for determining actual measuring lives (see notes 10 and 14 *supra* and text accompanying note 17 *supra*) curtails the dead hand more appropriately than a statutory list or the 90-year proxy therefor. About one point, there is no doubt: *When donors seek to exert maximum or near-maximum control, such as G did in Example 2 above, a "causal-relationship" regime accommodates them.* The allowable waiting period using a "causal-relationship" formula can expand to a period of 90 years *or more* in such cases. In Example 2, for instance, the youngest "causal-relationship" measuring life would presumably be G's youngest descendant living at G's death. If that youngest measuring life and the after-born grandchildren, if there are any, live out their statistical life expectancies (as determined in Table 108 in U.S. Bureau of the Census, Statistical Abstract of the United States: 1986 at 69), the allowable waiting period for each of the four families is more than ample to validate the disposition in each case—and is longer in each case than the flat 90-year waiting period under the Uniform Act:

Example 2 Under A "Causal-Relationship" Regime

Family	Youngest "C-R" Measuring Life	Projected Allowable Waiting Period	Projected Time of Actual Vesting	Unused End-Portion
I	S (age 0)	96 (75 + 21)	50	46
II	K (age 0)	96 (75 + 21)	60	36
III	Z (age 5)	92 (71 + 21)	70	22
IV	X&Y (age 0)	96 (75 + 21)	80	16

If the "causal-relationship" formula produces a projected allowable waiting period shorter than the other methods, it occurs sporadically and only when the greater margin of safety provided by a longer period is unlikely to be needed to accommodate the disposition—i.e., if *actual* vesting is projected to occur within a shorter period of time. The difference in such cases is merely in the length of the *unused* end-portion of the allowable waiting period, *which is a matter of no importance at all so far as curtailment of dead-hand control is concerned.* In Example 1 above, for instance, the youngest "causal-relationship" measuring life is presumably G's youngest grandchild living at G's death. In Families III and IV, therefore, the projected "causal-relationship" waiting period for Example 1 would be the *same* as that for Example 2, even though *actual* vesting in Example 1 is projected to occur *decades* earlier. Only in Families I and II is the projected "causal-relationship" waiting period shorter for Example 1 than it is for Example 2, and in both of these families the unused end-portion is equal to Family III's and greater than Family IV's:

II. Section-By-Section Analysis of The Uniform Act, With Statutory Text

This part of the article turns to a section-by-section analysis of the Uniform Act. It is presented in the following format: The text of each section is first set forth, followed by a commentary explaining the section's import and the rationale of certain of its features. The commentary presented here is considerably briefer than the actual set of Comments appended to the Act. The Comments appended to the Act are quite detailed and contain numerous examples designed to assist lawyers and judges in applying the Act to actual cases.

SECTION 1. STATUTORY RULE AGAINST PERPETUITIES.

(a) A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or

(2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

(2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

Commentary. Section 1 establishes the Statutory Rule Against Perpetuities (Statutory Rule). As provided in Section 9, the Uniform Act supersedes the Common-law Rule Against Perpetuities (Common-law Rule) in jurisdictions

Example 1 Under A "Causal-Relationship" Regime

Family	Youngest "C-R" Measuring Life	Projected Allowable Waiting Period	Projected Time of Actual Vesting	Unused End-Portion
I	Z (age 25)	72 (51 + 21)	5	67
II	Z (age 15)	82 (61 + 21)	15	67
III	Z (age 5)	92 (71 + 21)	25	67
IV	X&Y (age 0)	96 (75 + 21)	35	61

EXHIBIT 1

previously adhering to it (or repeals any statutory version or variation thereof previously in effect in the jurisdiction). The Common-law Rule (or the statutory version or variation thereof) is replaced by the Statutory Rule in Section 1 and by the other provisions of the Uniform Act.

Section 1(a) covers nonvested property interests, and will be the subsection most often applicable. Subsections (b) and (c) cover powers of appointment.

Paragraph (1) of subsections (a), (b), and (c) is a codified version of the validating side of the Common-law Rule. In effect, paragraph (1) of these subsections provides that nonvested property interests and powers of appointment that are valid under the Common-law Rule Against Perpetuities, *including those that are rendered valid because of a perpetuity saving clause*, continue to be valid under the Statutory Rule and can be declared so at their inceptions. This is an extremely important feature of the Uniform Act because it means that no new learning is required of competent estate planners: *The practice of lawyers who competently draft trusts and other property arrangements for their clients is undisturbed.*

Paragraph (2) of subsections (a), (b), and (c) establishes the wait-and-see rule. Paragraph (2) provides that an interest or a power of appointment that is not validated by paragraph (1), and hence would have been invalid under the Common-law Rule, is given a second chance: Such an interest is valid if it does not actually remain in existence and nonvested when the allowable 90-year waiting period expires; such a power of appointment is valid if it ceases to be subject to a condition precedent or is no longer exercisable when the allowable 90-year waiting period expires.

The rule established in subsection (d) deserves a special comment. Subsection (d) declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purpose of determining the validity of an interest (or a power of appointment) under paragraph (1) of subsection (a), (b), or (c). The rule of subsection (d) does not apply, for example, to questions such as whether a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest—as a member of a class or otherwise. Neither subsection (d), nor any other provision of the Uniform Act, supersedes the widely accepted common-law principle, sometimes codified, that a child in gestation (a child sometimes described as a child *en ventre sa mere*) who is later born alive is regarded as alive at the commencement of gestation.

The limited purpose of subsection (d) is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as "to A for life, remainder to A's children who reach 21." When the Common-law Rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to

validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of a deceased pregnant woman long enough to develop the fetus to viability[40]—advances in medical science unanticipated when the Common-law Rule was in its developmental stages—having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 1(a)(1) on the interest of A's children in the above example. The rule of subsection (d), however, does insure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that subsection (d) subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With subsection (d) in place, the third component of the common-law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in paragraph (1) of subsections (a), (b), and (c) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in the above example A leaves sperm on deposit at a sperm bank and after A's death a woman (A's widow or another) becomes pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift.[41] Without trying to predict how *that* question will be resolved in the future, the best way to handle the problem from the perpetuity perspective is the rule in subsection (d) requiring the possibility of post-death children to be disregarded.

SECTION 2. WHEN NONVESTED PROPERTY INTEREST OR POWER OF APPOINTMENT CREATED.

(a) Except as provided in subsections (b) and (c) and in Section 5(a), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this [Act], if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in Section 1(b) or 1(c), the nonvested property interest or power of appointment is created when the power to become the un-

[40]See Detroit Free Press, July 31, 1986, at 5A; Ann Arbor News, Oct. 30, 1978, at C5 (AP story); N.Y. Times, Dec. 6, 1977, at 30; N.Y. Times, Dec. 2, 1977, at B16.

[41]*Cf.* RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) Introductory Note to Ch. 26 at 2–3 (Tent. Draft No. 9, 1986).

qualified beneficial owner terminates. [For purposes of this [Act], a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.]

(c) For purposes of this [Act], a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

Commentary. Section 2 defines the time when, for purposes of the Uniform Act, a nonvested property interest or a power of appointment is created. The period of time allowed by Section 1 is measured from the time of creation of the nonvested property interest or power of appointment in question. Section 5, with certain exceptions, provides that the Uniform Act applies only to nonvested property interests and powers of appointment created on or after the effective date of the Act.

Section 2(a) provides that, with certain exceptions, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law. Because a Will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the Will, general principles of property law determine that a nonvested property interest or a power of appointment created by Will is created at the decedent's death. With respect to an inter vivos transfer, an interest or power is created on the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed or the funding of the trust. As for a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was created, not when it was exercised, if the exercised power was a non-general power or a general testamentary power. If the exercised power was a presently exercisable general power, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably exercised, not when the power was created.

Section 2(b) provides that, if one person can exercise a power to become the unqualified beneficial owner of a nonvested property interest (or a property interest subject to a power of appointment described in Section 1(b) or 1(c)), the time of creation of the nonvested property interest (or the power of appointment) is postponed until the power to become the unqualified beneficial owner ceases to exist. This is in accord with existing common law. The standard example of the application of this subsection would be a *revocable* inter vivos trust. For perpetuity purposes, both at common law and under the Uniform Act, the nonvested property interests and powers of appointment created in the trust are created when the power to revoke expires, usually at the settlor's death.

Section 2(c) provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing *irrevocable* inter vivos trust. Arguably, at common law, each transfer starts the period of the Rule running anew as to that transfer. The prospect of staggered periods is avoided by subsection (c). Subsection (c) is in accord with the saving-clause principle of wait-and-see embraced by the Uniform Act. If the irrevocable inter vivos trust had contained a saving clause, the perpetuity-period component of the clause would be measured by reference to lives in being when the original contribution to the trust was made, and the clause would cover subsequent contributions as well.

SECTION 3. REFORMATION.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 1(a)(2), 1(b)(2), or 1(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under Section 1 (statutory rule against perpetuities);

(2) a class gift is not but might become invalid under Section 1 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by Section 1(a)(1) can vest but not within 90 years after its creation.

Commentary. Section 3 directs a court, upon the petition of an interested person,[42] to reform a disposition within the limits of the allowable 90-year period, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in any one of three circumstances. Section 3 applies only to dispositions the validity of which is governed by the wait-and-see element of Section 1(a)(2), 1(b)(2), or 1(c)(2); it does not apply to dispositions that are initially valid under Section 1(a)(1), 1(b)(1), or 1(c)(1)—the codified version of the validating side of the Common-law Rule.

This section will seldom be applied. Of the fraction of trusts and other property arrangements that are incompetently drafted, and thus fail to meet the requirements for initial validity under the codified version of the validating side of the Common-law Rule, almost all of them will have terminated by their own terms long before any of the circumstances requisite to reformation under Section 3 arise.

If, against the odds, one of the circumstances requisite to reformation does arise, it will be found easier than perhaps anticipated to determine how best

[42]The "interested person" who would frequently bring the reformation suit would be the trustee.

to reform the disposition.[43] The court is given two criteria to work with: (i) the transferor's manifested plan of distribution, and (ii) the allowable 90-year period. Because governing instruments are where transferors manifest their plans of distribution, the imaginary horrible of courts being forced to probe the minds of long-dead transferors will not materialize.[44]

The theory of Section 3 is to defer the right to reformation until reformation becomes truly necessary. Thus, the basic rule of Section 3(1) is that the right to reformation does not arise until a nonvested property interest or a power of appointment becomes invalid; under Section 1, this does not occur until the expiration of the 90-year allowable waiting period.[45] As noted above, this approach substantially reduces the number of reformation suits. It also is consistent with the saving-clause principle embraced by the Uniform Act. Deferring the right to reformation until the allowable waiting period expires is the only way to grant every reasonable opportunity for the donor's disposition to work itself out without premature interference.[46]

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[43]Note that reformation under Section 3 is mandatory, not up to the discretion of the court. Consequently, as noted in the Comment to Section 3, the common-law doctrine of infectious invalidity is superseded by the Act.

[44]Perhaps the easiest way to illustrate the operation of Section 3 is to provide one of the several examples contained in the Comment to that section. It may be noted that the trust established in this example is abnormal in that the donor, G, tried to exceed the fair balance between descendants he knew and those he did not know. Consequently, the trust is not likely to terminate by its own terms before the expiration of the allowable 90-year waiting period.

Multiple-Generation Trust. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children for the life of the survivor, then to A's grandchildren for the life of the survivor, and on the death of A's last surviving grandchild, the corpus of the trust is to be divided among A's then-living descendants per stirpes; if none, to" a specified charity. G was survived by his child (A) and by A's two minor children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by his children (X, Y, and Z) and by three grandchildren (M, N, and O).

The validity of the remainder interest in the corpus in favor of A's descendants who survive the death of A's last surviving grandchild and the alternative remainder interest in the corpus in favor of the specified charity is governed by Section 1(a)(2).

Likely, some of A's grandchildren will be alive on the 90th anniversary of G's death. If so, the remainder interests in the corpus of the trust *then* become invalid under Section 1(a)(2), giving rise to Section 3(1)'s prerequisite to reformation.

How a court should reform G's disposition is rather apparent if time is taken to work through the example. In reforming G's disposition so that it comes as close as possible to his manifested plan of distribution without exceeding the allowable 90-year period, the Comment to Section 3 suggests that the court should order the following: (i) close the class in favor of A's descendants as of the 90th anniversary of G's death (precluding new entrants thereafter), (ii) move back the time when survivorship is required, so that the remainder interest is transformed into one that is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and (iii) redefine the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

[45]The Restatement (Second) is in accord. Reformation is provided for in the Restatement only if the nonvested property interest becomes invalid after waiting out the allowable waiting period. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5 (1983).

[46]The Committee specifically rejected the idea of granting a right to reformation at any time

At the same time, the Uniform Act is not inflexible, for it grants the right to reformation before the expiration of the 90-year allowable waiting period when it becomes necessary to do so or when there is no point in waiting that period out. Thus subsection (2), which pertains to class gifts that are not yet but still might become invalid under the Statutory Rule, grants a right to reformation whenever the share of any class member is entitled to take effect in possession or enjoyment. Were it not for this subsection, a great inconvenience and possibly injustice could arise, for a class member whose share had vested within the allowable period might otherwise have to wait out the remaining part of the 90 years before obtaining his or her share.[47] Reformation under this subsection will seldom be needed, however, because of the common practice of structuring trusts to split into separate shares or separate trusts at the death of each income beneficiary, one such separate share or separate trust being created for each of the income beneficiary's then-living children; when this pattern is followed, the circumstances described in subsection (2) will not arise.[48]

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on a showing of a violation of the Common-law Rule, as some states have done. The experience under these statutorily or judicially established reformation principles has not been satisfactory. The courts have lowered age contingencies to 21, an unwarranted distortion of the donor's intention because, like Example 1 (discussed at text accompanying notes 25–26 *supra*), the cases were such that the vesting of the beneficiaries' interests would almost certainly occur well within the period of time determined by the perpetuity-period component of a saving clause or, in the absence of such a clause, well within the time allowed by a wait-and-see element such as would be effected by the Uniform Act. The cases lowering age contingencies to 21 are collected and discussed in Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1757 n.103 (1983).

[47]Subsection (2) is illustrated by the following example, taken from the Comment to that subsection.

Age Contingency in Excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children"; the corpus of the trust is to be equally divided among A's children who reach the age of 30. G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died. After G's death, another child (Z) was born to A.

The class gift is not validated by Section 1(a)(1). Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he or she could be alive but under the age of 30 on the 90th anniversary of G's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the Statutory Rule because Z might die under the age of 30 within the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death. Consequently, the prerequisites to reformation in subsection (2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on reaching the age Z can reach if Z lives to the 90th anniversary of G's death. This would render Z's interest valid so far as the Statutory Rule Against Perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

[48]The example in note 47 *supra* was purposely structured to illustrate the application of Section

Subsection (3) also grants the right to reformation before the 90-year waiting period expires. The circumstance giving rise to the right to reformation under subsection (3) occurs if a nonvested property interest can vest but not before the 90-year period has expired. Though unlikely, such a case can theoretically arise. If it does, the interest—unless it terminates by its own terms earlier—is bound to become invalid under Section 1 eventually. There is no point in deferring the right to reformation until the inevitable happens. The Uniform Act provides for early reformation in such a case, just in case it arises.[49]

3(2). In an actual trust, however, it would be more likely that G's disposition would be structured quite differently. On A's death, the typical trust would divide into equal shares (or trusts), one share each for A's then-living children (and one share each for the then-living descendants of any of A's children who had predeceased A). The separate share or trust for each then-living child would pay the income from that share to that child until the child dies or reaches 30, whichever occurs first, with the corpus of that share going outright to that child if he or she reaches 30; there would also be an appropriate gift over if the child dies before reaching 30.

If the trust were structured this way, the so-called sub-class doctrine would apply, eliminating the need to petition for reformation on A's death in order for X and Y to receive their shares immediately. The trust would divide into three separate shares when A died, one share for X, one for Y, and one for Z. Under the sub-class doctrine, the validity of the interests of X and Y would not depend on the validity of Z's interest. Because X and Y were living at G's death, their interests were certain to vest or terminate within their own lifetimes, and were therefore initially valid under Section 1(a)(1), the codified version of the validating side of the Common-law Rule. No reformation suit would be necessary for X and Y to receive the corpus of their respective shares immediately on A's death. The validity of the interest of the after-born child, Z, in the corpus of his or her separate share or trust would be governed by the wait-and-see element of Section 1(a)(2). On the facts given (unlikely as they are to arise), it would be impossible for Z's interest to vest within the 90-year waiting period. Section 3(3) would therefore apply to allow an interested person to petition for reformation of Z's interest; such a reformation suit, which would be a less pressing matter because Z's *income* interest would be valid, would probably result in lowering the age contingency with respect to Z's nonvested interest in the corpus of his or her share or trust to the age Z can reach on the 90th anniversary of G's death. The point is, however, that even in this exceedingly unlikely factual situation, such a reformation suit would not be necessary in order for X and Y to receive their shares.

[49]In addition to the situation with respect to Z's interest in the example in note 48 *supra*, the application of Section 3(3) can be illustrated by the following example, taken from the Comment to that subsection:

Case of An Interest, As of Its Creation, Being Impossible to Vest Within the Allowable 90-Year Period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the allowable 90-year period of Section 1(a)(2). The interest would violate the Common-law Rule, and hence is not validated by Section 1(a)(1), because there is no validating life. In these circumstances, a court, on the petition of an interested person, is required by Section 3(3) to reform G's disposition within the limits of the allowable 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

SECTION 4. EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES.

Section 1 (statutory rule against perpetuities) does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

Commentary. Section 4 lists the interests and powers that are excluded from the Statutory Rule Against Perpetuities. This section is in part declaratory of existing common law but in part not. Under subsection (7), all the exclusions from the Common-law Rule recognized at common law and by statute in the state are preserved.

The major departure from existing common law comes in subsection (1). In line with long-standing scholarly commentary,[50] subsection (1) excludes

[50] 6 AMERICAN LAW OF PROPERTY § 24.56 at 142 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests § 1244 at 159 (2d ed. 1956); Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318, 1321–22 (1960); Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 660 (1938). *See also* Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) Introduction at 1 (1983).

nondonative transfers from the Statutory Rule. The Rule Against Perpetuities is an inappropriate instrument of social policy to use as a control on such arrangements. The period of the Rule—a life in being plus 21 years—is suitable for donative transfers only, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 1. That period, as noted, represents an approximation of the period of time that would be produced, on average, by tracing a set of actual measuring lives identified by statutory list and adding a 21-year period following the death of the survivor.

Certain types of transactions—although in some sense supported by consideration, and hence arguably nondonative—arise out of a domestic situation, and should not be excluded from the Statutory Rule. To avoid uncertainty with respect to such transactions, subsection (1) lists and restores such transactions, such as premarital or postmarital agreements, contracts to make or not to revoke a will or trust, and so on, to the donative-transfers category that does not qualify for an exclusion.

The Drafting Committee recognized that some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded from the Statutory Rule by the nondonative-transfers exclusion of subsection (1). The reason, again, is that the period of a life in being plus 21 years—actual or by the 90-year proxy—is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

The Committee was aware that a few states have adopted statutes on perpetuities that include special limits on certain commercial transactions,[51] and in fact the Committee itself drafted a comprehensive version of Section 4 that would have imposed a 40-year period-in-gross limitation in specified cases. In the end, however, the Committee did not present that version to the National Conference for approval because it was of the opinion that the control of commercial transactions that directly or indirectly restrain alienability is better left to other types of statutes, such as marketable title acts[52] and the Uniform Dormant Mineral Interests Act, backed up by the potential application of the common-law rules regarding unreasonable restraints on alienation.

SECTION 5. PROSPECTIVE APPLICATION.

(a) Except as extended by subsection (b), this [Act] applies to a nonvested property interest or a power of appointment that is created on or after the effective date of this [Act]. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created

[51] *E.g.*, FLA. STAT. § 689.22(3)(a); ILL. REV. STAT. ch. 30, § 194(a).

[52] *E.g.*, the Uniform Simplification of Land Transfers Act.

when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the effective date of this [Act] and is determined in a judicial proceeding, commenced on or after the effective date of this [Act], to violate this State's rule against perpetuities as that rule existed before the effective date of this [Act], a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

Commentary. Section 5 provides that, except for Section 5(b), the Uniform Act applies only to nonvested property interests or powers of appointment created on or after the Act's effective date. The second sentence of subsection (a) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. The import of this special rule, which applies to the exercise of all types of powers of appointment (general testamentary powers and nongeneral powers as well as presently exercisable general powers), is that all the provisions of the Uniform Act except Section 5(b) apply if the donee of a power of appointment exercises the power on or after the effective date of the Act, whether the donee's exercise is revocable or irrevocable. In addition, all the provisions of the Act except Section 5(b) apply if the donee exercised the power before the effective date of the Act if (i) that pre-effective-date exercise was revocable *and* (ii) that revocable exercise becomes irrevocable on or after the effective date of the Act. The special rule, in other words, prevents the common-law doctrine of relation back from inappropriately shrinking the reach of the Act.

Although the Statutory Rule does not apply retroactively, Section 5(b) authorizes a court to exercise its equitable power to reform instruments that contain a violation of the state's former rule against perpetuities and to which the Statutory Rule does not apply because the offending property interest or power of appointment was created before the effective date of the Act. Courts are urged in the Comment to consider reforming such dispositions by judicially inserting a saving clause, because a saving clause would probably have been used at the drafting stage of the disposition had it been drafted competently. To obviate any possibility of an inequitable exercise of the equitable power to reform, Section 5(b) limits its recognition of the authority to reform to situations in which the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the effective date of the Act. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

SECTION 6. SHORT TITLE.

This [Act] may be cited as the Uniform Statutory Rule Against Perpetuities.

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 8. TIME OF TAKING EFFECT.

This [Act] takes effect _____.

SECTION 9. [SUPERSESSION] [REPEAL].

This [Act] [supersedes the rule of the common law known as the rule against perpetuities] [repeals (list statutes to be repealed)].

III. Conclusion

The Uniform Act makes wait-and-see fair, simple, and workable, and it does so without authorizing excessive dead-hand control. Coming, as it does, on the heels of the Restatement (Second)'s adoption of wait-and-see, perpetuity reform in this country may at long last be achievable. The Act deserves serious consideration for adoption by the various state legislatures.

Modernizing the Rule Against Perpetuities

By James M. Pedowitz

There is now an opportunity for the various states to modernize the ancient Rule against Perpetuities. Ancient though it may be, it continues to plague bona fide purchasers and optionees of various real property interests, as well as drafters of wills and trusts.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has approved and recommended for adoption by the various states a Uniform Statutory Rule Against Perpetuities Act (USRAP). The proposed Act has gained the approval of the American Bar Association, the American College of Real Estate Lawyers and the American College of Probate Counsel. In the jurisdictions in which it is adopted, it could bring welcome relief to lawyers who practice in the fields of real estate, probate and trust law, as well as others who forget the draconian effect of an inadvertent violation of the long established rule with respect to remoteness of vesting. The states of South Carolina and Nevada acted quickly and have adopted USRAP effective July 1, 1987.

The common law Rule against Perpetuities, as stated in Gray, ***The Rule Against Perpetuities*** (4th ed., 1942) at page 191, is: "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." Many states have adopted statutory provisions which follow the rule either strictly or with some modifications. Some state statutes also limit the suspension of the power of alienation by the same time standard.

The common law rule and its statutory derivatives require the attention of the courts all too frequently, particularly since careful drafters easily can avoid its impact. Most recently, in *Metropolitan Transp. Auth. v. Bruken Realty Corp.* (492 N.E.2d 379 (N.Y. 1986)), the highest Court in New York considered whether that part of the New York statutory rule that limits remote vesting applies to certain preemptive rights. After reviewing the law and the statute, the Court decided the case upon principles of the "reasonableness" of the particular preemptive right, and the public nature of one of the parties to the transaction.

The Metropolitan Transportation Authority decision referred to other circumstances that required application of the rule; e.g., for options appurtenant to leases (*See Buffalo Seminary v. McCarthy*, 337 N.E.2d 76 (N.Y. 1983), to mineral rights (*Weber v. Texas Co.*, 83 F.2d 807 (5th Cir. 1936), *cert. denied* 299 U.S. 561 (1936)), to franchise rights (*Todd v. Citizens' Gas Co.*, 46 F.2d 855 (7th Cir. 1931), *cert. denied*, 283 U.S. 852 (1931) (dicta)), for options to expand an easement (*Caruthers v. Peoples Natural Gas Co.*, 38 A.2d 713 (Pa. Super 1944)) or to acquire an interest in a party wall if the optionee decided to build adjacent to the optionor's land (*Beloit Bldg. Co. v. Quinn*, 66 P.2d 549 (Kan. 1937)) Recent decisions have held that, because the management of condominium developments has a valid interest not only in securing the occupancy of the units but also in protecting the ownership of the common areas and the underlying fee, its preemptive rights to repurchase units before sale to third parties should be excepted from the operation of the rule. (*See, e.g., Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537 (Colo. 1985); *Anderson v. 50 E. 72nd St. Condominium*, 492 N.Y.S.2d 989 (N.Y. Sup. 1985); *see generally*, Note, *Condominiums and the Right of First Refusal*, 48 St. John's L. Rev. 1146, 1149 *et seq.* See also *Anderson v. 50 E 72nd St* Condominium, 505 N.Y.S. 2d 101 (N.Y.A.D. 1986).)

The foregoing is merely an indication of current aspects of the problem in

one state; the problems exist in most jurisdictions. USRAP would do away with the common law rule and with any state statutory rule with respect to remoteness of vesting, and replace it with a new modernized version that will be understood more easily, and will be simpler to apply.

Prof. Lawrence W. Waggoner of the University of Michigan Law School was the reporter of the drafting committee of NCCUSL that produced USRAP as a uniform law. It was approved and recommended for enactment by the state representatives at the annual conference of the commissioners held in Boston August 1-8, 1986. The prefatory note accompanying the Act, written by Waggoner, indicates that the common law rule on remoteness of vesting is altered by adopting a "wait and see" approach, as previously set forth in the American Law Institute's Restatement (Second) of Property, but with certain variations.

The prefatory note first explains that the common law rule has both a validating and invalidating side, as follows:

> *Validating side of the common law rule.* A non-vested property interest is valid when it is created (initially valid) if it is then *certain* either to vest or to terminate (fail to vest) within the lifetime of an individual then alive, or within 21 years after the death of that individual.
>
> *Invalidating side of the common law rule.* A non-vested property interest is invalid when it is created (initially invalid) if there is no individual then alive with respect to whom there is a certainty that the interest either will vest or terminate within the individual's lifetime, or within 21 years after that individual's death.

The invalidating side focuses on a lack of *certainty*, which means invalidity under the common law rule is *not* dependent on the *actual* events that subsequently occur, but only on *possible* post-creation events. Since *actual* post-creation events are irrelevant at common law (even those known at the time of the controversy) so that interests in fact would vest well within the period of a life in being plus 21 years as provided in the rule, they are nevertheless invalid if *at the time of the creation* of the interest there was any possibility, no matter how remote, that it might not vest within the permissible time period.

The harshness of the common law rule led scholars to consider an acceptable alternative. The "wait and see" approach is one such alternative that has gained considerable support, although there is still debate, particularly in the academic community, on the acceptability of that alternative as the preferred solution to the problem.

The Restatement (Second) of Property (Donative Transfers) adopts the wait and see approach, and its introductory note to chapter 1 at p.13 (1983) states it "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". For an opposing point of view, one should read Dukemenier, *Perpetuities: The Measuring Lives*, 85 Colum. L. Rev. 1648 (1985).

Under the Uniform Act, the validating and invalidating sides are set forth as follows:

> *Validating side of the new statutory rule.* A non-vested property interest is initially valid if, when it is created, it is then *certain* either to vest or to terminate (fail to vest) within the lifetime of an individual then alive or within 21 years after the death of that individual. The validity of a non-vested property interest that is not *initially* valid remains in abeyance. Such an interest is valid if it actually vests within the allowable waiting period after its creation.
>
> *Invalidating side of the new statutory rule.* A non-vested property interest that is not *initially* valid becomes invalid if it neither vests nor terminates within 90 years, the allowable waiting period after its creation.

Thus, the Uniform Act takes a radical step in using a flat period of 90 years for the allowable waiting period, instead of lives in being plus 21 years. The reasoning is that the 90-year period, on average, would approximate average lives in being plus 21 years after the creation of an interest, in most actual situations.

The comments to the Uniform Act contain various examples to support this analysis. The adoption of the flat 90-year waiting period avoids the tortuous and often difficult process of identifying and tracing appropriate measuring lives. Although there is bound to be some criticism of this departure from the traditional "lives in being plus 21 years" measurement, it certainly will be much easier to apply.

As a final protective step to help ensure carrying out the intent of a donor or testator who has violated the new statutory rule, there are provisions for reformation of the instrument that created the interest, to approximate the transferor's manifested intention and thus to avoid a total destruction of the gift or devise.

One feature of the Uniform Act that should appeal to most real estate practitioners is that the new statutory rule applies only to donative transfers and is inapplicable to genuine commercial transactions. Although this is a radical change, it will have no immediate effect, since the Uniform Act is prospective only, and existing documents and transfers would remain unaffected.

However, there generally has been considerable support among the members of the real estate bar for the exemption of bona fide commercial transactions from the operation of any Rule against Perpetuities as to vesting, since the social and economic policy that gave rise to the Rule initially is largely inapplicable to modern real estate transactions such as convertible mortgages, long-term options, preemptive rights and other sophisticated structuring of real estate transactions.

There can be little argument that the common law Rule against Perpetuities is difficult to understand and even more difficult to apply. It continues to plague law students and most lawyers who do not deal with it on a regular basis. It indeed has been a trap for the unwary, and in its strict application it often has destroyed totally the testamentary intent.

USRAP, as a result of the careful and intensive study given to its development, deserves acceptance by the members of the bar and through them by the various state legislatures. Its widespread adoption would be a long step toward simplification of an unnecessarily complex aspect of the law.

A copy of USRAP can be obtained by writing to the National Conference of Commissioners on Uniform State Laws (645 North Michigan Ave., Chicago, IL 60611).

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EXHIBIT 2

UNIFORM STATUTORY RULE AGAINST PERPETUITIES

§ 1. Statutory Rule Against Perpetuities

(a) A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

(2) the interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) when the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or

(2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or

(2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.

§ 2. When Nonvested Property Interest or Power of Appointment Created

(a) Except as provided in subsections (b) and (c) and in Section 5(a), the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this [Act], if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in Section 1(b) or 1(c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. [For purposes of this [Act], a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.]

(c) For purposes of this [Act], a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

§ 3. Reformation

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 1(a)(2), 1(b)(2), or 1(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under Section 1 (statutory rule against perpetuities);

(2) a class gift is not but might become invalid under Section 1 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by Section 1(a)(1) can vest but not within 90 years after its creation.

§ 4. Exclusions From Statutory Rule Against Perpetuities

Section 1 (statutory rule against perpetuities) does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

§ 5. Prospective Application

(a) Except as extended by subsection (b), this [Act] applies to a nonvested property interest or a power of appointment that is created on or after the effective date of this [Act]. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created before the effective date of this [Act] and is determined in a judicial proceeding, commenced on or after the effective date of this [Act], to violate this State's rule against perpetuities as that rule existed before the effective date of this [Act], a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

§ 6. Short Title

This [Act] may be cited as the Uniform Statutory Rule Against Perpetuities.

§ 7. Uniformity of Application and Construction

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

§ 8. Time of Taking Effect

This [Act] takes effect _____

§ 9. [Supersession] [Repeal]

This [Act] [supersedes the rule of the common law known as the rule against perpetuities] [repeals (list statutes to be repealed)].

EXHIBIT 2

ARTICLES

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES: NINETY YEARS IN LIMBO

Jesse Dukeminier*

INTRODUCTION

In 1986 the National Conference of Commissioners on Uniform State Laws approved the Uniform Statutory Rule against Perpetuities. This statute provides a 90-year wait-and-see period. If an interest violates the common law Rule against Perpetuities, we do not declare it invalid. Instead we wait and see whether it actually vests within 90 years. If it does, the interest is valid. Property may thus be tied up for almost a century, which Professor W. Barton Leach, the charismatic father of perpetuities reform, unhesitatingly condemned as "an unconscionable period" of time.[1] Again the old adage is proven true: the revolution devours its own children. The sire himself is cast aside.[2] So momentous an irony compels everyone—including descendants of Leach

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1. *See* 6 AMERICAN LAW OF PROPERTY § 24.16, at 52 (A. Casner ed. 1952); *see also infra* note 13 and accompanying text.

2. Professor W. Barton Leach of Harvard fired up the movement for perpetuities reform with his seminal article, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952). Leach proposed that instead of striking down an interest that *might* vest beyond the perpetuities period, we wait and see whether the interest *actually* vests within the period. The common law perpetuities period applicable to a particular interest is usually no more than a generation or two. *See* Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1874–76, 1880–82 (1986). The Uniform Statute extends the wait-and-see period to 90 years, which increases the period practically available to the dead hand by about 50%. *See infra* text accompanying notes 48–49.

who have approved of far less extreme forms of wait-and-see—to give a new, hard look at perpetuities "reform."

The Uniform Statute is a radical remedy for what ails the Rule against Perpetuities. It is a long step towards abolishing the Rule against Perpetuities itself. The Uniform Statute has the potential for much mischief, and it may ultimately require the expansion of judicial power to vary the terms of long-term trusts that have outlived the vision of their creators. The Uniform Statute is, altogether, an extraordinarily risky venture.

I. WHAT THE UNIFORM STATUTE DOES

The Uniform Statutory Rule against Perpetuities formally preserves the common law Rule against Perpetuities. It provides that an interest is valid if, "when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive."[3] The what-might-happen test of the common law,[4] including all its preposterous characters (fertile octogenarians, unborn widows, and such), remains, in theory, part of the law, though it cannot be applied by a court to invalidate an interest for 90 years. The Uniform Statute provides that an interest is valid if it satisfies the common law Rule or if "the interest either vests or terminates within 90 years after its creation."[5] This is a wait-and-see provision, which stays the court's hand for 90 years.

Generally, *no interest can be declared void for 90 years*. If, at the end of 90 years, an interest remains contingent and has not satisfied the common law Rule, the Uniform Statute requires a court to reform the interest "in the manner that most closely approximates the transferor's manifested plan

3. UNIFORM STATUTORY RULE AGAINST PERPETUITIES § 1(a)(1), 8A U.L.A. 80 (Supp. 1987) [hereinafter UNIFORM STATUTE].

4. Under the what-might-happen test, any possibility that an interest might vest more than 21 years after the death of the relevant lives in being at the creation of the interest invalidates the interest. Thus, in a devise "to *A* (aged 80) for life, then to *A's* children for their lives, then to *A's* grandchildren," the gift to *A's* grandchildren violates the Rule because of the possibility that *A* will have an afterborn child; this afterborn child might outlive the relevant lives (*A* and *A's* living issue) by more than 21 years and the remainder in fee might vest upon her death. *A* is the classic fertile octogenarian.

5. UNIFORM STATUTE, *supra* note 3, § 1(a)(2).

of distribution and is within the 90 years allowed . . . ."[6] The transferor's "plan of distribution" will, of course, have been formulated more than 90 years previously, under entirely different conditions, and in all probability the named beneficiaries of the plan will all be dead. Surely this gives courts about as broad a power as can be imagined to make a will for a person dead some 90 years.[7]

II. THE UNIFORM STATUTE PUTS THE RULE AGAINST PERPETUITIES IN THE DEEP FREEZER FOR 90 YEARS, FROM WHICH IT MAY NEVER EMERGE ALIVE

If the Uniform Statute is enacted, no interest created thereafter can be declared in violation of the Rule against Perpetuities for 90 years after the date of its creation.[8] All interests are valid for this period. At the end of 90 years, a court will take down the old books on the Rule against Perpetuities, determine what then existing contingent interests did not satisfy the common law Rule upon creation some 90 years earlier, and, as to any such interests, reform them to vest at once.

It is an extraordinary thing to declare a whole body of prohibitory law to be in abeyance for 90 years, with no violation of the law possible for that period of time. I can think of nothing in the whole history of English or American law that is comparable to what the Commissioners on Uniform State Laws have done. It is so bizarre that the mind boggles at the very thought of what will happen in 90 years, when the Rule against Perpetuities is scheduled to be revived and then to be applied to interests created by instruments effective more than 90 years previously.

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6. *Id.* § 3. Section 3(2) provides that a class gift may be reformed prior to 90 years in certain rare cases. Section 3(3) provides for reformation of a gift void at common law that has no possibility of vesting within 90 years. This may occur in what the commentary calls "exceedingly rare cases." *Id.* § 3, comment at 108.

7. The comment says "[t]he court in reforming is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole." *Id.* § 3 comment at 105.

8. There are a couple of exceptions. If the interest is created by exercise of a special or testamentary power of appointment, the interest cannot be declared void until 90 years after the creation of the power. *Id.* § 5 comment at 113, example (1). *See also supra* note 6 for references to other possibilities in rare cases of the exercise of *cy pres* within 90 years.

Ninety years is a long, long time. Everyone reading this Article in the year of its publication will be dead. The accelerating pace of change means that the next 90 years will see vastly more changes in the world than took place in the past 90 years. No one can envision all the consequences of computer technology, not to mention other possible scientific inventions and restructurings of economic arrangements, capital holdings, taxation, and the legal profession. No one can foretell whether we will be wrenched by egalitarian movements or wrecked by wars. Can the Rule against Perpetuities really survive 90 years in desuetude?

I do not see how it can. If the Rule cannot strike down any interest for 90 years, I predict it will not be taught and knowledge of it will be lost to lawyers. It will become a piece of history, like the Rule in Shelley's Case (imagine trying to revive Shelley's Case after 90 years in limbo!). If I felt my students were, as lawyers, to be governed by the Uniform Statute, I would not teach the Rule against Perpetuities. I do not see how it could be justified with all the other topics of current practical relevance pushing for an allotment of hours in the curriculum. And I am certain students would raise cries of derision, and maybe visit the Dean and tell her it is time this lovable old character retired, if I tried to push them through the hard, agonizing steps of learning the Rule, all the while telling them, "All future interests are valid for 90 years. You cannot violate the Rule against Perpetuities for 90 years." Somehow, I am sure, they will figure out that 90 years will cover their entire careers at the bar, and that no instrument they draw, disposing of their clients' property, can ever be struck down within their lifetimes.

What is likely to happen is that teachers will teach only the 90-year rule: "You can have a trust for 90 years, or you can tie up land for 90 years. Any period in excess of 90 years will be lopped off by a court at the end of 90 years, and, in that event, the court will have discretion to decide whom the testator would want to have the property." The fertile octogenarian and other wraiths may be trotted out for a laugh, and as a fleeting illustration of something lawyers may have to contend with if the trust does not end within 90 years. I think I can safely predict, however, that most of the Rule against Perpetuities will be completely ignored in the classroom.

Perpetuities saving clauses in their present form will probably continue to be routinely inserted in trusts for many years, since lawyers are creatures of habit. With the passage of time, however, fewer and fewer will understand why such clauses work. A saving clause may come to be regarded as the seal was in the late nineteenth century, a token of obeisance to the past that must be added without anyone really understanding exactly why. Far more likely—since lawyers realize that time is money—lawyers will increasingly draft trusts to end within 90 years, either because they have not been taught the Rule against Perpetuities or because it takes too much time to remember it and, by using a 90-year period, they can be certain everything is valid.

At the end of 90 years, I cannot believe that anything as complicated as *Gray on Perpetuities* will be brought back to life. If, at the end of 90 years, there are contingent interests more than 90 years old, is it realistic to think that lawyers and judges will dig into the crumbling books of their great-grandparents to see whether these interests have vested under the old common law Rule against Perpetuities, perhaps under some rule about vested with possession postponed, gifts to subclasses, or separate contingencies? Surely the bar will rise (almost in unison, with only the dissent of some antiquarians) and formally abolish the Rule at that point in time.

If the future does shape up this way, the effect of adopting the Uniform Statute is to keep the Rule against Perpetuities formally on the books, but in abeyance, for 90 years, after which we can expect the Rule to be discarded as an obsolete, overcomplicated relic of the Industrial Age, to be wholly replaced by a 90-year limitation on the dead hand. We are assured by the Reporter for the Uniform Statute, Professor Lawrence Waggoner, that the statute is "an evolutionary step in the development and refinement of the wait-and-see doctrine. Far from revolutionary, it is well within the tradition of that doctrine."[9] Well, if setting in motion events that almost inevitably will lead to abolition of the Rule against Perpetuities is not revolutionary, then neither was the Boston Tea Party.

9. UNIFORM STATUTE, *supra* note 3, at 84 (prefatory note).

There is no indication in the Official Commentary that the Commissioners on Uniform State Laws even recognized that the statute they promulgated puts the Rule against Perpetuities in dead storage for 90 years. Not one word in the Official Commentary is devoted to the probable consequences of consigning the Rule to limbo for 90 years. In the Commentary, the Reporter writes page after page of description of how an interest can violate the common law Rule. He describes at some length the fertile octogenarian and other absurdity cases, age contingencies over 21, class gifts that vest on the death of afterborn persons, powers of appointment exercisable by afterborn persons, and a lot of the rest of current doctrine. He does not hint that, if the Uniform Statute is enacted, these noises will virtually disappear from courtrooms for 90 years.[10] A court cannot declare void any gifts made after the act is adopted until 90 years pass by. A court could, of course, within this 90-year period, declare a gift valid under the common law Rule, but since all contingent interests are to be treated as valid for 90 years, it will be an extraordinary case where parties will spend good money to go to court to get such an imprimatur before the end of 90 years.

III. THE SAVING CLAUSE ANALOGY

The given justification for the Uniform Statute is that a 90-year wait-and-see period is analogous to a perpetuities saving clause inserted in an instrument by a lawyer. In view of the drastic consequences of adopting the Uniform Statute, this idea needs very careful examination. A perpetuities saving clause is a technical clause designed to prevent a perpetuities violation and intended to take effect only in the exceedingly rare event that the trust does not end, as specified in the dispositive provisions, within the perpetuities period. A saving clause commonly provides that, if the trust has not

10. This is a slight overstatement. Since the Uniform Statute is not retroactive, preexisting instruments will continue to be litigated under the common law. *Id.* § 5. Section 5(a) authorizes a court to apply *cy pres* to any existing interest in violation of the Rule. And in a few other rare cases the common law Rule may come into play. *See supra* notes 6, 8.

If the wait-and-see period is measured by the lives that govern the common law perpetuities period, the common law is not put in dead storage. In order to identify the measuring lives, it is necessary to know the common law. *See infra* notes 82–91 and accompanying text.

already terminated under the dispositive provisions, the trust will terminate 21 years after the death of the survivor of the beneficiaries of the trust living when the trust is created and the principal will then be distributed as directed. By terminating a trust at the end of the perpetuities period, a saving clause guarantees the validity of all interests in the trust.[11] A statutory wait-and-see provision, on the other hand, does not guarantee the validity of contingent interests. Wait-and-see only gives potentially invalid contingent interests a chance to prove themselves valid. There are other differences between the two, as will appear, but let us assume for the moment that a wait-and-see provision is analogous to a saving clause. The question is: What kind of saving clause is a 90-year wait-and-see period analogous to?

A. *The 90-Year Wait-and-See Period Is Comparable to a Saving Clause for the Lives of a Dozen Healthy Babies Plus 21 Years, Which Professor Leach Denounced*

The idea driving the Uniform Statute is that wait-and-see ought to be looked at as a statutory perpetuities saving clause comparable to what a knowledgeable lawyer could insert in an instrument; hence, the wait-and-see period should approximately equal the longest period of time a knowledgeable lawyer can produce through a saving clause. As the Prefatory Note to the Uniform Statute states, with emphasis: "*Aggregate dead-hand control will not be increased* [by using a 90-year period] *beyond what is already possible by competent drafting under the Common-law Rule.*"[12]

The longest period of time during which an expert lawyer can tie up property is about a century, by using a dozen or so healthy babies from long-lived families as measuring lives. Professor Leach pointed this out some years ago. Leach wrote:

> The settled inclusion of twenty-one years in gross and the admission of extraneous lives bring it about that a testator or settlor, when motivated by vanity, is able to

11. On saving clauses, see Becker, *Estate Planning and the Reality of Perpetuities Problems Today: Reliance Upon Statutory Reform and Saving Clauses Is Not Enough*, 64 WASH. U.L.Q. 287, 378–416 (1986); McGovern, *Perpetuities Pitfalls and How Best To Avoid Them*, 6 REAL PROP. PROB. & TR. J. 155 (1971).

12. Uniform Statute, *supra* note 3, at 84 (prefatory note) (emphasis in original).

> tie up his property, regardless of lives and deaths in his family, for an unconscionable period—viz. twenty-one years after the deaths of a dozen or so healthy babies chosen from families noted for longevity, a term which, in the ordinary course of events, will add up to about a century.[13]

But Leach did not recommend doing this. In the passage quoted, he called a century "an unconscionable period" of time. Elsewhere he condemned clauses using extraneous lives as "unjustified in family transactions"[14] and of "little appropriateness."[15] The balance between private right and public interest had been properly struck, in Leach's view, when "a man of property could provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority."[16] To give the dead hand power beyond that—to enable a man to tie up property during the lives of unborn members of the family by using extraneous lives such as a dozen healthy babies—was to permit "a capricious exercise of the power of the dead hand."[17]

Lawyers drafting wills and trusts have been in overwhelming agreement with the sound instincts of Professor Leach. Although it is possible for a lawyer to draft a trust to endure for the lives of twelve healthy babies plus 21 years, lawyers rarely, if ever, do so. Lawyers do not use a "dozen or so healthy babies chosen from families noted for longevity" for several reasons. First is the information cost—the time required to identify the "best bet" babies. A second reason is that the "best bets" may all defy the odds and die short of their life expectancy, leaving the lawyer with an embarrassing explanation to make. Third is the difficulty of keeping track of the lives of persons who have no relationship to the family involved. Most importantly, using extraneous babies is simply inappropriate to the needs and abilities of the living members of the particular family, which is what the trust is all about. A large percentage of trusts are trusts for surviving spouses or caretaker trusts for minor or incompetent children, which will terminate within a generation or two. Even when drafting dynastic trusts, to last for

13. 6 AMERICAN LAW OF PROPERTY, *supra* note 1, § 24.16, at 52.
14. *Id.* at 51.
15. *Id.* at 52.
16. *Id.* at 51.
17. J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 13 (2d ed. 1962).

several generations, careful lawyers virtually never create trusts to last for more than actual minorities after the living members of the family are dead. Professor Powell, who collected thousands of cases in preparing the first Restatement of Property, observed, "In a vast majority of limitations, the lives used are less than ten and are the lives of persons related to the transferor and beneficially interested in the dispositions made."[18] Professor Leach's remarks about using a dozen healthy babies were an imaginative illustration of the rigorous logic underlying the Rule. In the practice of law, using a dozen healthy babies as measuring lives is a myth.

In the face of Professor Leach's condemnation of using extraneous lives and of tying up property for about a century, and in the face of the bar's rejection of "twelve-healthy-babies" clauses, why did the Uniform Statutory Rule against Perpetuities come to insert in every trust a 90-year wait-and-see period? It is, in effect, a proxy for a period measured by the lives of a dozen healthy babies plus 21 years. This is implicitly conceded in the Rationale for the Uniform Statute, set forth in the Prefatory Note.

I reproduce part of the Rationale below, with my comments inserted and set off in brackets.

> *Rationale of the Allowable 90-Year Waiting Period.* The myriad of problems associated with the actual-measuring-lives approach are swept aside by shifting away from actual measuring lives and adopting instead a 90-year waiting period as representing a reasonable approximation of—a proxy for—the period of time that would, *on average*, be produced by identifying and tracing an *actual set* of measuring lives and then tacking on a 21-year period following the death of the survivor.[19]

[It seems a shame to sully such a lyrical sentence with cold, hard facts. Yet reality keeps intruding itself, at numerous points, to contradict the Official Commentary. The "myriad of problems"[20] resulting from using measuring lives, said to be "swept aside" by using a 90-year waiting period, are trivial, as will be shown later.[21] For the moment, let us focus on

18. 5A R. POWELL, THE LAW OF REAL PROPERTY ¶ 766[5] (P. Rohan ed. 1987).

19. UNIFORM STATUTE, *supra* note 3, prefatory note at 84 (emphasis added).

20. "Myriad [Gk *myriad-*, *myrias*, fr. *myrioi* countless, ten thousand] 1: ten thousand 2: an immense number." WEBSTER'S NEW COLLEGIATE DICTIONARY 755 (8th ed. 1980).

21. *See infra* text accompanying notes 81–91.

what 90 years is a "proxy" for. The Prefatory Note says it represents a period that would be produced by using "an actual set" of measuring lives plus 21 years. I am not sure why the word "actual" was used. In reality, "actual" turns out to be "hypothetical." The Prefatory Note explains:]

> The selection of 90 years as the period of time reasonably approximating the period that would be produced, on average, by using the set of actual measuring lives identified in the Restatement (Second) or the earlier draft of the Uniform Act is based on a statistical study published in Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 U. MIAMI INST. ON EST. PLAN. Ch. 7 (1986).

[The statement that 90 years would be produced, on average, by using "actual measuring lives identified in the Restatement" is purest speculation.[22] There are no "actual" measuring lives until there is an actual case, and no one can know in advance of an actual case with actual people what the actual ages of the measuring lives will be. The "statistical study" referred to is by Professor Waggoner, the Reporter for the Uniform Statute. It is a consideration of two hypothetical dispositions that violate the Rule and what ages the measuring lives would be in four hypothetical families with children of assumed different ages. The Prefatory Note continues:]

> This study suggests that the youngest measuring life, on average, is about 6 years old.

[Note carefully: The "statistical study" by the Reporter of two hypotheticals suggests that the youngest measuring life for wait-and-see, using the Restatement formula, would be

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22. The Restatement list of lives to be used for wait-and-see includes the transferor, owners of beneficial interests in the property and their parents and grandparents, and donees of powers of appointment. *See* RESTATEMENT (SECOND) OF PROPERTY § 1.3(2) (Donative Transfers) (1983).

It is noteworthy that the Reporter for the Uniform Statute took as the standard for wait-and-see measuring lives the current device that produces the longest list of measuring lives. He did not use the lives governing the common-law perpetuities period, which are used in the majority of states adopting wait-and-see (*see infra* text accompanying notes 135–38) and, being fewer than the lives on the Restatement list, will produce a shorter wait-and-see period. (For explanation of what lives govern the common law perpetuities period, see *infra* text accompanying notes 88–91.)

Even using the Restatement list of wait-and-see lives, the Restatement is likely to produce a period shorter than 90 years in many cases since only ancestors and *not descendants* of beneficiaries are used as measuring lives.

about six years old if every trust violating the Rule were averaged in. So extraordinary and implausible a suggestion cries out for some empirical data to support it. Mathematically, such an average is highly improbable. To reach an average of six years requires an enormous percentage of trusts with infant beneficiaries to balance all the Rule-violating trusts for fertile octogenarians, unborn widows, and others where the youngest beneficiary may well be 20, 30, 40, or 50 years old. Remember that in the first fertile octogenarian case, involving the famous Jee family, the youngest daughter was in all probability more than thirty years old. Upon a close look, this "statistic" is not an average of anything "actual," but an average of hypothetical measuring lives using hypothetical dispositions and hypothetical families!]

> The remaining life expectancy of a 6-year-old is reported as 69.6 years in the *U.S. Bureau of the Census, Statistical Abstract of the United States:* 1986, Table 108, at p. 69. (In the *Statistical Abstract* for 1985, 69.3 years was reported.) In the interest of arriving at an end number that is a multiple of five,[23] the Uniform Act utilizes 69 years as an appropriate measure of the remaining life expectancy of a 6-year-old, which—with the 21-year tack-on period added—yields an allowable waiting period of 90 years.

So here we have it: Since the Reporter for the Uniform Statute assumes that the average trust violating the Rule will have a wait-and-see period with a six-year-old person as a measuring life, the Act takes a six-year-old's life expectancy and adds 21 years to it. Not a scrap of hard data—not a single bit of empirical information about the actual ages of the parties in Rule-violating trusts—is offered for this inherently implausible assumption.[24]

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23. Why five? I have consulted books on numerology and find that Pythagoras regarded five as the number of Justice, Plato's Republic gave it as the number of the State, and five is connected by astrologers to Jupiter. A. FOWLER, SPENSER AND THE NUMBERS OF TIME 34–47, 206 (1964). A more modern numerologist says, "Number 5 symbolizes the law of gathering new experiences." M. GOODMAN, NUMEROLOGY 24 (1949). I rather think that will prove to be true under the Uniform Statute.

I hope the drafting committee was moved by something other than superstition, but I cannot imagine why the period has to be divisible by five. Anyway, this limitation meant the committee could not use the life expectancy of a two-year-old or a five-year-old but could and did use the life expectancy of a six-year-old. How convenient that the hypotheticals worked out to a six-year-old!

24. In justification, Professor Waggoner says that:

In truth, however, statistics are not really necessary to support the idea that 90 years is about equal to the longest time a lawyer can tie up property through a saving clause. Professor Leach's commonsensical observation is enough. Indeed, the Prefatory Note would have been more persuasive had it avoided pseudo-statistics and simply rested on Professor Leach's practical wisdom that the life expectancy of twelve healthy babies plus 21 years adds up to approximately a century.[25] Professor Leach chose his babies from "families noted for longevity." If the babies are from ordinary families, black as well as white, the perpetuities period will likely be as close to 90 as to 100 years. Thus a 90-year perpetuities period is an egalitarian clone of Leach's dozen healthy babies plus 21 years.

Leach thought this an entirely inappropriate period for tying up property. The Commentary to the Uniform Statute does not mention Leach's view, and makes no attempt to refute it.

> [a] precise average is empirically undeterminable from available data. The variety of possible dispositions is unlimited, and the family situations at the time of the disposition's creation and their frequencies are indeterminate. A *reasonable* approximation, not a precise average, is all that is possible, and all that is necessary to establish a responsibly based proxy.

Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule against Perpetuities*, 20 U. MIAMI INST. ON EST. PLAN. ¶ 704 (1986). I do not see how a reasonable approximation of actuality can be made without some empirical data about actuality. To me, a proxy for real lives based on selected hypotheticals is fatally flawed and is not saved by self-administered absolution.

As to whether the relevant data about actual violations and actual lives could be collected, see *infra* note 51 and accompanying text.

25. The Reporter suggested at one point that it would be acceptable for the Uniform Statute to use the life expectancy of a new-born infant.

> To forestall quibbling over what age to select, another acceptable approach might be to grant the benefit of the doubt, and select the life expectancy of a new-born infant. The life expectancy of a new-born infant, as reported in the 1985 *Statistical Abstract*, is 74 years, giving a flat period of 95 years with the 21-year period added.

Waggoner, *supra* note 24, ¶ 704. The Reporter even suggested that it "would be defensible" for the Uniform Statute,

> to adopt an allowable waiting period of 21 years plus the number of years, rounded off to the nearest whole number, designated as the remaining life expectancy of either a 6-year-old or of a new-born infant in the *Statistical Abstract of the United States* published for the year in which the contingent property interest was created.

Id. Thus as life expectancies increased with advances in medical science, so would the perpetuities period! The fundamental question remains: *Why should life expectancies, as opposed to actual lives, establish the appropriate period for tying up property?*

B. *A 90-Year Wait-and-See Period Is Not Comparable to Saving Clauses Used by Skilled Lawyers*

The Prefatory Note to the Uniform Statute argues that all the wait-and-see doctrine does is to insert a perpetuities saving clause into every dispositive instrument. But the perpetuities saving clause inserted by the Uniform Statute in the form of a 90-year wait-and-see period is not closely comparable to anything skilled lawyers currently insert in trusts they draft. The usual perpetuities saving clause uses the living beneficiaries of the trust as the measuring lives.[26] If the purpose of wait-and-see reform is to insert in every instrument the kind of saving clause an expert lawyer would use, the closest approximation is a wait-and-see period measured by the beneficiaries of the trust or lives related to vesting of the interests (who ordinarily are the beneficiaries of the interests and one or more ancestors).

A conventional perpetuities saving clause used by lawyers may produce a period of 21 years or 100 years or any period in between. It all depends upon the ages of the family members involved and the fortuitous occurrence of their deaths. A 90-year wait-and-see period, in contrast, is comparable to a perpetuities saving clause that always includes at least one infant beneficiary who always lives out the statistical life expectancy. The saving clause of the Uniform Statute will, in far more cases than not, result in a substantially longer period of time than would be produced by a conventional saving clause.

The Uniform Statute attempts to justify the 90-year period as a saving clause on the ground that, under existing common law, a knowledgeable lawyer can, if he wishes, tie up property in trust for approximately 90 years. But the fundamental fact is: Lawyers do not use saving clauses that have a dozen healthy babies as measuring lives or that always, or even on average, produce a 90-year perpetuities period. The Uniform Statute thus provides another ironic twist of fate: It takes what might happen, what lawyers might

26. *See, e.g.*, CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA WILL DRAFTING § 15.56 (1965); 5 A. CASNER, ESTATE PLANNING § 17.8, Article Ninth in R. H. BLACK III, Revocable Trust (5th ed. 1983); 2 J. MURPHY, MURPHY'S WILL CLAUSES, Form 8:46 (1987); *see also* Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. REV. 23, 49–53 (1987), for references to other saving clauses. Bloom is highly critical of analogizing wait-and-see to a saving clause.

do, and not what actually occurs, as the justification for its version of an actualities test.

C. *The Critical Flaw: A Wait-and-See Saving Clause Does Not Put the Clients of an Unskilled Lawyer on a Par with the Clients of a Skilled Lawyer*

It is possible for a statutory wait-and-see saving clause to give the client of an inexperienced lawyer the same *perpetuities period* as a skilled lawyer might provide through a saving clause. *But wait-and-see can never give the client of the unskilled lawyer the dispositive provisions written by an expert.* This important point has often been overlooked or obscured in the heat of debate. In the debates at the American Law Institute over whether the Restatement (Second) of Property should adopt wait-and-see, Professor Casner, the Reporter, replied to his opponents with a magisterial line of argument:

> The thing I have never been able to fully understand in the opposition that has developed in this is their failure to recognize that I can draw documents to do exactly what this book says will be done under the wait-and-see approach. That is the thing that it seems to me is unfair, completely inequitable, in the operation of the what-might-happen approach. So that you don't avoid the problems that Professor Berger is talking about [the uncertainties of title arising from wait-and-see] when you put yourself in the hands of a person who takes full advantage of the rule against perpetuities. All this really does is to give a person who has not had the good fortune of putting himself in skilled hands the opportunity to have the same benefit.[27]

Eloquence aside, the claim set forth in the last sentence of Professor Casner's argument is somewhat disingenuous. Although wait-and-see can operate to preserve a trust for the same period of time as the learned Reporter could secure through a perpetuities saving clause, wait-and-see cannot "give a person who has not had the good fortune of

27. American Law Institute, *Proceedings of 1979 Annual Meeting*, 56 A.L.I. PROC. 456 (1980) (remarks by Prof. Casner). The same point is made in a slightly, but importantly, different way in RESTATEMENT (SECOND) OF PROPERTY 13 (1983) (Ch. 1, Donative Transfers, introductory note): "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." (emphasis added).

putting himself in [Professor Casner's] skilled hands the opportunity to have the same benefit." The work of Lawyer Bumbler, saved by the wait-and-see doctrine, will not be the work of Lawyer Casner. This bears emphasis because wait-and-see will not often come to the rescue of the skilled draftsman, who will routinely insert an appropriate perpetuities saving clause. Wait-and-see almost always will affect families whose ancestor consulted an average lawyer or, worse, drew the will himself. The inept work of a thoughtless draftsman will be saved for the wait-and-see period. The testator's descendants may be left in a straitjacket.

An example of this is the notorious *Estate of Pearson*,[28] a Pennsylvania case decided in 1971. In this case the testator left a holographic will creating a testamentary trust for the benefit of his six brothers and sisters, and their descendants "as long as there are living legal heirs." The trust was construed to order division of the income among the six brothers and sisters from time to time living (with the last survivor receiving all the income); at the death of the last surviving brother or sister, the income was to be divided per capita among the nephews and nieces from time to time living, and then, when the last surviving nephew or niece died, among the next generation of collaterals in the same manner ad infinitum. No power was given to the trustee or to the beneficiaries to vary this rigid and unwise scheme, which gives to those of each generation lucky enough to survive more and more income, depriving the family of any deceased income beneficiary of support. This trust was saved by the Pennsylvania wait-and-see statute for at least one generation and possibly for several generations. Under the Uniform Statute this trust would be saved for 90 years!

A knowledgeable and experienced estate planner is likely to think through what might happen during a long-term trust and try to structure it so that living persons can deal intelligently with changing circumstances. These circumstances include changes in the number, needs, and abilities of family members, in taxation, and in the purchasing power of the dollar. The skilled lawyer may create discretionary powers in the trustee to go into principal or even to

28. 442 Pa. 172, 275 A.2d 336 (1971). This case is much criticized by the Reporter for the Uniform Statute in L. WAGGONER, FUTURE INTERESTS IN A NUTSHELL 301–21 (1981).

terminate the trust and create special powers of appointment in the beneficiaries.[29] It is likely that the unskilled draftsman will not foresee all these possible changes and draft appropriate provisions. In giving the client of the unskilled a wait-and-see period of 90 years, the Uniform Statute may leave the client's family much worse off than if a shorter wait-and-see period were chosen.[30]

If wait-and-see is going to save the work of a thoughtless draftsman, it should save it for as small an amount of time as is reasonably calculated for a potential perpetuities violation to work itself out without causing significant problems. This period of time might be the duration of life estates of persons in being, as is provided in the statutes of four states.[31] Or it might be for the lives of persons who can affect vesting of the contingent interest in question.[32] Either of these periods will ordinarily give a generation or two for the perpetuities problem to be resolved. But 90 years seems a wholly unreasonable period of time. So long a perpetuities

29. *See* A. CASNER, *supra* note 26, § 1, art. 7 (power of trustee to apply all or part of principal to support settlor's widow, general testamentary power of appointment in widow); art. 8, § 1 (discretionary power in trustee to spray income among settlor's widow and issue); art. 8, § 2 (discretionary trusts for each child and issue of child, with power in disinterested trustee to terminate trust, and with special power of appointment in each child).

30. Another largely unrecognized problem with long-term trusts is the difficulty of removing a corporate trustee that immoderately increases its fees or of successfully combatting excessive fees in court. The longer the trust the less will fees be regulated by competitive forces in the market.

Under UNIFORM PROBATE CODE § 7-201 (6th ed. 1982), continuing court jurisdiction over testamentary trusts is eliminated. (Courts have never had continuing supervisory jurisdiction over inter vivos trusts.) After California adopted this provision of the Uniform Probate Code in 1983, some trust companies raised their fees an inordinate amount, presumably because they are no longer subject to routine judicial review of their accounts. The California Law Revision Commission has recommended legislation to provide that one trust company can be substituted for another when it is considered to be appropriate to do so by the beneficiaries. *See* CALIFORNIA LAW REVISION COMMISSION, STUDY L-3010, MEMO. 87-54 (1987). Should the legislation permit an out-of-state trust company to be substituted? If so, would the state law governing the trust change to the law of the new trustee's domicile? Pressure for a "trustee substitution statute" may grow with a rise in the number of long-term trusts.

31. *See* Connecticut, Maine, Maryland, and Massachusetts statutes cited *infra* notes 133–34.

32. *See* Alaska, Florida, Kentucky, Mississippi, Nevada, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, South Dakota, Vermont, and Virginia statutes and decisions cited *infra* notes 135–37.

period permits, as Professor Leach observed, "a capricious exercise of the power of the dead hand."[33]

IV. A Wait-and-See Period of 90 Years Is More Than a Saving Clause; It Is an Alternative Perpetuities Period Inviting an Increase in Dead Hand Rule

A. *It Invites 90-Year Trusts*

A wait-and-see period measured by a period of 90 years is not merely a saving clause. It offers the draftsman an alternative perpetuities period of 90 years.[34] Hence, it invites lawyers and others to create trusts for 90 years and use the maximum amount of time permitted by law.[35] Indeed, in

33. J. Morris & W. Leach, *supra* note 17.

34. In California, an alternative 60-year perpetuities period is available to the drafter. Cal. Civ. Code § 715.6 (West 1982). I am told by experienced California trust attorneys that they have never seen a California trust drafted to last for 60 years, presumably because anyone knowledgeable about perpetuities who wants to tie up property so long can draft a trust lasting for 90 or 100 years by using a dozen healthy babies as measuring lives. Then too, since the trust might, under some conceivable circumstances, be governed by the law of another state, it is prudent to use the common law perpetuities period to govern the duration of the trust.

If the period of years were increased to the maximum obtainable by using extraneous measuring lives (e.g., 90 years), and the period were uniformly adopted in this country, and if the tax advantages of a 90-year trust were well-advertised, there is a good chance that lawyers would shift over to using a 90-year period. The California experience up to now indicates little about what would happen under those circumstances.

In England, lawyers can use a fixed period of up to 80 years to govern the duration of a trust, if they specify such a period. English Perpetuities and Accumulations Act, ch. 55, § 1 (1964). This power was allowed in an attempt to wean lawyers away from measuring the duration of a trust by royal lives. It is interesting to observe that the English "royal lives clause" is the equivalent of Leach's "dozen healthy babies" clause; royal lives (e.g., "the issue of George VI") are practical as extraneous lives because they are ever so much easier to identify and keep up with than lives of ordinary extraneous babies. However, the length of a trust does not matter very much in England, because the tax structure, which hits long trusts extremely heavily, makes them unpopular, and because under the English Variation of Trusts Act of 1958, 6 & 7 Eliz. 2, ch. 53, § 1, the living adult trust beneficiaries can secure judicial rearrangement or termination of the trust on almost any justification. *See* L. Sheridan & G. Keeton, The Law of Trusts 348–61, 374–91 (11th ed. 1983); *see also infra* note 149 and accompanying text.

35. Because the Uniform Statute is satisfied if an interest vests *in interest* within 90 years, a trust can be created to last for considerably more than 90 years. A trust can be created to pay the income among the settlor's issue per stirpes from time to time living for 90 years, and then to pay the income to the settlor's issue living 90 years from now for their lives, and then to distribute the principal to X charity. All future interests vest in interest in 90 years. With any luck, the settlor's

view of the fact that the common law Rule is put in dead storage for 90 years by the Uniform Statute, the likelihood of this invitation being accepted will probably grow as the years go by.

A 90-year perpetuities period may lead to a substantial increase in the number of long-term trusts measured by the period of 90 years. These trusts may be standardized, with resulting unsuitable rigidity, and they may be marketed aggressively by fiduciaries and financial advisors selling estate and transfer tax avoidance for at least 90 years. The exemption of one million dollars (two million dollars per married couple) from the generation-skipping transfer tax may make a 90-year trust particularly attractive to the rich.[36] If 90-year trusts are widely advertised and marketed, citizens concerned about the inequality of wealth, particularly inherited wealth that passes tax-free from generation to generation, may press Congress to discourage such trusts by taxation.[37] As the generation-skipping tax exemplifies, Congressional tax measures curbing long-term trusts are likely to bring headaches for every estate planner. A 90-year perpetuities period is asking for tax trouble.

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issue living 90 years from now will include some young children, and so the trust might run for 150 years or so.

36. I.R.C. §§ 2631(a), 2652(a)(2) (1986).

In states with estate or inheritance taxes exempting life estates from taxation, long-term trusts may offer significant tax advantages no longer available under the federal generation-skipping tax.

See Bloom, *supra* note 26, at 54:

> Rather than benefitting the average consumer, wait-and-see legislation will likely benefit the wealthy consumer of legal services. Indeed, if the 90-year period-in-gross version of the USRAP is widely adopted, the estate planning bar will likely encourage their wealthy clients to prolong the duration of trusts to obtain tax benefits.

For a recent example of such estate planning advice, see Plaine, *Generation-Skipping Transfer Tax Contained in the Tax Reform Act of 1986 (H.R. 3838)*, 13 PROB. NOTES 18 (1987).

37. When Professor Leach called attention to the fact that Delaware's unusual statute on special powers of appointment made it possible to tie up property in the family potentially forever (*see* Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 653 n.37 (1938)), Congress amended the Internal Revenue Code to provide, *inter alia*, that if a donee of a special power of appointment exercises the power by will so as to create a general inter vivos power, the property subject to the special power will be includible in the donee's gross estate. I.R.C. § 2041(a)(3) (1986). *See* J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 823–24 (3d ed. 1984). Congress thus may be expected to keep a distant eye on perpetuities legislation permitting overly long trusts.

Delaware, the home of the entrenched DuPont dynastic trusts and the state that gave us troublesome Section 2041(a)(3) of the Internal Revenue Code,[38] has recently upped the ante on the Commissioners on Uniform State Laws. In 1986, Delaware completely abolished the common law Rule for interests in trust and provided a 110-year wait-and-see period for such interests.[39] This may be a bid by Delaware trust companies for more trust business from out of state. It would be a sour turn of fortune if the various states were to start bidding contests for long-term trust business. Yet, as the Delaware move shows, it is hard to defend 90 years against dynastic forces urging 110 years or even 150 years. Once the great compromise between the judges and the dynastic rich ("lives in being plus 21 years") is cast aside, there is no principled stopping place in sight—only some arbitrary period of years or total abolition of the Rule against Perpetuities. Each state can have a different period of years.

If the wait-and-see period is measured by the relevant lives in being, no alternative perpetuities period is created. No substantial increase in long-term trusts is likely to ensue. At present, lawyers can tie up property for the full length of the common law perpetuities period by using a dozen healthy babies as measuring lives. Yet, because of the difficulties in selecting and tracing a dozen healthy babies from extraneous families and their inappropriateness to the proper objectives of family estate planning, lawyers do not do so. It seems obvious that, by removing the problems associated with using extraneous lives, the Uniform Statute opens the door to a lengthy extension of the dead hand.

B. *It Extends the Period of Accumulations*

An accumulation of trust income is valid until the perpetuities period expires.[40] Under the Uniform Statute, trust income can be ordered accumulated for 90 years. Although income tax advantages in accumulating income and taxing it

38. *See supra* note 37.

39. 65 Del. Laws 422 (1986), *amending* DEL. CODE ANN. tit. 12, § 213 (Supp. 1986).

40. RESTATEMENT (SECOND) OF PROPERTY, § 2.2(1).

to the trust have been abolished,[41] society still should keep a wary eye on accumulations of income. Accumulations of trust income have undesirable social consequences. The income must be reinvested by the trustee using fiduciary standards; it cannot be spent by the beneficiaries. Accumulations of income also tend to build up the concentration of wealth in fewer people and extend dead hand control.

The Uniform Statute makes a 90-year period available for accumulation of income, which will be substantially longer in most cases than the common law perpetuities period.

C. *It Extends the Termination Date of Trusts*

It is a generally accepted rule that a trust may be terminated by the beneficiaries, regardless of the settlor's intent, after the period of the Rule against Perpetuities has run.[42] No trust can be made indestructible by the settlor for a period longer than the perpetuities rule allows. Under the common law, this period is relevant lives in being plus 21 years. Under the Uniform Statute this period is 90 years.[43]

Inasmuch as the common law perpetuities period is, in the usual case, far shorter than 90 years, the Uniform Statute permits the dead hand to control trust duration for a longer period of time.

D. *It Validates Noncharitable Purpose Trusts for 90 Years*

The increase in duration of trusts resulting from the 90-year perpetuities period will not be limited to trusts for private beneficiaries. Trusts for noncharitable purposes will also be affected.

Charitable trusts are exempt from the Rule against Perpetuities. Noncharitable purpose trusts are subject to it. Generally, there are three kinds of noncharitable purpose trusts: (a) trusts for noncharitable associations; (b) trusts for benevolent purposes; and (c) honorary trusts for pets. Any

41. Under the Tax Reform Act of 1986, accumulated income is taxable to the trust at the maximum 28% rate. *See* Petkun & Lerner, *Income Taxation of Trusts and Estates Under TRA 86*, 66 J. TAX'N 38 (1987).

42. IA A. SCOTT, THE LAW OF TRUSTS § 62.10(2) (W. Fratcher 4th ed. 1987); RESTATEMENT (SECOND) OF PROPERTY, e.g. § 2.1 (Donative Transfers) (1983).

43. UNIFORM STATUTE, *supra* note 3, § 1, comment G at 101, § 3, comment at 106.

trust of one of these types is void if it can continue for more than lives in being plus 21 years.[44] Thus a trust for the benefit of the Newport Yacht Club, or a trust to serve oysters annually at state bar conventions, or a trust to care for "my dog Trixie" is void. Although the Uniform Statute is silent about its effect on noncharitable purpose trusts, it appears to validate them for 90 years.

Lawyers drafting noncharitable purpose trusts almost never put in a perpetuities saving clause of any type. They never seem to have the Rule against Perpetuities in mind when creating purpose trusts. Under the general theory of the Uniform Statute, the Act inserts in the work of a thoughtless lawyer a saving clause of 90 years.

Noncharitable purpose trusts have marginal social utility, and dead hand control of property for these purposes should be severely limited. It may be reasonable to permit benevolences of this type to last for 21 years (which would be the result in almost all of these cases if the common law perpetuities period were used for wait-and-see).[45] But 90 years seems far too long a period of time to honor the noncharitable whims of the dead.

V. THE UNIFORM STATUTE INCREASES THE INALIENABILITY OF LAND

A. *It Extends Forfeiture Restrictions on Use of Land*

One of the most objectionable "perpetuities" in land is a forfeiture restriction on the use of land that may endure forever. Take this case: "O conveys Blackacre to the Baptist Church, but if the church ceases to use Blackacre for church purposes, then to A and her heirs." Under the common law, A's interest is void. It violates the Rule against Perpetuities. The church has a fee simple absolute. If the Uniform Statute is in effect, A's interest is valid for 90 years. In his first article advocating perpetuities reform, Professor Leach spent several pages inveighing against the *Woburn Church* case, where a church had a defeasible fee and was forced out of existence after 90 years because it could not sell its land and move, with its parishioners, out of an area that had

44. *See* Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1701–05 (1985).

45. *See id.*

become industrial.[46] How supremely ironic it is that the Uniform Statute—labelled a "reform" statute—validates precisely what Leach denounced.

If, in the above example, the right to enforce forfeiture had been retained by the grantor, it would have been valid. Possibilities of reverter and rights of entry retained by the grantor are not subject to the Rule against Perpetuities. The long duration of these interests has been criticized by virtually every commentator on the Rule. Yet, in dealing with forfeiture restrictions on the use of land, the Uniform Statute has gone in exactly the opposite of the directions it ought to go. First, instead of restricting the duration of possibilities of reverter and rights of entry, the Uniform Statute has left them alone. Second, the statute has validated for 90 years a comparable executory interest enforcing forfeiture, which would be void at common law. Thus is the dead hand extended.

B. *It Validates Donative Options for 90 Years*

The Uniform Statute applies only to donative transfers, and therefore it does not apply to commercial options. Commercial options are freed of any time limit on their exercise on the ground that they will be appropriately limited by bargaining or by applying the general principles of contract law requiring performance within a reasonable time. Donative options are another matter. As the Uniform Statute applies to all donative transfers, donative options appear to come within its sweep. Such options, validated for 90 years, can reduce the marketability of land. Thus suppose that a testator devises Blackacre to A and her heirs, and gives B and his heirs an option to buy Blackacre by paying A or her heirs $50,000. This option, which is exercisable by B or his heirs or assigns without a time limit, violates the common law Rule against Perpetuities; it is void. Under the Uniform Statute, the option is valid for 90 years.

Whether a transfer is donative may be a matter of dispute in some cases. The commentary to the Uniform Statute resolves one such case. It says that where A purchases an interest in property from O and orders O to transfer the interest to B, the transfer is donative and the interest given B

46. Leach, *supra* note 2, at 741–45.

is subject to the Act.[47] Hence if A pays the consideration for an option that O grants to B, B's option is a donative transfer and is valid for 90 years. On the other hand, if B had paid the consideration himself, the option would be exempt from the statute and subject to whatever reasonable time limitations are imposed under the law of contracts. For a violation of the Rule against Perpetuities to turn on who paid the consideration makes as little sense as having it turn on whether the interest is created in the transferor or a transferee.

VI. No Published Empirical Studies Support a Substantial Expansion of the Perpetuities Period

When an alternative perpetuities period of 90 years is proposed, substantially extending the reach of the dead hand, supporting empirical studies are called for. Such studies ought to include the following:

1. What is the average duration and the longest duration of different types of trusts? Empirical data are essential for appraising the likely effect of a 90-year perpetuities period on trust duration. Even anecdotal data are better than none at all; information from experienced lawyers and trust officers in New York and other states should not be difficult to obtain. Before adopting the Uniform Statute, we need a reliable study of how much a 90-year period will extend the current period practically available to the dead hand.

Inasmuch as the drafting committee did not publish any study, I made a few inquiries on my own just to see what experienced lawyers might tell me. I asked William N. Throop, Jr., senior partner of Davidson, Dawson & Clark, a New York law firm specializing in estates and trusts, how long, in his experience, family trusts endure. Mr. Throop replied that, on the basis of mortality tables, he expected none of the many trusts of which he is trustee, almost all of which have special powers of appointment, to endure more than 60 years. The longest trust his firm has ever had, closed some years ago, lasted 73 years.[48] I asked partners in

47. Uniform Statute, *supra* note 3, § 4 comment A at 110.

48. Letter from William M. Throop, Jr. to Jesse Dukeminier (Apr. 15, 1986). Mr. Throop also doubts that the federal generation-skipping tax (on dynastic

Gibson, Dunn & Crutcher and O'Melveny & Myers, two of Los Angeles' oldest and largest law firms, the same question. They replied that a trust lasting more than 50 or 60 years would be quite exceptional.[49] It is noteworthy that in these experienced New York and Los Angeles law firms, dispensing expert advice to the very rich, dynastic trusts—governed by the common law perpetuities period—almost never run more than 60 years. A handful of responses does not, of course, constitute a serious study, but my 35 years in this field give me no reason to doubt that a comprehensive study would roughly confirm the experience of these knowledgeable trust lawyers.

The Uniform Statute provides a 90-year duration for ineptly drafted trusts violating the Rule and offers lawyers an easy way to draw a trust for 90 years by avoiding the dozen-healthy-babies routine. The potential for extension of the dead hand by about 50 percent is striking.

2. What types of perpetuities violations actually occur? What percentage are fertile octogenarian cases, unborn widow cases, excessive age contingency cases, "as long as the law allows" cases, et cetera? What are the ages of the parties? This information would be helpful in determining what type of reform is best, and—if wait-and-see is decided on—what period of time is required to resolve the perpetuities problem. Is 90 years really necessary, or will the perpe-

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trusts) will have much effect on the creation of long-term trusts. The dynastic urge is still strong in the East, and substantial death tax advantages for dynastic trusts still exist under the estate tax laws of New York and surrounding states. In contrast, the California lawyers referred to *infra* at note 49 suggested that dynastic trusts have diminished in popularity in California, partly because of the generation-skipping tax. California abolished its inheritance tax in 1982.

49. Stuart Tobisman of O'Melveny & Myers replied: "I found no active (non-charitable) trusts in our office created before 1935, and I estimate that only one trust created before 1940 will remain in effect after 1999." Letter from Stuart P. Tobisman to Jesse Dukeminier (May 15, 1987).

At Gibson, Dunn & Crutcher, Robert Burch reported: "My experience over the past 30 years has been that we rarely encounter trusts which have lasted or are lasting more than 50 to 60 years." Frank Mallory reported:

> One set of family trusts with which I work has existed for 60 years and still has two beneficiaries living. Both of them were living when the trust was established 60 years ago. Another trust with which I work is also at least 60 years old and has a number of beneficiaries still living. It will probably endure for another 10 to 20 years. However, I think these are more the exception than the rule.

Letter from Charles A. Larson of Gibson, Dunn & Crutcher (with enclosures) to Jesse Dukeminier (May 28, 1987).

tuities problem almost surely be resolved during the preceding life estates or lives of persons who can affect vesting of the interest?

In the last 30 years a few researchers have published some useful, though limited, studies of appellate cases.[50] Although appellate cases may not be entirely reliable indicators of the types and frequency of perpetuities violations, they do provide enough information to make an *informed* judgment about the best way to deal with perpetuities errors and about the time required for the invalidating possibility to be resolved.

The Reporter seems to agree with this. Referring to Professor Powell's study of the cases that had reaffirmed the what-might-happen rule between 1956 and 1978, the Reporter says:

> According to a survey of perpetuity cases decided between 1956 and 1978, the vast majority of perpetuity violations were technical violations—fertile octogenarian, administrative contingency, or unborn-widow cases. . . . In technical violation cases, it is all but certain that the contingencies will resolve themselves far earlier than the expiration of the period of time marked off by the perpetuity-period component of the saving clause.[51]

If the contingencies in the "vast majority of perpetuity violations" will be resolved "far earlier" than 90 years, why have a 90-year period?

3. What will happen to the teaching of the Rule if it cannot be violated for 90 years? It would be simple to canvass Property and Wills and Trusts teachers about this matter. If the Rule will not be taught, what is likely to happen in 90 years when the Rule is scheduled to be revived and applied to then-contingent interests? If a 90-year wait-and-see period is merely a transition phase leading to the Rule's abolition, why not abolish the Rule now as Delaware has done?

4. How will permitting a 90-year trust affect the drafting of trusts? Will 90-year trusts become common? If so, is this a good idea? Permitting 90-year trusts may prove to have the most far-reaching consequences of any of the

50. *See* Bloom, *supra* note 26, at 33–38 (recent cases using Lexis); Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 1, 102–13 (1960) (over 100 years of Kentucky cases); McGovern, *supra* note 11 (20 years of cases nationwide).

51. Waggoner, *infra* note 104, at 1718 n.17.

changes of the Uniform Statute. The Reporter says: "If a period of 80 to 100 years were codified as the actual wait-and-see perpetuity period, lawyers might be reluctant to use the flat period in their saving clauses because of the danger that the law of a state that had not enacted the same period of years might apply."[52] This is a puzzling statement from the Reporter for a *Uniform* statute, proposed for adoption in all states. It appears to be saying the Uniform Statute might be saved from its consequences if a lot of states do not adopt it.

5. How have existing perpetuities reform statutes worked? The Massachusetts wait-and-see statute has been in place for over 30 years; the New York statute eliminating specific absurdities and the California statute adopting *cy pres* have been in effect for more than 20 years. To what extent have these statutes eliminated perpetuities violations or litigation? If these statutes have worked, why should they not serve as models for reform elsewhere?

Nowhere in the Official Commentary can I find cited any empirical studies of these fundamental questions, though amassing supporting data is, I would have supposed, one of the more important functions of any group proposing legislation making expansive changes in the law. The National Conference of Commissioners on Uniform State Laws is a respected institution that sends acts to state legislatures with implicit assurances that appropriate underlying studies have been made. The Official Commentary and the Reporter's supporting articles[53] contain—so far as I can find—scant empirical data about what actually happens in the trust world, no data-supported projections of what the effect of the act will be on the drafting of trusts, no careful consideration of how alternative reforms, already in place, have worked, and—as we shall see—pitifully little discussion of the policy implications of the act. Were Congress to act in such a fashion, it would be viewed as little short of scandalous.

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52. *Id.* at 1726 n.44.

53. *See* Waggoner, *supra* note 24; Waggoner, *infra* note 66; Waggoner, *infra* note 99; Waggoner, *infra* note 104; Waggoner, *infra* note 108.

VII. The Commentary to the Uniform Statute Inadequately Discusses the Serious Policy Implications of the Act

Although the Official Commentary, adopting a certain evangelistic tone, is full of reassurances and hyperbole, it is practically devoid of serious policy discussion. I have already noted that there is no discussion at all of the consequences of putting the common law Rule against Perpetuities in dead storage for 90 years, with abolition of the Rule as a potential effect. Nor is there any discussion of the statute's effect on noncharitable purpose trusts or on forfeiture restrictions on land use. Now I will discuss two common criticisms of wait-and-see and how they are dealt with by the Reporter.

A. *Wait-and-See Makes Title Uncertain for the Waiting Period*

First, opponents of wait-and-see have long argued that waiting to determine the validity of an interest may bring many practical difficulties because of the uncertainty of title. The Reporter provides this reply:

> One of the early objections to wait-and-see should be mentioned at this point, because it has long since been put to rest. It was once argued that wait-and-see could cause harm because it puts the validity of property interests in abeyance—no one could determine whether an interest was valid or not. This argument has been shown to be false. . . . It is now understood that wait-and-see does nothing more than affect that type of [non-vested] future interest with an *additional* contingency. To vest, the other contingencies must not only be satisfied—they must be satisfied within a certain period of time. *If* that period of time—the allowable waiting period—is easily determined, as it is under the Uniform Act, then the additional contingency causes no more uncertainty in the state of the title than would have been the case had the additional contingency been originally expressed in the governing instrument.[54]

The moment I read this passage, a sensation overcame me as of one who has just put his foot in quicksand. The gist of the answer comes in the last sentence. Although steadying this sentence is not easy, it appears to say that the additional contingency added by the act—that the otherwise invalid

54. Uniform Statute, *supra* note 3, at 81 (prefatory note).

contingent remainder will be valid if it actually vests within 90 years—causes no more uncertainty than if the contingency (presumably governed by a saving clause)[55] had been explicitly placed in the instrument itself. But the point is: wait-and-see and saving clauses do not operate alike. Wait-and-see says, "This interest may or may not turn out to be valid." A saving clause says, "This interest is valid." It cannot be denied, I think, that interests of questionable validity may cause problems not caused by valid interests.[56] I do not see how a claim that *potentially invalid* contingent interests may give rise to serious practical difficulties during the wait-and-see period is "shown to be false" by a demonstration that similar, *but valid*, contingent interests can be created.

B. *Wait-and-See Extends the Period of Dead Hand Control*

The second criticism of wait-and-see, first voiced many years ago by Professor Simes,[57] is that waiting to see extends dead hand control during the waiting period. Reasoning from a policy position that it is socially desirable for the wealth of the world to be controlled by living persons and not by the dead,[58] Simes objected to the extension of control by the dead implicit in waiting to see whether an interest created by the dead is valid. Simes thought it objectionable to wait-and-see even during *lives in being* when the testator died. He did not consider waiting during the lives of persons *born after* the testator's death, probably because he never imagined anyone suggesting such a thing. Times have

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55. I say "presumably governed by a saving clause" because a clause directing the courts to wait-and-see for 90 years (or for any period) cannot now lawfully be placed in the governing instrument without a "dozen healthy babies" saving clause or something similar.

56. Elsewhere, the Reporter recognizes this. In discussing *Estate of Pearson*, see *supra* text accompanying note 28, Professor Waggoner says, "The inability of the estate's administrator to obtain a determination regarding the validity of the remainder interest in favor of the charitable organizations apparently cost the estate an estate tax charitable deduction." L. WAGGONER, *supra* note 28, at 305.

Another difference between creating an interest subject to a saving clause and an interest subject to the wait-and-see doctrine concerns the lawyer's potential malpractice liability. In the former case, there is none. In the latter, the lawyer who drafts the instrument has potential malpractice liability (for 90 years under the Uniform Statute?). *See infra* note 157.

57. Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179, 188 (1953).

58. For further explication of this policy, see L. SIMES, PUBLIC POLICY AND THE DEAD HAND 59–60 (1955).

now changed in Ann Arbor. Professor Simes' successor at the University of Michigan, Professor Waggoner, believes that it is not objectionable to wait during the lives of afterborn persons, at least not in some cases.

The disdain of the Reporter for the ancient and prudent limitations on the dead hand is revealed in a remarkable passage in the Prefatory Note stating that the wait-and-see period ought to end on the death of afterborn beneficiaries:

> [I]t 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*.[59]

The Reporter gives two examples to illustrate his point.[60] First, the Reporter believes that in a devise to the testator's children, then to the testator's grandchildren who reach 30, the waiting period *should* end on the death of the last survivor of the testator's *afterborn grandchildren* (which would permit the insertion of any age contingency, even that of reaching age 60 or 70).[61] In the Reporter's second example, he contends that in a devise to the testator's children for their lives, then to the testator's grandchildren for their lives, then to the testator's great grandchildren in fee simple, the waiting period *should* end on the death of the youngest *afterborn grandchild*. This view might extend permissible dead hand control for an entire extra generation where the testa-

59. UNIFORM STATUTE, *supra* note 3, at 84 (prefatory note) (emphasis added). Of course, a perpetuities period designed to permit dead hand rule for lives in being plus 21 years is not "scientifically" designed—indeed, is not intended at all—to permit rule during afterborn lives.

60. *Id.* at 83.

61. In Second Nat'l Bank of New Haven v. Harris Trust & Sav. Bank, 29 Conn. Supp. 275, 283 A.2d 226 (1971), the donee of a general testamentary power of appointment created in 1922 by the donee's mother appointed in further trust for her daughter Mary (aged 40), who was not alive when the trust was set up. The donee appointed the trust income to Mary (granddaughter of the settlor) for 30 years, and then gave the principal to Mary, if living, and if Mary did not survive to age 70, to Mary's issue. I believe it is unwise policy for several reasons, including some a psychiatrist might offer, to allow controlling ancestors to keep the principal out of Mary's hands until she reaches 70, and then give it to her, if living. And the Rule against Perpetuities forbids that result. As I read the Reporter's view of policy, however, it is sound to keep Mary in tutelage until she is 70. Or perhaps his view is that it is sound only if Mary had a sibling alive in 1922; *see infra* note 62.

tor has no grandchildren at the time of his death.[62] Upon this assumption of wise policy the Reporter says that a 90-year period is preferable to an actual measuring lives wait-and-see period because it gives a longer "margin-of-safety" (meaning a period of time that improves the chances of the dead hand being able to work its will more than 21 years after lives in being are dead), and because, "unlike the actual-measuring-lives approach, the flat 90-year period cannot be cut short by irrelevant events"[63] (irrelevant events being the "early" deaths of the testator's descendants in being at his death which start the 21-year period running). "Plainly," the Reporter concludes, "no rational connection exists between the premature deaths of the measuring lives and the time properly allowable" for interests to vest in, or at the death of, afterborn persons.[64] Plainly, in my view, the learned Reporter has lost contact with the sound reasons why Lord Nottingham and his successors fixed on *lives in being* plus 21 years as the perpetuities period.[65]

In a recent article, published soon after the promulgation of the Uniform Statute, Professor Waggoner attempts to shore up the reasoning in the Prefatory Note.[66] With respect to the two examples referred to above, Waggoner ex-

62. It is not wholly clear whether the Reporter believes that the testator should be able to control during the grandchildren's generation where there is no grandchild alive at the testator's death. In his examples in the Official Commentary he posits the existence of grandchildren at the testator's death, but he does not explicitly say their existence is crucial to testator's control during this generation. In an earlier publication the Reporter stated that he was considering proposing a fixed period, with a provision that any interest would be valid "if it vests within the lifetime of or at the death of a grandchild of the transferor, whether or not that grandchild was in being at the creation of the interest." Waggoner, *supra* note 24, at ¶ 703.4 n.22. This suggests that the existence of one grandchild is not crucial.

In a subsequent publication, however, the Reporter tries only to justify control during the grandchildren's generation when the testator could see and know at least one grandchild. *See infra* note 68.

63. UNIFORM STATUTE, *supra* note 3, at 84 (prefatory note).

64. *Id.* In the discussion of these two examples, numerous policy assumptions are hidden in the Reporter's Orwellian prose—all favoring extension of the dead hand. An example is the word "premature" in the quoted sentence. If the policy of the law is to allow the testator to control during lives he knew and 21 years thereafter, there is no such thing as a "premature" death. A death is "premature" only if the testator is trying to control for more than 21 years after lives in being.

65. *See infra* text accompanying note 71.

66. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569 (1986).

plains more fully why he believes the testator should be able to control during the lives of afterborn grandchildren. He writes:

> Accept, for the moment, a proposition that will be developed later: conferring validity on these examples fits well within the policy of the Rule, for the reason that the afterborn beneficiaries in both of these examples are members of the same generation as (or an older generation than) that of the youngest of the measuring lives.[67]

Although Professor Waggoner says this proposition "will be developed later," I looked in vain for any development of *reasons* why the existence of one grandchild should open the door to the testator's control of an entire generation. The common law is based on the idea that the testator should control only for the lives of persons he knows. If the testator deems one known grandchild incompetent to manage money, why should the law honor such a judgment about unknown grandchildren? The fact that they are of the same generation has heretofore been deemed irrelevant under the reasoning permitting control during lives personally known to the testator.

But let us not belabor this point. Professor Waggoner has a very important conclusion to draw from his assumption, and it is this conclusion that concerns us the most. Waggoner concludes that if the common law standard of permitting dead hand control only during lives in being known to the testator

> can be taken to mean that donors should be allowed to exert control through the youngest generation of descendants they knew and saw, *or at least one or more but not necessarily all of whom they knew and saw*, both [perpetuity saving clauses and the Uniform Act's 90-year period] effectuate this standard well. Certainly, by this standard, the Example Two trust fits well within the policy of the Rule.[68]

Even if one accepts Waggoner's assumption that if the testator sees one grandchild, he ought to be able to control the entire generation of grandchildren, Waggoner's conclusion that a 90-year perpetuities period effectuates "well" a standard that the testator can control only during lives he

67. *Id.* at 578.

68. *Id.* at 587 (emphasis added to indicate where the camel's nose under the tent permits the whole camel to go inside).

sees and knows is surely a dubious sequitur. Ninety years can cover several generations where no member was alive at the testator's death. To test this, suppose that a testator creates a 90-year trust for his issue from time to time living. How many of his issue alive within the next 90 years will he see and know? Try this on one of your own ancestors who died approximately 90 years ago. I've tried it on one of mine. I found that there were considerably more grandchildren, great-grandchildren, great-great-grandchildren and great-great-great-grandchildren born within the 90 years after the ancestor died than were alive at the time of his death. All members of the last three generations were born after the ancestor's death. To conclude that a trust for all these people, denying them control of their shares, is justifiable on the ground that my great-grandfather should be permitted to judge the competence of one or more of his known issue involves a leap of reasoning so wide that reason itself seems to fall short of the other side.

C. *The Commentary Puts Its Policy in a Nutshell*

The policy implications of the Uniform Statute on the extension of the dead hand are summarized in one sentence in the Prefatory Note to the Uniform Statute. Yet what an arresting sentence it is, standing out in bold italics. The sentence reads: "*Aggregate dead-hand control will not be increased beyond what is already possible by competent drafting under the Common-law Rule.*"[69] This allegation ignores the ease with which a 90-year trust can bypass the difficulties associated with using a dozen extraneous babies as measuring lives and the likelihood that 90-year trusts will be increasingly drafted.[70] If dead hand control is analogized to pollution, this sentence in the Prefatory Note appears to be saying something like, "If an easy method of pollution is made available, aggregate pollution will not be increased beyond what would result if

69. UNIFORM STATUTE, *supra* note 3, at 84 (prefatory note). Professor Waggoner expands on this a bit in Waggoner, *supra* note 66, at 580–81. He writes: "Because only a fraction of trusts and other property arrangements are incompetently drafted, the modest increase in aggregate dead-hand control that would be effected under USRAP is hardly significant in terms of national policy." Waggoner has his eye fixed on the past and not on the potential of what he has wrought.

70. *See supra* text accompanying notes 34–37.

all industry polluted at the level skillful and careful polluters now can but rarely do." That's logic for you, with a sting!

VIII. A WAIT-AND-SEE PERIOD USING THE COMMON LAW PERPETUITIES PERIOD IS PREFERABLE TO A 90-YEAR PERIOD

A wait-and-see period measured by lives in being is preferable to a period of 90 years. I have already noted that using the common law perpetuities period for wait-and-see does not offer an alternative perpetuities period, as does 90 years, which invites an increase in long-term trusts. I have also mentioned that using the lives governing the common law perpetuities period will not lead to a decline in classroom teaching of the Rule or risk bringing on its abolition. Using the lives that govern the common law perpetuities period for wait-and-see requires continued knowledge of the common law. Moreover, the common law perpetuities period will ordinarily be far shorter than 90 years and the potential uncertainties about title associated with wait-and-see will have much less chance to develop. There are, in addition, other reasons for preferring the common law perpetuities period to a 90-year period for wait-and-see.

A. *The Common Law Perpetuities Period Is Commended by Experience*

First is the lesson from history and experience. 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. And the reason is as appropriate today as it was in the seventeenth century. 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. Lord Chancellor Nottingham and his successors recognized this concern as legitimate and developed an appropriate period during which the father's judgment could prevail.[71] The father could realistically and

71. For an illuminating examination of the competing interests that influenced the judges in *The Duke of Norfolk's Case*, see Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV.

perhaps wisely assess the capabilities of living members of the family. 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 to 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.

As Lord Hobhouse said, in his lectures on the dead hand:

> A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events. I submit, then, that the proper limit of Perpetuity is that of lives in being at the time when the settlement takes effect.[72]

This "clear, obvious, natural line," drawn by a man who later became a judge of the Privy Council, seems the most plausible reason why the ancient sages selected "lives in being" as the perpetuities period.[73]

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19 (1977). In that great case, decided in 1682, the Earl of Arundel and his lawyer, Orlando Bridgman, created trust indentures to protect the family from the consequences of the insanity of the Earl's eldest son, Thomas. Alienation was curtailed only during Thomas' lifetime, a period Lord Nottingham thought posed no danger of a perpetuity.

72. A. HOBHOUSE, THE DEAD HAND 188 (1880).

73. About 50 years after *The Duke of Norfolk's Case*, the perpetuities period was extended to include an actual minority after lives in being. Thus a father could tie up land during the life of his incompetent son and until his (presently unborn) grandson reached full age. Subsequently the period was extended to lives in being plus 21 years, irrespective of any actual minorities. Gray claimed these extensions were "accidents" rather than products of logical reasoning. *See* J. GRAY, THE RULE AGAINST PERPETUITIES §§ 186–88 (4th ed. 1942). More likely, as Gray himself earlier intimated, the judges were concerned more with establishing a reasonable period than with rigorous theory, which did not take hold authoritatively until the nineteenth century. *See id.* §§ 175–85. Although earlier dicta by some judges indicated that nonbeneficiaries could be measuring lives, this idea was firmly established only in Thellusson v. Woodford, 32 Eng. Rep. 1030, 11 Ves. Jr. 112 (H.L. 1805). *See* A. GULLIVER, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 390–416 (1959); *see also* Leach, in 6 AMERICAN LAW OF PROPERTY, *supra* note 1, at 51 (condemning the allowance of extraneous lives and suggesting that the period was quite sufficient in family transfers when it permitted a man of prop-

This same reasoning is in the minds of estate planners today. Although skillful lawyers can create trusts for the afterborn, by using extraneous measuring lives, they never do so in practice. The Uniform Statute disregards this wisdom and makes it easy for anyone to create trusts for the afterborn which last for 90 years. In so doing, the Uniform Statute has moved the Rule against Perpetuities away from a sensible reason supporting the common law perpetuities period and settled it on a base lacking foundation in experience.

Another reason for preferring the common law perpetuities period is that it tends to channel persons desirous of creating long-term trusts to lawyers who are experienced in trust drafting. Long-term trusts may develop many troublesome problems over the years, and persons contemplating such trusts need the counsel of an experienced estate planner. No small part of the job of an experienced attorney is to point out to the client the nonwisdom of a rigid long-term trust. The law should channel clients desiring long-term trusts to attorneys who know how to draft them properly. Using the common law perpetuities period of lives in being plus 21 years for the wait-and-see period serves this channeling function. Like the what-might-happen test it replaces, waiting to see for the common law perpetuities period acts as a wholesome deterrent to persons nonconversant with the law of future interests who might try to create long-term trusts. The unskilled lawyer tends to be wary of "lives in being" and to create trusts of short duration. A 90-year perpetuities period makes it easy for the unskilled to create a long-term trust for 90 years.

B. *The Common Law Perpetuities Period Strikes a Fair Balance Between Generations*

Another reason for using lives in being for the wait-and-see period relates to Lewis Simes' argument that perpetuities law should strike a "fair balance" between what the present generation wants and the desire of future generations to do what they want with inherited property.[74] Obvi-

erty to "provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority.").

74. *See* L. SIMES, *supra* note 58, at 58–59.

ously persons can disagree about what balance is fair. But it does seem to me that lives in being plus 21 years is about right and has the acceptance of history on its side. In contrast, 90 years seems far too long. It increases the time practically available to the dead hand by about 50 percent.[75]

It is interesting to observe here that the English, who originally set the "fair balance" at lives in being plus 21 years, have since retreated from giving the dead hand so much control. In *Saunders v. Vautier*,[76] the court held that all the beneficiaries of a trust may terminate it despite the contrary intention of the settlor. And in the 1950s, the English Variation of Trusts Act of 1958[77] gave the court power to consent to modification or termination of the trust on behalf of incompetent, minor, or unborn beneficiaries wherever the court finds it beneficial to the beneficiaries.[78] Thus the English have come to regard property in trust as the beneficiaries' property, not the settlor's property.

In contrast, American courts reject the rule of *Saunders v. Vautier*, and refuse to terminate a trust if it would defeat a material purpose of the settlor.[79] American courts, unlike the English courts, continue to view the property as the settlor's. Thus, because of the inability of beneficiaries to terminate trusts in this country, any extension of the perpetuities period means extended dead hand control, which it would not necessarily mean in England. How paradoxical it is: While the aristocratic English, with their long dynastic traditions, are eliminating effective dead hand control, even during the allowable perpetuities period, the Commissioners on Uniform State Laws are recommending legislation for a democratic country with egalitarian ideals that extends dead hand control far beyond what the English permit.

C. *The Lives Governing the Common Law Perpetuities Period Are Easily Traceable*

The Reporter for the Uniform Statute gives two basic reasons for rejecting the use of the common law perpetuities

75. *See supra* text accompanying notes 48–49.

76. 49 Eng. Rep. 282, 4 Beav. 115 (1841).

77. 6 & 7 Eliz. 2, ch. 53, § 1.

78. *See infra* note 149 and accompanying text; *see also supra* note 34.

79. *See, e.g.*, Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889); 4 A. SCOTT, THE LAW OF TRUSTS § 337–37.8 (3d ed. 1967).

period for wait-and-see.[80] First, the Reporter 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.[81] This is probably true if "twelve healthy babies" selected at random are used as measuring lives, but in the real world where "twelve healthy babies" rarely exist, this argument is much exaggerated. The common law measuring lives for wait-and-see are, in almost all cases, some of the beneficiaries of the trust or parents or grandparents. The trustee must keep up with the deaths of these persons in any event in order to properly administer the trust.

D. *The Lives Governing the Common Law Perpetuities Period Are Easily Ascertained*

The second objection of the Reporter to using the common law perpetuities period is more fundamental. The lives that govern the common law perpetuities period applicable to a particular interest are the persons who can affect vesting of the particular interest.[82] These are sometimes said to be the lives causally related to vesting. The Reporter says it is not clear who these persons are in every case.[83] The Reporter is stubborn in his view, but he is absolutely wrong.

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80. The Reporter also argues that a wait-and-see period marked off by measuring lives plus 21 years is arbitrary. *See* Waggoner, *supra* note 24, at ¶ 703.4; UNIFORM STATUTE, *supra* note 3, at 82–84 (prefatory note). Admittedly, the 21-year period is arbitrary. Some scholars have argued that only actual minorities rather than a 21-year period in gross should be part of the Rule. But I do not see how the use of *actual lives* for wait-and-see is arbitrary, if you accept the reasons usually advanced for using actual lives in being as a measure of dead hand control. *See supra* text accompanying notes 71–73. Gray said: "The true theory of the Rule against Perpetuities, so far as any artificial rule can be said to have a theory, is that no future interest must begin beyond lives in being." J. GRAY, *supra* note 73, § 187. Under wait-and-see, the law simply waits out the relevant lives known to the testator to see if the future interest vests ("begins," in Gray's words) beyond these lives. Using measuring lives for wait-and-see is arbitrary, I suggest, only if you believe that lives in being plus 21 years does not give a long enough time for the dead hand to work its will. The Reporter's views on this point are discussed *supra* at notes 59–68 and accompanying text.

81. UNIFORM STATUTE, *supra* note 3, at 83 (prefatory note).

82. *See* Dukeminier, *supra* note 44, at 1654–74.

83. This approach was not adopted because, among other reasons, it was concluded that it would shift to the courts the unwelcome task of divining who the measuring lives are on a case-by-case basis in an environment in which the exact meaning of 'persons . . . who can affect the vesting of the interest' is disputable: Not even perpetuity scholars, to say nothing of non-experts in the field, can agree on its precise meaning.

From the early years of the wait-and-see movement, a group of us reformers believed that the logic of the common law provided a natural wait-and-see period. This period was measured by lives causally related to vesting. The principle of causal relationship, however, was not entirely clear, nor was it certain that the principle could identify the causally-related measuring lives in every case. For over 20 years I hoped that someone in this group would undertake the arduous task of probing the common law, unravelling its logic and its knots, and clarifying the meaning of causal relationship. But Barton Leach[84] died. John Morris[85] died. Sir Robert Megarry was appointed Vice-Chancellor of England, running the royal courts of equity, and was doubly busy turning out new editions of his superb treatise on English property law.[86] His co-author, Professor Wade, was going back and forth between the chairs of English law at Oxford and Cambridge, finally settling in as Master of Gonville and Caius College at Cambridge. Robert Lynn,[87] lately elevated to the John Deaver Drinko-Baker & Hostetler chair at Ohio State, had charitable trusts, pension plans, and other things on his mind. My hope that one of these eminencies would

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UNIFORM STATUTE, *supra* note 3, at 82 (prefatory note). Although this statement may have had some validity before the logic of the common law was laid out in the *Columbia Law Review* (*supra* note 44), what support does it have now? For the allegation that the meaning of causal relationship to vesting is disputable, the Reporter cites only his pieces in the *Columbia Law Review* in which he strove mightily, but unsuccessfully, to find a hole in the logic of the causal relationship principle. *See* Waggoner, *infra* notes 104, 108. Waggoner could not find a single case—*not one*—where the causal relationship principle did not clearly identify the measuring lives. For more on this, see *infra* notes 103–11 and accompanying text.

84. Leach approved of the causal relationship principle. Remarking on the express provision in the Kentucky statute that the measuring lives be causally related to vesting, Leach said: "This addition seems to me a good idea, especially if it makes my learned friends happier. But I expect that the Vermont and Washington courts will reach the same result without the additional clause; indeed I recommend that they do, if the problem comes before them." Leach, *Perpetuities Legislation: Hail Pennsylvania!*, 108 U. PA. L. REV. 1124, 1146 (1960).

85. *See* Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 498–99 (1964) (saying that "the right general guidance is surely given" by the provision in the Kentucky statute, but the "clear principle" of causal relationship provides the measuring lives for wait-and-see even without the express language).

86. *See* R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 253–54 (5th ed. 1984), for discussion of the inherent common law perpetuities period each interest has, measured by the relevant lives, which the authors believe should be used for wait-and-see.

87. *See* R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 47–50 (1966), for discussion of the wait-and-see period.

make an exhaustive examination of causal relationship faded. The lot fell to me.

So, in early 1985, I sat down to work out the logic of wait-and-see. I first consulted with the doyen of logicians at UCLA, Professor David Kaplan, who immediately put his finger on the problem with the common law Rule in its traditional formulation. "You cannot solve a perpetuities problem logically," he said, "unless you know who are the relevant lives." John Chipman Gray himself said as much, but in a somewhat indirect way. Gray said that the measuring lives at common law must "have a necessary [causal] relation to the event on which the limitation vests."[88] This is the key to understanding the logic of the common law Rule.

It is useless to look at everyone in the world in search for a life that enables you to prove the interest valid. Logical necessity requires you to narrow the candidates for a validating life to persons who have a causal relation to vesting. 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 21 years thereafter*. (It will not 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 perpetuities period applicable to it alone, fixed by the persons who can affect vesting. If an interest will not vest or fail within the perpetuities period applicable to the particular interest, it is void. If we decide to judge the validity of interests by an actualities test, rather than by a possibilities test, logic suggests that we wait and see what happens during these lives that can affect vesting. If the interest actually vests within these lives or within 21 years after they expire (the common law perpetuities period), the interest is good.

Although unravelling the complexities of the common law and fitting the parts together was not easy, when the logic of the common law—in both its what-might-happen and wait-and-see forms—was finally revealed, the causal relationship principle turned out to be an astonishingly simple

88. J. GRAY, *supra* note 73, § 219.2 n.2. RESTATEMENT (SECOND) OF PROPERTY § 1.3, comment b (donative transfers) (1983), puts it this way: "Such [validating] life or lives, if they exist, will be related to the occurrence of the events that lead to the vesting of the nonvested interest in question."

principle to apply. The meaning of causal relationship to vesting and the limitations on who can be measuring lives are dictated by the common law. "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) all conditions precedent are 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 the case of a class gift, any person who can affect a condition precedent attached to the interest of any class member.

There is one major limitation imposed by the common law. 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 measure the perpetuities period. It must be possible to say when the perpetuities period ends. The causal relationship principle abides by the meanings and discipline of the common law.

Upon close and extensive examination, I found that the causal relationship principle could be easily applied to every hypothetical case posed by discussants of wait-and-see. All this requires is logical deduction from fundamental premises. It cannot be fairly said, then, that the causal relationship principle is not workable. Once the logic of the common law is seen, finding the common law measuring lives for wait-and-see is almost child's play for anyone who knows something about the law of future interests. Anyone who wants further illumination on the common law measuring lives for wait-and-see will find extensive explanations in the *Columbia Law Review*[89] and the *Law Quarterly Review*.[90] The logic of the common law, which unifies the possibilities

89. Dukeminier, *supra* note 44, at 1654–74.

test and the actualities test, is concisely analyzed in the *California Law Review*.[91]

E. *Why Have Two Perpetuities Periods?*

To my mind, there is no persuasive case for having two different perpetuities periods: (1) lives in being plus 21 years for the possibilities test, and (2) 90 years for the actualities test. Inasmuch as each interest has its own inherent perpetuities period, the real issue is one of policy: Is it better to have a possibilities test or an actualities test? The period should remain the same however you answer that question.

It is possible to make a case for abolishing the Rule against Perpetuities entirely and substituting 80 or 90 years as the period in which interests must either actually *vest in possession* or fail.[92] The advantage of this would be to rid us of all the old complications of perpetuities law, including the evanescent distinction between vested and contingent interests. But otherwise such a proposal has every disadvantage of the 90-year alternative perpetuities period of the Uniform

90. Dukeminier, *Wait-and-See: The Causal Relationship Principle*, 102 L.Q. REV. 250 (1986).

91. Dukeminier, *supra* note 2.

Using this logic, a student, John Shure, and I have prepared a computer program successfully applying the Rule against Perpetuities to gifts to individuals. We used Prolog, which stands for programming in logic. The computer can solve such problems as "to the first grandchild of A who reaches 21 (or 25)" and "to the first child of A who is a lawyer." For the computer to solve these problems it is necessary to train the computer to determine the relevant lives and the validating life. Furthermore, it is necessary to treat as a validating life any person who enables the computer to show an interest is vested and valid upon creation (something denied by Professor Waggoner, *infra* text accompanying note 108); that is an essential vesting routine the computer must check.

We did not reach class gifts before Shure, a computer whiz, graduated, but our experience so far indicates it is entirely feasible for the computer program to handle class gifts and, ultimately, powers of appointment.

The computer should also be able to determine the wait-and-see lives, which are the lives tested in applying the vesting routines to the particular interest.

92. New South Wales has abolished the common law Rule against Perpetuities entirely and requires interests to *vest in interest* within 80 years, which, of course, preserves the old distinction between vesting in interest and vesting in possession. *See* New South Wales Perpetuities Act, No. 43, § 7 (1984). After enactment, the fixed period of time for perpetuities was discovered to have some unexpected difficulties that cannot arise where the common law period of lives in being is used for wait-and-see. *See* Sappideen, *Perpetuities—Age Reduction and the Application of the Eighty-Year Period: Some Unexpected Problems*, 60 AUSTL. L.J. 471 (1986); *see also* 65 Del. Laws ch. 422 (1986), *amending* DEL. CODE ANN. tit. 12, § 213 (Supp. 1986) (abolishing the Rule and substituting a 110-year period).

Statute. The Reporter has not made the case for such an act, since such is not the Uniform Statute. Nor is it my place to make the case, for I do not believe such a statute is desirable. I stand with the English Law Reform Committee, which was strongly of the view that the common law perpetuities period should continue to apply. The Committee said:

> We know of no serious objections to the period as being excessive in duration, and we can see no real advantage in shortening it, or in substituting a rigid and arbitrarily fixed term of years which might be too long in some cases and too short in others. A period which has grown out of the provisions commonly to be found in wills and trusts has at all events that much to commend it, and seems preferable to any of the alternatives which have been suggested. In the absence of any compelling reasons, whether based on public policy or otherwise (and we can see none), we prefer to leave the permitted period as it is. . . .[93]

IX. WHY THE UNIFORM STATUTE IS THE WAY IT IS

The Uniform Statute is the way it is because Professor Lawrence Waggoner, the Reporter, wanted it that way. It is inevitable that a Uniform Statute, like a Restatement, is the shadow of the Reporter—if the Reporter is insistent in his views.

Judge Charles E. Clark discovered this truth many years ago in the preparation of the volume of the first Restatement of Property dealing with servitudes. Judge Clark sat as an adviser to the Reporter for this volume, Professor Rundell, and, argue as he might, Clark found Rundell could not be moved. Clark wrote:

> Unless the Reporter himself will yield his views to others (a tolerance not characteristic of the scholarly mind), the central administration of the Institute must get behind his views in order that a restatement be forthcoming, and thereafter the administration party is naturally strong enough to carry the matter through to a conclusion. The writer has served as Adviser on Property in one branch or another of the subject practically since the formation of the Institute; and while he has seen many sharp differ-

93. ENGLISH LAW REFORM COMMITTEE, FOURTH REPORT, 1956, CMND. SER. No. 18, at 6.

> ences of opinion, he knows of no instance where the views of the Reporter, persisted in, did not prevail.[94]

It is true, as Clark observed, that academics do not yield easily to the views of others. Unhappily, this has been the story of perpetuities reform. The original reformer, Professor W. Barton Leach, was a gifted teacher (of mine) and a powerful personality, with strong views and a biting wit. His lively writing style was enjoyed by everyone except those skewered by his sharp pen. In writing about why wait-and-see had aroused so much opposition from his academic peers, Leach himself noted that his own personality was the source of much resistance to his ideas:

> There is a sad and humiliating aspect of this distinguished group of professors: they are all my friends of many years standing, and the degree of virulence of their attacks on my ideas is in direct proportion to how well they know me and how closely we have been professionally associated. On the other hand, most of the supporters of my published views are men whom I know only casually if at all.[95]

Unquestionably, Leach's strong personality made it extremely difficult to achieve unanimous agreement among perpetuities experts upon any single reform. And, indeed, Leach set no great store in uniformity. At one place or another in his writings, Leach approved wait-and-see during life estates only, full-scale wait-and-see, reduction of age contingencies to 21, immediate *cy pres*, and wait-and-see plus delayed *cy pres*. Each of these reforms would rid the law of some or all of its absurdities, and Leach, fired up to exorcise the fertile octogenarian and her friends, encouraged each of them to grow.

When the Restatement (Second) of Property came to be written, Professor Casner was appointed Reporter. Casner was Leach's longtime collaborator, and, with Leach, was one of the earliest advocates of wait-and-see. True to the tradition of Restatement Reporters, Professor Casner insisted upon writing full-scale wait-and-see into the Restatement. Like a shadow from the past, Professor Powell, the Reporter for the first Restatement of Property, who had opposed wait-and-see when it was first suggested back in the early 1950s,

94. Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699, 726 (1943).

95. Leach, *supra* note 84, at 1125–26.

rose out of retirement to attack it. He was joined by Professors Berger and Rohan, advisers on the Restatement (Second). Two annual meetings of the American Law Institute were given to the battle.[96] Professor Berger argued strenuously for the adoption of *cy pres*—immediate reformation by a court of invalid gifts.[97] Professor Rohan also would have agreed to immediate *cy pres*, had that reform produced unanimous agreement.[98] But Casner was determined to put wait-and-see into the Restatement, and, as Judge Clark would have predicted, Casner prevailed.

In 1984, the Commissioners on Uniform State Laws decided to propose a uniform statute on perpetuities. They appointed Professor Waggoner the Reporter. A year earlier, in 1983, Professor Waggoner had written a comprehensive article on perpetuities reform.[99] In this article, Waggoner favored the wait-and-see idea, but he opposed using lives causally related to vesting as the measuring lives for wait-and-see. Unfortunately, he misunderstood causal relationship,[100] though others did too at the time he was writing. Waggoner declared the causal relationship principle to be "inferior" to the list of lives laid down by the Restatement (Second), which he thought was "rather easy to understand."[101] Waggoner concluded that the Restatement "not only makes the wait-and-see concept workable but it virtually preserves the mechanical precision inherent in the requirement of initial certainty."[102]

While working on my article for the *Columbia Law Review*,[103] I learned that Professor Waggoner had been appointed Reporter for the Uniform Statute. I sent the drafting

96. *See* American Law Institute, *Proceedings of 1978 Annual Meeting*, 55 A.L.I. PROC. 222–307 (1979); American Law Institute, *supra* note 27, at 424–521.

97. *See* American Law Institute, *supra* note 27, at 453–56 (remarks by Prof. Berger).

98. *See* 5A R. POWELL, *supra* note 18, ¶ 827F[3][h].

99. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983).

100. *Id.* at 1775–76. Waggoner states that in a devise to *A* for life, then to *A's* children who reach 30, *A's* children in being at *T's* death are not causally related to vesting of the remainder. Of course, this is clearly wrong. They are beneficiaries, and beneficiaries—being necessary for a vested interest—are always causally related to vesting. Waggoner even attributed his idea to me, but I deny the parentage. *See* Dukeminier, *supra* note 44, at 1665 n.48, 1667 n.51, for discussion of this and other examples of Waggoner's misunderstanding of causal relationship.

101. Waggoner, *supra* note 99, at 1781.

102. *Id.* at 1780.

103. Dukeminier, *supra* note 44.

committee acting for the Commissioners, including Professor Waggoner, copies of my article. I thought this might prove helpful to them. I proposed a simple wait-and-see statute using as measuring lives the lives that can affect vesting (i.e., the lives you test in your search for the validating life). The Reporter would have none of it. He replied in the *Columbia Law Review*.[104] Waggoner reformulated the premise of the common law, affirmed by Gray and the Restatement (Second) of Property,[105] among others, that the validating life at common law will be found, if at all, only among persons who can affect vesting. Waggoner posited that "people who are connected in some way with the transaction" (as opposed to connected with vesting) are relevant to the search for a validating life.[106] So broad and undefined a premise is not of sufficient logical rigor to permit sequences to be supplied by deduction, as is true of a premise that only lives connected to vesting are relevant. Starting from this imprecise premise the Reporter subsequently had difficulty seeing the logical connections of a theory using only lives related to vesting of the particular interest. He found what he thought were fallacies in my reasoning. When I responded, once again explaining the logic of the common law, which contains none of the fallacies Waggoner supposed were there,[107] the Reporter asked to have one more try at demonstrating a flaw in my analysis. I consented to this, for logic is only as strong as its ability to resist continuing attack. One of the logical deductions from the definition of a vested interest is that the beneficiary is always related to vesting since an ascertained beneficiary is an absolute requirement for a vested interest. In Waggoner's final attack, he tried to rebut this by asserting that a beneficiary who enables you to prove the interest is vested *ab initio* is not a validating life because "the common law Rule Against Per-

104. *See* Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985).

105. *See supra* note 88 and accompanying text.

106. Waggoner, *supra* note 104, at 1717. In his *Michigan Law Review* article, Waggoner stated: "It was never thought that 'persons connected in some way to the transaction' defined a precise group of individuals." Waggoner, *supra* note 99, at 1767 n.136. In contrast, lives that can affect vesting are a precisely ascertainable group.

107. *See* Dukeminier, *A Response by Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985).

petuities is not concerned about aspects of vesting that are satisfied at the date of the gift."[108] When Waggoner read my reply pointing out that this was tautological reasoning,[109] he asked to be allowed to insert an elaborate footnote in his rejoinder citing authors (including me) who, Waggoner believed, disproved he was trapped in a tautology.[110] These authors wrote that the Rule against Perpetuities is inapplicable to vested interests which, of course, means exactly the same thing as saying that a vested interest satisfies the Rule against Perpetuities and is valid at the outset. Waggoner refused to recognize that if an interest is vested *ab initio*, there necessarily must be a validating life—i.e., a person who enables you to prove that the interest is vested and valid.[111]

I actually thought I might change the Reporter's mind. But the Reporter had earlier taken a published position against waiting out the lives that can affect vesting; he would not be moved in that direction. When the ship the Reporter was sailing on—the Restatement (Second)—proved to be riddled with ambiguities, Professor Waggoner was forced to abandon it.[112] But instead of turning to something with which lawyers have experience, the common law, Professor Waggoner cast off for unknown waters, embracing something utterly new and different—a phantom destroyer, full of perpetuities law, condemned to sail the seas for 90 years before firing its cannons. Judge Clark could have written the script himself (though even Clark, who had a memorably creative mind while professor and dean of the Yale Law School, might have had a hard time imagining Waggoner's phantom ship).

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108. *See* Waggoner, *A Rejoinder by Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985).

109. Dukeminier, *A Final Comment by Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985).

110. Waggoner, *supra* note 108, at 1739–40 n.7.

111. For computer verification of this principle, see *supra* note 91.

112. Although the Restatement was deemed not dependable enough to provide a wait-and-see period for new dispositions, the Commentary to the Uniform Statute suggests that the Restatement list of lives be used by courts in fashioning a *cy pres* saving clause for existing instruments in violation of the Rule. *See* UNIFORM STATUTE, *supra* note 3, § 5, comment at 114–15. If this advice is followed, existing instruments may be provided—through *cy pres*—with the wait-and-see period of the Restatement. There is an Alice-in-Wonderland quality about this. Why should the Restatement be deemed unseaworthy for new voyages, but perfectly satisfactory for persons who have already sailed?

X. WHAT ARE THE ALTERNATIVES?

Now that the Uniform Statutory Rule against Perpetuities has given such a bizarre turn to perpetuities reform, we need to stop and rethink perpetuities law revision. Since the 1950s, the dead hand has been increasing its grasp with each new stage of perpetuities reform. Reform first began in earnest when Professor Leach heaped scorn on the absurdities of the Rule—the fertile octogenarian, the unborn widow, the slothful executor—and on the bar for permitting such nonsense to exist. In the first wave of reform, about a dozen states responded with curative legislation eliminating specific absurdities,[113] adopting *cy pres*,[114] or providing for waiting out life estates before declaring a remainder void.[115] These reforms were small extensions of the dead hand and brought very little uncertainty into titles. Almost no scholar opposed the first two of these revisions. The limited wait-and-see statutes aroused no vigorous opposition, though some scholars suspected limited wait-and-see to be the camel's nose under the edge of the tent.

The second stage of perpetuities reform came with statutes providing for wait-and-see during the full common law perpetuities period. Vermont, Kentucky, and several other states adopted the earlier Pennsylvania statute to this effect.[116] These statutes increased the reach of the dead hand and uncertainty of title, yet the increase was less than occurred in later stages. The third stage of perpetuities reform was the adoption of the Restatement (Second) of Property, which provided for wait-and-see during the lives of certain designated persons. The persons on the Restatement list of measuring lives were more numerous than the persons whose lives govern the common law perpetuities period. Finally has come the Uniform Statutory Rule against Perpetuities, which extends the dead hand further than any existing wait-and-see statute by providing for a 90-year waiting period.

It is time now to look back and evaluate these reforms with a fresh eye. When wait-and-see was first proposed, Pro-

113. *See infra* notes 118–24 and accompanying text.
114. *See infra* note 125 and accompanying text.
115. *See infra* notes 133–34 and accompanying text.
116. *See infra* notes 135–37 and accompanying text.

fessor Simes warned, "The wait and see doctrine is a long step in the direction of inalienability of property."[117] We now know that wait-and-see has indeed proven to be a slippery slope. Experience has given new force to Professor Simes' warning.

What are the alternatives to the Uniform Statute? I list them in order of the magnitude of their departure from the common law, beginning with the least.

1. *Eliminate specific traps.* New York has enacted legislation designed to eliminate specific absurdities in the application of the Rule derided by Professor Leach. It was these oddities that brought on Leach's crusade for perpetuities reform. New York's basic approach is to assume the transferor intended to create a valid interest and hence to construe the absurdities out of the instrument.[118] Thus the "fertile octogenarian" is dealt with by a presumption that a female over the age of 55 cannot have a child and by the admission of evidence in any case as to whether a particular person is able to have a child.[119] The "unborn widow" is largely eliminated by a presumption that a reference to a spouse of a person is a reference to a person in being.[120] "Administrative contingencies" are eliminated as perpetuities traps by a presumption that the testator intended the contingency to occur, if at all, within 21 years.[121] New York also reduces age contingencies over 21 to 21 when necessary to save the gift from the Rule against Perpetuities.[122] Florida and Illinois have similar legislation.[123] In four other states (Connecticut, Maine, Maryland, and Massachusetts), age contingencies are reduced to 21, as in New York.[124]

The merit of the New York approach is that it eliminates the large majority of complaints about unjustifiable applica-

117. Simes, *supra* note 57, at 188.

118. N.Y. EST. POWERS & TRUSTS LAW § 9-1.3(b) (McKinney 1967).

119. *Id.* § 9-1.3(e).

120. *Id.* § 9-1.3(c).

121. *Id.* § 9-1.3(d).

122. *Id.* § 9-1.2.

123. FLA. STAT. ANN. § 689.22(4) & (5) (West Supp. 1987); ILL. ANN. STAT. ch. 30, ¶ 194(c)(1)–(3) (Smith-Hurd Supp. 1986).

124. CONN. GEN. STAT. ANN. § 45-96 (West 1981); ME. REV. STAT. ANN. tit. 33, § 102 (1978); MD. EST. & TRUSTS CODE ANN. § 11-103(b) (1974); MASS. ANN. LAWS ch. 184A, § 2 (Law. Co-op. 1977).

tions of the Rule against Perpetuities without sacrificing the certainty inherent in the common law Rule.

2. *Adopt immediate cy pres.* If an interest violates the Rule, seven states authorize a court to immediately reform the instrument so as to carry out the transferor's intent as closely as possible within the perpetuities period.[125] The only objections to immediate *cy pres* yet presented are that reformation by a court requires a lawsuit and that *cy pres* confers on a court too broad a power to rewrite a will.

There are, in general, two schools of thought about how the *cy pres* power should be exercised. The first is the more conservative. It suggests that courts should construe perpetuities violations out of the instrument, reform offending language, reduce any excessive age contingencies to 21, and in general eliminate uncertainties that cause perpetuities problems. To date, courts exercising *cy pres* power have followed this line of thinking.[126]

The second school of thought, which appears to be preferred by academics, suggests that the *cy pres* power should be used to insert a perpetuities saving clause in the instrument adapted to the particular possibility that causes the gift to be invalid.[127] The measuring lives for such a saving clause necessarily will be some or all of the persons who can affect vesting of the invalid interest. For example, in a fertile octogenarian case[128] with a primary life tenant of child-bearing years, the court would reform the instrument to deal only with the situation where the life tenant did in fact have an afterborn child who outlived the other relevant lives by more than 21 years (the possibility that causes invalidity of the remainder).[129] Judicial insertion of a saving clause of this sort resembles wait-and-see, but the measuring lives for waiting are tailored to the particular invalidating contin-

125. Berry v. Union Nat'l Bank, 262 S.E.2d 766 (W. Va. 1980); Estate of Chun Quan Yee Hop, 52 Haw. 40, 469 P.2d 183 (1970); CAL. CIV. CODE § 715.5 (West 1982); IDAHO CODE § 55-111 (1979); MO. ANN. STAT. § 442.555 (Vernon 1985); OKLA. STAT. ANN. tit. 60, §§ 75–78 (West Supp. 1987); TEX. PROP. CODE ANN. § 5.043 (Vernon 1984).

126. *See* Dukeminier, *supra* note 2, at 1900 n.113, 1901 n.115.

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

128. *See supra* note 4.

129. *See* Dukeminier, *supra* note 2, at 1901.

gency.[130] Up to the present time, no court has seen fit to insert a saving clause in exercising its *cy pres* power.

Professor Leach favored *cy pres*, as did Professor Simes,[131] and I can find no commentator strongly opposed to it. If academics were forced, by some powerful monarch, to agree on one perpetuities reform, in all probability it would be *cy pres*. Far less objection has been voiced to *cy pres* than to wait-and-see.

In a recent article Professor Bloom has suggested combining in one statute the New York approach of remedying specific defects in the Rule with immediate *cy pres* for those violations that do not fall within one of the specific remedies.[132] This proposal, joining both schools of thought about *cy pres*, has considerable merit. Since the large majority of defects will be dealt with by one of the specific curative rules, the room for reformation by a court will be limited to unusual cases.

3. *Wait-and-see for the preceding life estate.* The earliest wait-and-see statute successfully enacted through the efforts of Professors Casner and Leach was the Massachusetts statute.[133] Subsequently this statute was copied in Connecticut, Maine, and Maryland.[134] Under this statute, the court is directed to wait out the lives of the preceding life tenants or other lives upon whose expiration the remainder is limited to take effect. If, at the end of those lives, it can be shown

130. In a novel expansion of this theory, again extending the reach of the dead hand even more, the Commentary to the Uniform Statute suggests that a court exercise *cy pres* by inserting a saving clause that a lawyer would use or a saving clause using the measuring lives designated for wait-and-see by the *Restatement (Second) of Property*. *See* UNIFORM STATUTE, *supra* note 3, § 5 comment at 115. This, of course, is nothing less than using *cy pres* to adopt full-scale wait-and-see.

131. *See* Simes, *Perpetuities in California Since 1951*, 18 HASTINGS L.J. 247, 253 (1967).

Although Professor Powell was not too happy with any reforms beyond those of New York, he clearly preferred *cy pres* to wait-and-see. *See* 5A R. POWELL, *supra* note 18, ¶ 827F[3][h].

For an excellent student Comment, inspired by Professor Powell and Professor Dorothy Glancy, comparing the merits of wait-and-see and *cy pres*, and coming down strongly on the side of *cy pres*, see Comment, *Rule Against Perpetuities: The Second Restatement Adopts Wait and See*, 19 SANTA CLARA L. REV. 1063 (1979).

132. Bloom, *supra* note 26, at 78–79.

133. MASS. ANN. LAWS ch. 184A, § 1 (Law. Co-op. 1977) (enacted 1954).

134. 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).

that the remainder will timely vest or fail under the Rule against Perpetuities, the remainder will be declared valid.

Under the Massachusetts statute, the validity of future interests may be uncertain during the existence of the life estates, but this uncertainty is accepted in order to more perfectly carry out the testator's intent without a lawsuit. In many cases, including the cases of the fertile octogenarian and unborn widow, the possibility of remote vesting will almost surely disappear during the existence of the life estate. The Massachusetts statute does not deal with the administrative contingency case or other cases not involving a prior life estate.

4. *Wait-and-see for the common law perpetuities period.* Thirteen states have statutes or decisions providing for wait-and-see during the common law perpetuities period.[135] If, at the end of such period, the interest has not in fact vested, it is void. Some statutes expressly provide that the measuring lives for wait-and-see shall be the lives causally related to vesting[136] (i.e., the lives that govern the common law perpetuities period). In other states, the measuring lives are not explicitly given,[137] but the lives governing the common law perpetuities period seem implicit in the logic of wait-and-see.[138]

The disadvantages of waiting to see during the common law perpetuities period are those associated in general with wait-and-see. Title is rendered uncertain for the waiting period, and the work of a thoughtless drafter (who violated the Rule against Perpetuities) is preserved for an extended period of time. If the drafter knew so little of future interests law as to omit a perpetuities saving clause, it may be ex-

135. *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); *see also* statutes cited *infra* notes 136–37. Illinois has a wait-and-see statute, applicable to trusts only, limiting the measuring lives to the "beneficiaries of the instrument" creating the trust. ILL. ANN. STAT. ch. 30, ¶ 193 § 3, ¶ 195a § 5(a) (Smith-Hurd Supp. 1986).

136. ALASKA STAT. § 34.27.010 (1986); KY. REV. STAT. ANN. § 381.216 (Baldwin 1979); NEV. REV. STAT. § 111.103 (1985); N.M. STAT. ANN. § 47-1-17.1 (Supp. 1985); R.I. GEN. LAWS § 34-11-38 (1984).

137. FLA. STAT. ANN. § 689.22(2)(a) (West Supp. 1986); OHIO REV. CODE ANN. § 2131.08 (Baldwin Supp. 1985); 20 PA. CONS. STAT. ANN. § 6104(b) (Purdon 1975); S.D. CODIFIED LAWS ANN. § 43-5-6 (1983); VT. STAT. ANN. tit. 27, § 501 (1975); VA. CODE ANN. § 55-13.3 (1986); *see also* WASH. REV. CODE ANN. § 11.98.130 (Supp. 1986).

138. *See* Dukeminier, *supra* note 2, at 1880–83.

pected that the instrument is also defective in providing the needed flexibility to deal with property over a long period of time. Wait-and-see advocates have been reluctant to admit that the uncertainties of title and the saving of bad trusts may result in substantial problems. The truth is, we do not yet know, and probably shall not know for years.[139]

A majority of states enacting wait-and-see also provide that if an interest does not vest within the wait-and-see period it shall be reformed to carry out the transferor's intent as closely as possible within the period of the Rule.[140] They couple *cy pres* with wait-and-see. If wait-and-see is adopted, it seems hardly worth arguing about whether a court should reform the instrument at the end of the wait-and-see period, or return the property to the heirs of the transferor, or give it to the income beneficiaries.[141] Violations of the Rule will

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139. It was for this reason that Professor Leach, in his explanation of the Vermont statute, and I, in my explanation of the Kentucky statute, stated that if it becomes impracticable to postpone decision, a court should reform the instrument without waiting out the full period. Leach, *Vermont Enacts a Cy Pres Statute*, in W. LEACH & O. TUDOR, THE RULE AGAINST PERPETUITIES 224, 228–30 (1957); Dukeminier, *supra* note 50, at 65. I wrote:

> If such exceptional cases do arise, the Court of Appeals cannot be expected to push a sound principle to its drily logical extreme, resulting in great and serious inconvenience in the distribution of property. The ability of the court to reform the instrument to carry out testator's intent to the greatest extent possible should, and was designed to, prevent the wait-and-see doctrine from getting out of control in any such manner.

Id. at 69.

See also the remarks of Professor Donahue at the American Law Institute meeting:

> I was sufficiently convinced by the arguments this morning about when the *cy pres* decision ought to be made that I was wondering if we might not, at least in some circumstances, leave it to the determination of the court as to when they were going to make the *cy pres* determination . . . .

American Law Institute, *supra* note 27, at 494–95.

140. Alaska, Iowa, Kentucky, Nevada, New Mexico, Ohio, Rhode Island, South Dakota, Vermont, Virginia, and Washington. *See* statutes from these states cited *supra* notes 136–37 and *infra* note 143; *see also* Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891).

141. Professor Bloom is critical of deferred *cy pres* and predicts that it will result in complex litigation over the settlor's intent with "staggering fees." Bloom, *supra* note 26, at 46.

Another criticism of deferred *cy pres* is that it continues to treat the property (for 90 years under the Uniform Statute) as the dead settlor's property rather than as the beneficiaries' property. Compare the way the English and some Commonwealth jurisdictions rather quickly switch over to regarding the trust property as belonging to the beneficiaries; *see supra* note 78 and accompanying text.

rarely occur. But it must be recognized that as the date of the instrument recedes into the past, the court, acting under a *cy pres* power, will be more and more likely to reform the instrument in light of circumstances then existing rather than in the obscure light of the intentions of someone long dead. The *cy pres* doctrine functions in a much more realistic way if applied at the outset, when the instrument becomes effective, than if applied some 20 or 30—or, under the Uniform Statute, 90—years later.

5. *Wait-and-see for the Restatement period.* The Restatement (Second) of Property lays down an artificial list of lives to measure the wait-and-see period.[142] The number of lives on the Restatement list will ordinarily exceed the number of lives that govern the common law perpetuities period. Dead hand control is extended further. Iowa has enacted a wait-and-see statute using the Restatement lives, and adding some extra lives to the list.[143] Because of the ambiguities in the Restatement list of measuring lives, and perhaps because of opposition to wait-and-see, the Restatement does not seem to have much chance of further adoption.[144]

It is worth noting that the Uniform Statute extends dead hand control and uncertainties of title far beyond any of the foregoing alternative methods of perpetuities reform. It is riskier than any of them.

6. *Abolish the Rule against Perpetuities entirely.* It is possible to abolish the Rule against Perpetuities and impose no time limit on the vesting of interests or the duration of trusts. If the problem of controlling legal future interests, which make land unmarketable, is dealt with, perhaps by converting legal future interests to equitable ones, it is arguable that there is no need to control the duration of trusts.

142. RESTATEMENT (SECOND) OF PROPERTY § 1.3(2) (donative transfers) (1983).

143. IOWA CODE ANN. § 558.68(2) (West Supp. 1986). Oddly enough, the statutory list of measuring lives was ignored in Henderson v. Millis, 373 N.W.2d 497 (Iowa 1985), and the causally related life of the optionee used for the duration of an option.

144. *See* Young, *Uniform Statutory Rule Against Perpetuities*, 12 PROB. NOTES 244, 244 (1987), reporting, "Three states which have considered the question since the issuance of the Restatement (Second) have not adopted the Restatement position."

In Idaho, South Dakota, and Wisconsin, a trust can endure forever if the trustee has a power to sell the trust assets.[145]

In 1983 the Canadian province of Manitoba abolished the Rule against Perpetuities entirely.[146] At the same time Manitoba transformed legal future interests into equitable interests, and gave courts authority to alter or terminate any trust if this will benefit the beneficiaries.[147] This approach to the problem of overlong trusts was recommended by the Manitoba Law Reform Commission,[148] which adopted the views of Professor Waters.

The essential idea underlying the Manitoba approach is that a variation of trusts act, giving a court power to consent on behalf of unborn or minor beneficiaries to vary, rearrange, or terminate trusts—despite the settlor's intent—is preferable to limiting trust duration. Statutes authorizing courts to vary or terminate trusts have been enacted in England and in Canada. Professor Waters tells us, "It is sometimes not realized how considerable is the scope of this power. It means that revocation on any terms is possible and that variation of any degree is also possible."[149] The end

145. IDAHO CODE § 55-111 (1979); S.D. CODIFIED LAWS ANN. §§ 43-5-1, 43-5-8 (1983); WIS. STAT. ANN. § 700.16 (West 1981 & Supp. 1984).

146. Manitoba Perpetuities & Accumulations Act of 1983, 1982–83 MAN. REV. STAT. ch. 43. *See* Deech, *The Rule against Perpetuities Abolished*, 4 OXFORD J. LEGAL STUD. 454 (1984) (approving); Glenn, *Perpetuities to Purefoy: Reform by Abolition in Manitoba*, 62 CAN. B. REV. 618 (1984) (disapproving).

147. Manitoba Act of 1983 to Amend the Trustee Act, 1982–83 MAN. REV. STAT. ch. 38.

148. MANITOBA LAW REFORM COMMISSION, REPORT ON THE RULES AGAINST ACCUMULATIONS AND PERPETUITIES, Pub. L. No. 49 (1982).

149. D. WATERS, THE LAW OF TRUSTS IN CANADA 1074 (2d ed. 1984). Waters describes English as well as Canadian legislation at 1055–86. The English Variation of Trusts Act of 1958 was brought on by the fact that at that time England did not have a gift tax, but had a very steep progressive estate tax when income from capital shifted at death. The key to avoiding ruinous death duties was to give capital during life to chosen beneficiaries (or move with it out of the country). To enable income beneficiaries to unlock the capital in trusts and donate it during life, statutory relief was granted giving courts the power to consent to variation or termination on behalf of all unborn or minor beneficiaries.

The British tax laws have changed considerably since 1958, and so has the drafting of trusts. In 1975 a capital transfer tax, replacing the estate tax, was enacted. This tax is levied whenever capital or the right or privilege to receive income from capital shifts from one person to another, at death or during life. *See* Maudsley, *The British Capital Transfer Tax*, 13 SAN DIEGO L. REV. 799 (1976); R. MEGARRY & H. WADE, *supra* note 86, at 1058–59 (reporting that estate planning has now shifted away from dynastic trusts to trusts for minors which are given special favorable tax treatment); *see also supra* note 34.

result is to permit beneficiaries "to make vast inroads upon the schemes of beneficial interests as contrived by settlors and testators."[150] Variation of trusts by a court is strikingly different from the practice in this country, where the settlor's intent cannot be set aside.[151]

In a provocative recent colloquy among property teachers, Professor Richard Epstein, taking an uncompromising stand in favor of unrestrained ownership rights of the present owner, suggested that the Rule against Perpetuities should be abolished.[152] Yet, if no maximum period is set on trust duration, inevitably, I think, a variation of trusts act will be enacted to permit persons to deal with changed circumstances that were not foreseen by the settlor.[153] Whether judicial handling of change of circumstances in individual trusts would be more efficient or fairer than rather strictly adhering to the settlor's intent for an allowable period of time is doubtful. Such power in a court would give less predictability, and would give a court greater latitude in making a will for the testator than does reformation of a perpetuities error using the *cy pres* doctrine.

XI. CONCLUSION

It is a matter of record that I have been a proponent of wait-and-see since my salad days in teaching. In 1960 I drafted the Kentucky wait-and-see statute, and subsequently I drafted similar statutes in Alaska, Nevada, New Mexico, and Rhode Island. I have advocated wait-and-see in several publications, though never for more than the common law perpetuities period. It is therefore a melancholy occasion when I find that the Commissioners on Uniform State Laws

150. D. WATERS, *supra* note 149, at 287.

151. *See* 4 A. SCOTT, *supra* note 79, §§ 337–337.8.

152. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667, 710–13 (1986); Roundtable Discussion, *Time, Property Rights, and the Common Law*, 64 WASH. U.L.Q. 793, 841–61 (1986). Epstein finds a changed circumstances doctrine (and presumably would find a variation of trusts statute) objectionable as well. *Id.* at 850.

153. In his book, ECONOMIC ANALYSIS OF LAW § 18.2 (3d ed. 1986), Judge Richard Posner remarks that since no one can foresee the future, "[a] policy of rigid adherence to the letter of the donative instrument is likely to frustrate both the donor's purposes and the efficient use of resources." Posner even suggests that inasmuch as information costs about future events after death "are uniquely high—one might say infinitely high . . . , maybe therefore anyone who tries rigidly to control the future shows he is behaving irrationally."

have given their highly respected imprimatur to a wait-and-see statute that substantially increases the reach of the dead hand and may have far-reaching consequences, including the abolition of the Rule against Perpetuities, without publishing any empirical studies of its probable and potential effects, but supporting it instead with a hollow rationale and an unconvincing and inadequate analysis of its consequences for our ancient policy against the dead hand.

"O lente, lente currite noctis equi," cried Dr. Faustus, waiting for the devil to claim him.[154] "Run slowly, slowly ye horses of the night." So too I urge resistance to the grasp of the fettering, stifling hand of the dead. More than a century ago Baron Hobhouse criticized the common law Rule against Perpetuities as going too far in honoring the wishes of the dead:

> Now the effect of our law of Perpetuity is this—that the Settlor of property can take the dominion over it away from those whom he knows, to confer it on those whom he does not know, nay, on those who are unborn and may never come into existence. . . . The result is that, among the richer classes of this country, a very large number of families have their property governed, not according to their own desires or necessities, but according to the guesses or the fancies of some one who died long ago, and who could not, even if he wished, make the best arrangements for them. If we were now proposing to enact such a law, this statement of it would probably be enough to ensure its rejection. What could be more irrational than to maintain that each generation shall be considered more competent to foresee the needs of the coming one than that one, when arrived, is to see them? . . . Yet such is the direct effect of our law of Perpetuity; and according to my experience the phenomena are much in accordance with the law. As the tree is, so is the fruit. The cold and numbing influence of the Dead Hand is constantly visible.[155]

The wait-and-see doctrine, of course, extends dead hand rule even further than perpetuities law permitted when

154. C. Marlowe, *The Tragical History of Doctor Faustus*, act v, scene ii (1604).

155. A. HOBHOUSE, *supra* note 72, at 183–84; *cf.* Hobhouse, *supra* text accompanying note 72. In the text above, Hobhouse was objecting to the English strict settlement as permitted by the Rule against Perpetuities, but his objections apply equally to a modern dynastic trust. It should be noted that the strict settlement and dynastic trust have almost passed out of existence in England (*supra* note 149) and that Hobhouse's strictures are now more applicable to the United States than to England.

Hobhouse wrote. The Uniform Statute is a quantum leap in the extension of that doctrine.

We should not adopt any more wait-and-see statutes, certainly not any statutes providing for waiting beyond the existing common law perpetuities period. The Restatement (Second), devised by artifice, and suffering from numerous ambiguities, no longer seems workable. The Uniform Statute, which consigns the Rule against Perpetuities to desuetude for 90 years, is itself deserving of oblivion. The only wait-and-see statutes which, in my judgment, are at all prudent are the Massachusetts type and the Kentucky type, but I think the rancorous and divisive battles over wait-and-see, staged in the American Law Institute, *Powell on Real Property*, the *Columbia Law Review*, and numerous other journals, have very probably (and quite properly) made legislators suspicious of any form of wait-and-see. Something that rouses vehement opposition and bitter dissent from eminent scholars who have devoted their professional lives to the law of property cannot be all good.

At this point in history, I am convinced, *cy pres* offers the best and most acceptable reform. Those states that have not reformed the Rule against Perpetuities should enact statutes authorizing a court to reform perpetuities errors at the outset. The California, Texas, and Missouri statutes can serve as models. This reform will be supported by the overwhelming majority of scholars, perhaps even without any dissent. The adoption of *cy pres* would put all these noisy battles over wait-and-see behind us. That, by itself, would be no small blessing. But the fundamental reason for the adoption of *cy pres* is that it is the best solution. The Rule against Perpetuities has many virtues. It is certain in application, it gives predictability in advance, it does not interfere with the reasonable desires of donors, and it protects future family members by permitting the dead hand to control only so long as the donor was able to assess the capabilities and needs of living persons (plus 21 years thereafter). What is wrong with the Rule against Perpetuities is that its technicalities and sometimes absurd assumptions lay traps for people. Occasionally an expert unwittingly violates the Rule, but the usual victim is an inexpert lawyer or a testator who drew his own will. *Cy pres*—immediate reformation by a court of an instrument that violates the Rule—is all that is necessary to

eliminate these traps.[156] *Cy pres* preserves the virtues of the Rule, while protecting the consumers of bad (or no) legal advice.[157]

The battle over perpetuities reform, raging now for over 30 years, has led me to see, at last, that we scholars have very little more to tell the future about this subject—but the future has a lot to tell us about which of our perpetuities reforms turns out to be most satisfactory. In the meantime, prudence suggests caution in extending the dead hand.

XII. ENVOI

Few scholars filled the sky over their fields as amply as did Barton Leach in his day. Few warned as eloquently against dead hand control, both from the point of view of sound estate planning and as a matter of public policy. Leach wrote:

> The tendency of some testators to make rigid dispositions is often an aspect of an understandable type of vanity. *T* has been successful in business and this money is the measure of and witness to his success. He has been a good father and has always known what was best for his family. Who should know better than he how to invest and dispose of this money after his death? The only answer is: Time marches on. Thoughtless, playful children grow into serious-minded resourceful adults. Healthy, prosperous adults suffer illnesses, failure and the other casualties of life. The gilt-edge bonds of today are the cats-and-dogs of tomorrow. To regulate events in 1980

156. A final irony in the preparation of the Uniform Statute is that it does not carry through with the idea so brilliantly developed by Professors Langbein and Waggoner in *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982). The authors there argue persuasively for the reformation of mistakes in wills, including reformation of perpetuities mistakes by *cy pres*. *Id.* at 548.

157. In terms of solving lawyers' malpractice suits, *cy pres* is preferable to wait-and-see. Under *cy pres*, the correction suit takes place at once, and the maximum liability appears to be the cost of the lawsuit. Under wait-and-see, difficult issues are raised because the lawyer may have a potential liability for many years. Will the statute of limitations run when the potentially invalid interest has been discovered but the claimant cannot procure a decision as to its invalidity for the wait-and-see period? Can such a claim be kept alive after the drafter dies? At the end of the wait-and-see period (90 years under the Uniform Statute), will the partners of the long-dead drafter be liable if the interest is then declared void? *See* Dukeminier, *Cleansing the Stables of Property: A River Found at Last*, 65 IOWA L. REV. 151, 163–64 (1979).

> by the judgment of a mediocre mind on the spot is incomparably preferable to the guess in 1960 of the greatest man who ever lived.[158]

Alas, how could the counsel of this sensible man end up, disesteemed and ignored by the drafters of the Uniform Statute, as the whisper of a wimp? Do we really want 90 years of control by great-grandpa?

158. W. LEACH & J. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 241–42 (1961).

EXHIBIT 3

THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES: THE RATIONALE OF THE 90-YEAR WAITING PERIOD

Lawrence W. Waggoner†

The Uniform Law Commissioners promulgated the Uniform Statutory Rule Against Perpetuities in 1986.[1] The perpetuity-reform efforts of the American Law Institute in the Restatement (Second) inspired the Uniform Act.[2] The Restatement and the Uniform Act employ the so-called wait-and-see approach to perpetuity reform. Wait-and-see is a two-step strategy. Step One preserves the validating side of the common-law Rule Against Perpetuities (the common-law Rule): By satisfying the common-law Rule, a nonvested future interest in property is valid at the moment of its creation.[3] Step Two is a salvage strategy for future interests that would have been invalid at common law: Rather than invalidating such interests at creation, wait-and-see allows a period of time, called the waiting period, for the contingencies to work out harmlessly.[4]

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1 UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8A U.L.A. 103 (Supp. 1988) [hereinafter UNIF. ACT].

2 RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.1-1.6 (1983) [hereinafter RESTATEMENT].

3 UNIF. ACT § 1(a)(1); RESTATEMENT § 1.3(1). In estate-planning practice, every incentive remains to comply with the common-law Rule, through the use of a standard perpetuity saving clause, *see infra* note 35, if appropriate, or one tailored to the particular trust or property arrangement, or otherwise.

4 UNIF. ACT § 1(a)(2); RESTATEMENT § 1.3(2). Nearly all trusts (or other property arrangements) will have terminated by their own terms long before the waiting period expires, leaving the waiting period to extend unused (and ignored) into the future long after the contingencies have been resolved and the property distributed. *See* Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569, 579-90 (1986) [hereinafter Waggoner, *Uniform Statutory Rule*]. In the unlikely event that the contingencies have not been resolved by the expiration of the waiting period, the disposition is to be reformed by the court so that all contingencies are resolved within the allowable period. UNIF. ACT § 3; RESTATEMENT § 1.5.

Neither the Restatement nor the Uniform Act authorized judicial reformation at any time before the expiration of the waiting period (except in certain specified cases). The Drafting Committee of the Uniform Act and its Advisors discussed at length and specifically rejected the "immediate *cy pres*" idea, as it is sometimes called, under which the

Although the traditional method of measuring the waiting period is by reference to the period of lives in being at the creation of the interest (the measuring lives) plus 21 years, there are various difficulties and costs associated with identifying and tracing a set of actual measuring lives to see which one is the survivor and when he or she dies.[5] Consequently, in a step the framers of a Restatement of the Law of Property could not appropriately have taken in the early 1980s, given the constraint of basing their position on existing law, the framers of the Uniform Act decided to forgo the use of actual measuring lives and use instead an allowable waiting period of a flat 90 years.[6] The framers intended the 90 years to represent a reasonable approximation of the average period of time reached when actual measuring lives are used.

The Uniform Act has been endorsed by the House of Delegates of the American Bar Association (on the recommendation of the Council of the A.B.A. Section of Real Property, Probate and Trust

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statute grants a right to reformation at any time, merely on a showing of a violation of the common-law Rule. A few states have adopted this approach, but the experience under it has not been satisfactory. Almost all of the cases that have arisen have involved age contingencies in excess of 21 or a variation thereof. An example of such an age-contingency case is set forth *infra* note 26. Although the vesting of the interests in such cases is almost certain to occur well within the period of a life in being plus 21 years, and although such interests can easily be validated in their original form by a perpetuity saving clause (*see infra* note 35 and accompanying text), the courts have chosen to "reform" such dispositions by lowering the age contingencies to 21. *E.g.*, Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974). Such an approach amounts to an unwarranted distortion of the donor's intention, a distortion that is avoided by the approach of the Uniform Act and the Restatement under which reformation is delayed until the contingencies as originally written by the donor have been given a chance to work out harmlessly. *See* Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1755-59 (1983); *see also* UNIF. ACT § 5 comment; Waggoner, *Uniform Statutory Rule*, *supra*, at 596 n.46.

Another possible approach under a general reformation ("immediate *cy pres*") doctrine is for the courts to insert a perpetuity saving clause into dispositions that violate the common-law Rule. This type of reformation has been advocated by academics, *e.g.*, Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963), but not adopted by any court. This approach, were a court to adopt it, would be superior to lowering age contingencies to 21. The donor's intention would not be unnecessarily frustrated. However, even this approach is less efficient than the approach of the Uniform Act. The period of time produced by a judicially inserted perpetuity saving clause would be about the same in length as that which is automatically granted by the Uniform Act without front-end litigation. The more efficient course, opted for by the Uniform Act (and the Restatement), is to defer the right to reformation until after the waiting period has run its course. Deferring the right to reformation enormously reduces the necessity and cost of litigation because the contingencies attached to most future interests that would otherwise have fallen victim of the common-law Rule will be resolved well within the allowable waiting period. Litigation to reform an offending disposition will seldom become necessary. See UNIF. ACT § 3 comment; Waggoner, *Uniform Statutory Rule*, *supra*, at 596 & n.46.

5 *See infra* notes 17-25 and accompanying text.

6 UNIF. ACT § 1(a)(2).

Law), the Board of Regents of the American College of Probate Counsel, and the Board of Governors of the American College of Real Estate Lawyers. It has been enacted, so far, in ~~three~~ four states[7] and appears to be on its way toward enactment in several others.

I

MISUNDERSTANDINGS ABOUT THE 90-YEAR PERIOD

My purpose in this short Article is to set the record straight concerning the rationale for the 90-year waiting period. The question arises because, in a pair of recent law review articles,[8] Professor Dukeminier labels the 90-year waiting period a clone[9] of the "twelve-healthy-babies ploy," a device that is unused in actual practice by estate-planning attorneys and that was denounced by the father of wait-and-see reform, Professor W. Barton Leach. The device is one that allows drafters of trusts and other property arrangements to tie up property for an abnormally long time; it accomplishes this purpose by using, as measuring lives, babies from long-lived families. As Professor Leach put it, a testator or settlor could, by using this ploy,

> tie up his property, regardless of lives and deaths in his family, for an unconscionable period — viz. twenty-one years after the deaths of a dozen or so healthy babies chosen from families noted for longevity, a term which, in the ordinary course of events, will add up to about a century.[10]

Professor Leach rejected this ploy as a "capricious exercise of the power of the dead hand."[11]

Professor Dukeminier charges that the framers of the Uniform Act intended the 90-year waiting period to institutionalize this ploy. He writes:

> [W]hy did the Uniform Statutory Rule against Perpetuities come to insert in every trust a 90-year wait-and-see period? It is, in effect, a proxy for a period measured by the lives of a dozen healthy

Florida,

7 The states are Minnesota, Nevada, and South Carolina. MINN. STAT. §§ 501A.01-501A.07 (West Supp. 1988); NEV. REV. STAT. ANN. §§ 111.103-111.1035 (Michie Supp. 1987) (repealing its former wait-and-see statute, which delimited the allowable waiting period by reference to actual measuring lives determined by the causal-relationship method); S.C. CODE ANN. §§ 27-6-10 to -80 (Law. Co-op. Supp. 1987).

8 Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987) [hereinafter Dukeminier, *Ninety Years in Limbo*]; Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1884-87 (1986) [hereinafter Dukeminier, *Modern Guide*].

9 Dukeminier, *Modern Guide*, *supra* note 8, at 1886 ("The Uniform Statute has cloned Professor Leach's dozen healthy babies.").

10 VI AMERICAN LAW OF PROPERTY § 24.16, at 52 (A. Casner ed. 1952).

11 J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 13 (2d ed. 1962).

> babies plus 21 years. This is implicitly conceded in the Rationale for the Uniform Statute, set forth in the Prefatory Note. . . .
>
> The Uniform Statute attempts to justify the 90-year period as a saving clause on the ground that, under existing common law, a knowledgeable lawyer can, if he wishes, tie up property in trust for approximately 90 years. But the fundamental fact is: Lawyers do not use saving clauses that have a dozen healthy babies as measuring lives or that always, or even on average, produce a 90-year perpetuities period. The Uniform Statute thus provides another ironic twist of fate: It takes what might happen, what lawyers might do, and not what actually occurs, as the justification for its version of an actualities test.[12]

This account of the rationale for the 90-year period is a misunderstanding. As the Reporter for the Uniform Act, I can say with certainty that the 90-year period was not derived in the fashion Professor Dukeminier suggests, that is, by approximating the period of time that would be reached, on average, by the length of the lifetime of the survivor of twelve healthy babies from unrelated families (plus 21 years). To my recollection, such an idea was never seriously discussed in the deliberations of the Drafting Committee or on the floor of the National Conference of Commissioners on Uniform State Laws. Nor is there anything in the Uniform Act, its prefatory note and comments, or my writings that implicitly concedes or even mildly suggests that this ploy was the actual basis for selecting 90 years.[13] There is, in short, no foundation for the claim that the Act takes as the justification for its selection of 90 years the twelve-healthy-babies ploy denounced by Professor Leach.

Actual justification aside, what of the claim that the 90-year period is in effect a proxy for the period that would be reached by the twelve-healthy-babies ploy? The life expectancy of a new-born baby

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12 Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1031, 1035-36; *see also* Dukeminier, *Modern Guide*, *supra* note 8, at 1885 ("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.").

13 The actual basis for selecting 90 years is set forth in the prefatory note to the Uniform Act. In explaining that the 90-year period is built on the life expectancy (plus 21 years) of the youngest measuring life, the prefatory note cites Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 INST. ON EST. PLAN. ch. 7 (1986) [hereinafter Waggoner, *Progress Report*], which shows in table 1, *Id.* ¶ 703.4, at 7-17, that the reference to the youngest measuring life was to the *transferor's youngest descendant* in being when the trust was created; no reference to twelve healthy babies from unrelated families appears in *Progress Report*, in the prefatory note to the Uniform Act, or my other writings about the Uniform Act. *See* Waggoner, *Uniform Statutory Rule*, *supra* note 4; Waggoner, *Wait-and-See: The New American Uniform Act on Perpetuities*, 46 CAMBRIDGE L.J. 234 (1987) [hereinafter Waggoner, *Wait-and-See*].

For further discussion of the actual basis for selecting 90 years, see Part II of this Article, *infra* notes 17-33 and accompanying text.

today is 75 years.[14] With the 21-year tack-on period, this method would, at first impression, appear to produce a total period of 96 years (75 + 21). Ninety-six years is longer than the 90 years actually adopted in the Uniform Act, but only by about 6.7 percent. If that were all there were to it, the claim that the 90-year period is in effect a proxy for the twelve-healthy-babies ploy, while an exaggeration, would not be an exaggeration of such proportion as to be wholly unfair.

But that is not all there is to it. An actual approximation of the twelve-healthy-babies ploy would, in fact, produce a much longer period of time—a period of about 113 years, not 96 years. The reason is as follows. It is true that, *as a whole*, the average number of years lived per member of a group of twelve healthy babies, selected at random (not specially chosen from families noted for longevity), is 75 years—that is, the average life expectancy of each individual member of the group is 75 years. An average group of twelve, however, will include babies who will die prematurely and babies who will outlive their individual life expectancies. Under the twelve-healthy-babies ploy, the period would be measured by the lifetime (plus 21 years) of the longest living member of the group, not by the average number of years lived per member of the group as a whole. The life expectancy of the longest living member of a group of twelve new-born babies is about 92 years,[15] not 75 years; with the 21-year tack-on period, the twelve-healthy-babies ploy would produce, on average, the period of 113 years (92 + 21) mentioned above.[16] One hundred thirteen years is 25.6 percent longer than the 90 years actually adopted in the Uniform Act. The claim that the 90-year period is in effect a proxy for the twelve-healthy-babies ploy

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[14] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987, at 71 table 108 (107th ed. 1986).

[15] The 92-year life expectancy was computed by applying a complicated actuarial formula to the data set forth in table LN, Treas. Reg. § 20.2031-7 (1984). Starting with an original cohort of 100,000 new-borns, table LN gives the number of people who live to age one (97,998), age two (97,876), and so on to ages 109 (14) and 110 (0).

I would like to express my gratitude to Dr. Cecil Nesbitt, professor emeritus of mathematics at the University of Michigan, for deriving the actuarial formula used in the computation; he derived the formula from the principles set forth in N. BOWERS, H. GERBER, J. HICKMAN, D. JONES & C. NESBITT, ACTUARIAL MATHEMATICS ch. 16 (1986).

[16] Recall that Professor Leach judged the twelve-healthy-babies ploy to produce a period of about 100 years. *See supra* text accompanying note 10. Professor Leach wrote this in the early 1950s, when individual life expectancy was about 68 years, not 75 years as it is today. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 (pt. 1), at 55 table B 107-115 (1975). Professor Leach, in projecting a 100-year period, must, therefore, have attempted to take account of the phenomenon described in the text, above, that the longest living member of a group of new-born babies will outlive, by an appreciable margin, his or her individual life expectancy. Otherwise, Professor Leach would have projected a period of about 89 years (68 + 21), not 100 years, for the twelve-healthy-babies ploy.

is, therefore, an exaggeration of considerable proportion. The 90-year period of the Uniform Act falls substantially short of the longest time permissible under the current common-law Rule.

II
THE RATIONALE OF THE 90-YEAR PERIOD

In truth, the philosophy behind the 90-year period was to fix a period of time that approximates the average period of time that would traditionally be allowed by the wait-and-see doctrine.[17] There was no intention to use the flat-period-of-years method as a means of lengthening the waiting period beyond its traditional boundaries. The fact that the traditional period roughly averages out to a longish-sounding 90 years is a reflection of a quite different phenomenon: the dramatic increase in longevity that society as a whole has experienced in the course of the twentieth century.[18] Seen in this light, the 90-year period is an evolutionary step in the development of the wait-and-see doctrine.

As mentioned earlier, the traditional method of delimiting the allowable waiting period is to use actual measuring lives plus 21 years. Specifically, under this method, a group of persons—called the measuring lives—is identified. Once the group is identified, the lives of all its members are traced to see which one outlives all the others and when that survivor dies. The allowable waiting period extends 21 years beyond the death of that last surviving measuring life.

From its inception, the actual-measuring-lives approach has been plagued by two problems: identification and tracing. The identification problem concerns the method by which the measuring lives are to be chosen. Rival methods have been advanced. Under one method, long advocated by Professor Dukeminier,[19] the measuring lives are identified by testing each disposition to determine the persons whose lives have a "causal relationship" to the vesting or failure of the future interest in question. The actual meaning of causal relationship is in dispute,[20] and the adoption of that method

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17 The philosophy appears in the prefatory note to the Uniform Act.

18 The average life expectancy in 1900 was 47 years, as compared to the 75 years projected today. *See* Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 588 n.32 (table).

19 Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 1 (1960); Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) [hereinafter Dukeminier, *Measuring Lives*]; Dukeminier, *Modern Guide*, *supra* note 8; Dukeminier, *Wait-and-See: The Causal Relationship Principle*, 102 L.Q. REV. 250 (1986) [hereinafter Dukeminier, *Causal Relationship*].

20 *Compare* Dukeminier, *Measuring Lives*, *supra* note 19, at 1660 ("causal relationship must include any person who can affect vesting, either in possession or interest") *with* Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714, 1719

could require front-end litigation to determine the identity of the measuring lives in a given case. Neither the Restatement nor the Uniform Act adopted the causal-relationship method.[21] The Restatement specifies the measuring lives in a different way. The Restatement uses a list composed, generally speaking, of the transferor, the beneficiaries of the disposition, the parents and grandparents of the beneficiaries, and, in certain cases, the donee of a nonfiduciary power of appointment; of the foregoing, those who are in being at the creation of the interest are the measuring lives.[22] It soon became apparent that the Restatement's list contained ambiguities, at least at the fringes,[23] which could also require front-end litigation to determine the full complement of measuring lives in a given case. The framers of the Uniform Act concluded that an ambiguity-free formulation of the specified-list method would necessitate a complex set of statutory provisions.[24]

In sum, both methods of identifying actual measuring lives entail identification problems: If the specified-list method is used, the measuring lives are difficult to describe in statutory language that is both uncomplicated and unambiguous; the statutory language necessary to adopt the causal-relationship method is not so difficult to draft as it is to apply to actual cases.

The second problem plaguing the actual-measuring-lives approach is that of tracing. No matter how the measuring lives are identified, the lives of those actual individuals must be traced to determine which one is the longest survivor and when he or she died.

The tracing and identification problems are exacerbated by the premise, seemingly accepted under both methods, that the measuring lives cannot always remain a static group, assembled once and for all at the beginning. Instead, individuals who were once measuring lives must be dropped from the group if certain events happen (such as the individual's divorce, adoption out of the family, or assignment of his or her beneficial interest to another); conversely,

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(1985) (causal relationship formula, "in certain of its particulars, is arbitrary and ambiguous").

21 In his most recent article, Professor Dukeminier appears to have largely abandoned the wait-and-see cause in favor of the reformation ("immediate *cy pres*") method of perpetuity reform. Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1079-80. Neither the Restatement nor the Uniform Act adopted that method, either. The Drafting Committee of the Uniform Act and its Advisors discussed that method at length and, for the reasons set forth *supra* note 4, found it less attractive than wait-and-see coupled with a *deferred* right to reformation.

22 RESTATEMENT § 1.3(2).

23 Ambiguities in the Restatement's list are identified in Dukeminier, *Measuring Lives*, *supra* note 19, at 1681-1701.

24 The draft of such a set of statutory provisions prepared for the consideration of, but not adopted by, the Drafting Committee of the Uniform Act, is set forth in Waggoner, *Progress Report*, *supra* note 13, ¶ 703.1, at 7-26 n.18.

individuals who were not among the initial group of measuring lives must be included later if certain events happen (such as marriage, adoption into the family, or receipt of another's beneficial interest by assignment or succession) and if they were living when the interest in question was created.[25] This instability within the group of measuring lives heightens the potential for a further round of litigation at one point or another during the running of the waiting period.

By opting for a flat period of years, the framers of the Uniform Act eliminated the clutter that has heretofore plagued the wait-and-see strategy—the problems of identifying, tracing, and possibly litigating the make-up of a sometimes-fluctuating group of measuring lives. The expiration of a waiting period measured by a flat period of years is litigation free, easy to determine, and unmistakable.

The framers of the Uniform Act considered objections to replacing the actual-measuring-lives approach with a flat period of years, despite the gain in administrative simplicity that would result. One such objection was the idea that the use of actual measuring lives—especially if determined by the causal-relationship method—generates a waiting period that self-adjusts to each situation, somehow extending the dead hand no further than necessary in each case.[26] A flat period of years obviously cannot replicate a self-

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25 Dukeminier, *Measuring Lives*, *supra* note 19, at 1672-73 (causal-relationship method); *id.* at 1697-99 (Restatement's specified-list method).

26 Perpetuity specialists may wish to notice that Professor Dukeminier has made such a claim: He has stated that the causal-relationship method for determining the measuring lives produces a waiting period that "extends the dead hand no further than necessary" in each case. Dukeminier, *Causal Relationship*, *supra* note 19, at 250, 265; *see also* Dukeminier, *Measuring Lives*, *supra* note 19, at 1710-11 ("The causal relationship principle provides appropriate measuring lives—persons who can affect vesting—and it automatically adjusts the lives to fit the facts of each particular case. Because it self-adjusts to each limitation, the causal relationship principle, following the principle of parsimony, effects what scientists would call an elegant solution. It provides no more measuring lives than are necessary to deal with the scrivener's particular mistake. . . . [T]he causal relationship principle . . . fit[s] the shoe to the foot . . . .").

To test Professor Dukeminier's claim, consider the following example, which is Example 1 from Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 577, 581:

> G died, bequeathing property in trust, income in equal shares to G's children for the life of the survivor, then in equal shares to G's grandchildren, remainder in corpus to G's grandchildren who reach age 30; if none reaches 30, to a specified charity.

The youngest causal-relationship measuring life in this example is G's youngest grandchild living at G's death. Taking G's death to occur at age 75 (G's life expectancy), and placing G's disposition in each of four hypothetical families (deemed to be representative of actual families) developed in that article, *see id.* at 582-85, the projected time of *actual* vesting (when G's youngest grandchild will reach age 30) is 5 years after G's death in Family I, 15 years after G's death in Family II, 25 years after G's death in Family III, and 35 years after G's death in Family IV. The projected allowable waiting period under a causal-relationship regime is much longer: 72 years in Family I, 82 years in Family II, 92 years in Family III, and 96 years in Family IV. *See id.* at 590-91 n.39. Thus,

adjusting function. This objection proved unfounded, however, for the actual-measuring-lives approach also fails to perform a self-adjusting function. Although that approach produces waiting periods of different lengths from one case to another, it does *not* generate a waiting period that expires at a natural or logical stopping point along the continuum of each disposition, thereby pinpointing the time before which actual vesting ought to be allowed and beyond which it ought not to be permitted. Instead, the actual-measuring-lives approach—under either the specified-list or causal-relationship method—generates a waiting period whose length almost always *exceeds* by some arbitrary period of time the point of actual vesting in cases that are traditionally validated by the wait-and-see strategy.[27] The actual-measuring-lives approach, therefore, performs a margin-of-safety function,[28] a function that *can* be replicated by the use of a

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the projected waiting period produced by the causal-relationship method *exceeds* the time of projected *actual* vesting by periods ranging from 61 years (Family IV) to 67 years (Families I, II, and III).

In fact, if I had fashioned the above example more realistically, *see infra* note 30, I would have made the gift-over (in case none of the grandchildren reaches age 30) in favor of G's *descendants* rather than a specified charity. This simple modification of the example does not alter the projected time of actual vesting. But it does shift the identity of the youngest causal-relationship measuring life from G's youngest grandchild to G's youngest descendant in each family; this, in turn, makes the length of the projected causal-relationship waiting period be 92 years in one of the families (Family III) and 96 years in the other families (Families I, II, and IV). As modified, the projected causal-relationship waiting period *exceeds* the projected time of *actual* vesting by as much as 91 years. The idea that the causal-relationship formula "extends the dead hand no further than necessary" in each case by "fit[ting] the shoe to the foot" appears to be a questionable proposition. *See also infra* note 28.

The above example, in either its originally published form or as modified above, illustrates the fact that the waiting period for wait-and-see (no matter by what method it is delimited) performs a margin-of-safety function, not a self-adjusting function. The example also illustrates the idea that the margin of safety can be quite extensive in given cases. *See supra* note 4. The contingencies in the vast majority of perpetuity-violation cases will be resolved long before the waiting period expires. In challenging the 90-year period allowed by the Uniform Act, Professor Dukeminier has noted this point and asked: Why, then, "have a 90-year period?" Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1047. The answer is that this is how the waiting period works—even under the causal-relationship formula. Having an *unused* end-portion of the waiting period does no harm and its length has nothing at all to do with dead-hand control. Vesting will occur when it does in trusts such as the one illustrated in the above example, whether the unused end-portion of the waiting period is 5 years, 50 years, or 500 years.

27 *See supra* note 26. For further demonstration of this point, see Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 577-79, 581-90; Waggoner, *Wait-and-See*, *supra* note 13, at 236-38.

28 In point of fact, the margin of safety produced by the actual-measuring-lives approach (even under a causal-relationship regime) can be quite erratic from one case to another: The waiting period produced by the causal-relationship method can be longer in cases in which actual vesting is projected to take place sooner, and shorter (though still ample) in cases in which actual vesting is projected to take place later. For demonstration of this phenomenon, see Waggoner, *Progress Report*, *supra* note 13, ¶ 703.4, at 7-18 to 7-19.

proxy such as the flat 90-year period under the Uniform Act.

In standard cases, the rivalry between the causal-relationship and the specified-list methods of identifying actual measuring lives is very little concerned with the length of the waiting period. Often, the specified-list method will produce a greater number of measuring lives than the causal-relationship method. In the normal course of events, however, the waiting period is not governed by the number of measuring lives, but by the lifetime of the youngest. Unless the additional measuring lives are younger than the others or are clustered in very young age groups, such as under the twelve-healthy-babies ploy, a greater number of measuring lives seldom adds to the length of the waiting period.[29] In the normal course of events, the youngest measuring life is the key to the length of the allowable waiting period, and no matter which method is used for determining the identity of the measuring lives, the youngest measuring life, in standard trusts, is likely to be the transferor's youngest descendant living when the trust was created.[30] The 90-year period of the Uniform Act is premised on this proposition. Using

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29 Professor Dukeminier has attacked the Restatement by observing that it specifies a greater number of measuring lives than the causal-relationship formula and stating that the greater the number of measuring lives, the longer the waiting period. Dukeminier, *Measuring Lives*, *supra* note 19, at 1710-11; Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1032 n.22, 1075. Usually, however, the measuring lives added by the Restatement are older (the transferor; the parents and grandparents of the beneficiaries) and their addition to the group would seldom end up adding to the length of the waiting period. A greater number of measuring lives does, however, add to the administrative burden of tracing their lives out; tracing out the lives of the older measuring lives cannot be dispensed with, because of the remote possibility, in every case, that one of them will beat the odds and outlive all the others, either because the younger ones die prematurely or one of the older ones sufficiently outlives his or her life expectancy.

30 All beneficiaries of a trust who are living when the trust was created are on the Restatement's list of measuring lives. RESTATEMENT § 1.3(2). Though the point is disputed, Professor Dukeminier maintains that all beneficiaries of an otherwise invalid interest are automatically to be counted as causal-relationship measuring lives. Dukeminier, *Measuring Lives*, *supra* note 19, at 1661; Dukeminier, *Modern Guide*, *supra* note 8, at 1881; Dukeminier, *Causal Relationship*, *supra* note 19, at 257. It should also be noted that the transferor's descendants are typically measuring lives under standard perpetuity saving clauses, either by direct designation or by virtue of a designation of the beneficiaries of the trust as the measuring lives. *See infra* note 35.

In the judgment of the Drafting Committee and its Advisors (a group that included experienced estate-planning attorneys), almost all family-oriented trusts, at some point, create a beneficial interest in favor of a multiple-generation class such as the transferor's descendants or issue. Usually, that beneficial interest is a nonvested future interest in the corpus of the trust; and, that beneficial interest is one that is otherwise invalid in the fraction of trusts that violate the common-law Rule and to which wait-and-see applies. In the judgment of the Drafting Committee and its Advisors, this is true even in fertile-octogenarian and unborn-widow cases. In such cases (contrary to the suggestion in Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1033), the youngest measuring life ordinarily is not the youngest child of the "fertile octogenarian" (who likely is an adult) or the life tenant whose income interest precedes that of the "unborn widow" (who also likely is an adult), but the beneficiaries of the remainder interest in the trust's corpus

four hypothetical families deemed to be representative of actual families, the framers determined that, on average, the transferor's youngest descendant in being at the transferor's death—assuming the transferor's death to occur between ages 60 and 90, which is when 73 percent of the population die—is about 6 years old.[31] The remaining life expectancy of a 6-year-old is about 69 years.[32] The 69 years, plus the 21-year tack-on period, gives an allowable waiting period of 90 years. Although this method may not be scientifically accurate to the nth degree,[33] the Drafting Committee considered it

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that takes effect on the death of the "fertile octogenarian's" last living child or on the death of the "unborn widow."

In actual trusts, the typical set of beneficiaries of that remainder interest are the transferor's "issue" or "descendants," although law professors (myself included, *see supra* note 26) are not always careful to fashion their hypothetical cases so. For hypothetical cases that are realistic on this point, however, see J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS AND ESTATES 794 (3d ed. 1984) (Case 7, an unborn-widow case in which the remainder interest is in favor of T's "son's issue."); Dukeminier, *Modern Guide*, *supra* note 8, at 1876-77 (Illustration 8, a fertile-octogenarian case in which the remainder interest is in favor of A's "grandchildren," who presumably are T's great-grandchildren; it would be unlikely for T to have a descendant in being at his or her death younger than a great-grandchild); *id.* at 1878 (Illustration 9, an unborn-widow case in which the remainder interest is in favor of A's "issue," who presumably are also T's issue).

If the transferor has no descendants or issue, a family-oriented trust will likely be for the benefit of a collateral line of descent (such as descendants of the transferor's parents). (This is not only true today—*e.g.*, Estate of Pearson, 442 Pa. 172, 275 A.2d 336 (1971)—but also true in even so ancient a case as Jee v. Audley, 29 Eng. Rep. 1186 (Ch. 1787). In that case, the beneficiaries of Edward Audley's testamentary trust included "my niece Mary Hall and the issue of her body lawfully begotten and to be begotten"; as it turned out in the actual case, Mary Hall had no issue living at Edward's death, and, had that case arisen today, only this fortuitous turn of events would prevent the youngest measuring life under the Restatement's list or the causal-relationship formula from being a very young child.) In most such cases, the youngest measuring life would be the youngest descendant in that collateral line of descent. *See Pearson*, 442 Pa. at 172, 275 A.2d at 336. There is no reason to think that the age of that youngest descendant, on average, would be appreciably different from the age of the 6-year-old descendant of the transferor upon whose remaining life expectancy the 90-year waiting period of the Uniform Act is built.

31 Waggoner, *Progress Report*, *supra* note 13, ¶ 703.4, at 7-17.

32 U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986, at 69 table 108 (106th ed. 1985).

33 Professor Dukeminier has suggested that a more accurate method of determining the average length of the waiting period under an actual-measuring-lives approach would be to examine appellate cases in which a perpetuity violation was found to exist. Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1033-34 n.24, 1047 n.51. With respect, this is an unrealistic suggestion, for two reasons. First, only a fraction of perpetuity violations reach the appellate-court stage. *See* Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 580 n.23. Second, in those that do reach that stage the appellate courts seldom give sufficient information about the facts of the case to determine the age of the person who would be the youngest measuring life under a wait-and-see regime. *See, e.g.*, Estate of Pearson, 442 Pa. 172, 275 A.2d 336 (1971) (youngest measuring life, under either the Restatement's list or a causal-relationship formula, would have been the youngest of the testator's grandnephews and grandneices in being at his death; court does not identify that person or give that person's age).

reliable enough to support a waiting period of 90 years, given the margin-of-safety function that it performs.

III
CONCLUSION

The Uniform Act unclutters the wait-and-see strategy of perpetuity reform. It makes wait-and-see simple to administer, fair, and workable. It achieves this objective without the necessity or cost of front-end or mid-period litigation and without supplying a waiting period that exceeds traditional boundaries. Rather than institutionalizing the twelve-healthy-babies ploy, the 90-year period fits well within the range of the margin of safety provided by an actual-measuring-lives approach to wait-and-see, using either the specified-list or causal-relationship method.[34] Standard perpetuity saving clauses routinely grant such a margin-of-safety period to thousands upon thousands of trusts without any demonstrated harm befalling society as a result.[35]

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[34] See the tables set forth in Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 590 n.39, showing that the waiting period under either of these methods in standard cases can easily exceed the 90-year period that the Uniform Act authorizes.

[35] Without a saving clause, many trusts would violate the common-law Rule.

Note that, by the term standard perpetuity saving clause, I mean to refer to one in which the descendants of the transferor (or of an ancestor of the transferor) in being at the creation of the trust (either by direct designation or by virtue of a designation of the beneficiaries of the trust then in being), plus 21 years, are used to measure a period of time that provides an adequate margin of safety in which to allow the contingencies in the trust's future interests to work out harmlessly. I do not mean to refer to a saving clause using twelve healthy babies from unrelated families.

Professor Dukeminier charges that the Uniform Act "increases the period practically available to the dead hand by about 50%." Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1023 n.2; *see also id.* at 1046 ("The potential for extension of the dead hand by about 50 percent is striking."). (Elsewhere, Professor Dukeminier likened the 90-year period to "pollution." *Id.* at 1054-55; Dukeminier, *Modern Guide*, *supra* note 8, at 1886 n.66.) If Professor Dukeminier means this claim literally, he is charging that the Uniform Act increases by 50 percent the margin-of-safety period traditionally granted by the wait-and-see strategy and by its privately established counterpart, the standard perpetuity saving clause. If true, the solution would seem to be to propose shortening the Uniform Act's waiting period to 60 years. But, with respect, the claim does not seem credible. For it to be credible, the youngest person among groups of measuring lives would have to average out to be about 38 years old rather than 6 years old, as determined by the Drafting Committee of the Uniform Act and its Advisors. (The remaining life expectancy of a 38-year-old is 39 years, U.S. BUREAU OF THE CENSUS, *supra* note 32, at 69 table 108, which, with the 21-year tack-on period, gives a period of 60 years (39 + 21).) More likely, if a 38-year-old is in the group of measuring lives, he or she is not the youngest. It is more plausible to think that the youngest is that 38-year-old's 6-year-old child, upon whose remaining life expectancy the 90-year period of the Uniform Act is predicated.

Professor Dukeminier offers no evidence to support his charge. He mentions again, *see supra* note 12 and accompanying text, the assertion that a 90-year margin-of-safety period can only be achieved by the twelve-healthy-babies ploy—a false assertion. *See supra* notes 14-16 and accompanying text; notes 17-18 and accompanying text; note 26;

notes 31-34 and accompanying text. His other evidence relates to the actual duration of existing trusts, as reported to him by three law firms from whom he made inquiries. Dukeminier, *Ninety Years in Limbo*, *supra* note 8, at 1045-46. Such anecdotal evidence has nothing to do with the average length of the margin-of-safety period that can be provided under the current common-law Rule by a standard perpetuity saving clause. If perpetuity saving clauses are to provide an adequate margin of safety, they must of necessity establish a period that extends beyond—often substantially beyond—the time when the contingencies in the trusts work themselves out. The length of the unused end-portion of the margin-of-safety period has nothing at all to do with dead-hand control. *See supra* notes 4 & 26; *see also* Waggoner, *Uniform Statutory Rule*, *supra* note 4, at 590 n.39.

In the final analysis, the 90-year period of the Uniform Act does not increase by 50 percent the margin-of-safety period traditionally granted by wait-and-see or standard perpetuity saving clauses. It is, in fact, well within traditional boundaries.

EXHIBIT 4

PERPETUITIES REFINEMENT: THERE IS AN ALTERNATIVE

Ira Mark Bloom*

A new uniform law is in the offing: a Uniform Statutory Rule Against Perpetuities (USRAP).[1] The law is based on the wait-and-see approach to the common law Rule Against Perpetuities.[2] Under this approach, a waiting period is prescribed to see whether the contingency which renders a nonvested interest void under the common law Rule actually occurs.

The wait-and-see cause was initially championed by Professor Leach, who in 1952 asked: "Why should we not 'wait and see' to determine whether the contingency happens within the period of the Rule?"[3] By 1979, Professor Casner, Reporter for the Restatement (Second) of Property, convinced the American Law Institute to adopt a version of the wait-

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1. The National Conference of Commissioners on Uniform State Laws approved a Uniform Statutory Rule Against Perpetuities (USRAP) at its August, 1986 meeting in Boston, Massachusetts. UNIF. STATUTORY R. AGAINST PERPETUITIES (1986) [hereinafter Act or USRAP]. The Act is the culmination of three years of work by the Drafting Committee on the Uniform Statutory Rule Against Perpetuities Act, including its Reporter-Draftsman, Professor Lawrence Waggoner of the Michigan Law School. *See* Waggoner, *Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*, 20 INST. ON EST. PLAN. ¶ 700 (1986) [hereinafter Waggoner, *Progress Report*].

The Conference has completed all work on the statutory portion of the USRAP, including review by the Conference's Style Committee. The Prefatory Note and Comments to the Act must still be finalized, however. Letter to the author from Professor Lawrence Waggoner (Sept. 19, 1986).

Official publication of the USRAP, with Prefatory Note and Comments, is expected in early 1987. The Act will also be submitted to the House of Delegates of the American Bar Association for its anticipated approval in early 1987. Telephone interview with John M. McCabe, Legislative Director, National Conference of Commissioners on Uniform State Laws (Aug. 12, 1986).

Professor Waggoner graciously furnished the author with advance copies of his *Progress Report* article and various USRAP drafts. When appropriate, this article provides page references to the Prefatory Note and Comments contained in the April 30, 1986 draft version of the USRAP. UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft Apr. 1986) [hereinafter DRAFT USRAP (Spring 1986)]. Subject to minor changes and polishing, it is anticipated that the official version of the Act will be comparable to the Spring 1986 Draft.

2. The wait-and-see component of the Uniform Statutory Rule Against Perpetuities (USRAP) is set forth *infra* note 71.

3. Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 730 (1952) [hereinafter Leach, *Reign of Terror*].

and-see approach.[4] If the USRAP is widely adopted by the states,[5] the wait-and-see advocates will have succeeded in affecting "a fundamental modification of the common law Rule Against Perpetuities."[6]

The purpose of this article is twofold: first, to demonstrate why, in response to Professor Leach's basic question, we should not "wait-and-see"; second, to offer constructive alternatives to the wait-and-see approach.

Part I of this article identifies those areas of agreement between wait-and-see advocates[7] and opponents,[8] including the acknowledged desirability for some rule against perpetuities. In part II, the case for wait-and-see is summarized and the three major wait-and-see methods are described. These methods include: (1) the causal relationship method, (2) a measuring lives version under the Restatement (Second) of Property, and (3) the newly-unveiled proxy method under the USRAP. A recent debate between Professors Dukeminier and Waggoner highlights the controversy among

4. At the American Law Institute Proceedings in 1978, Director Herbert Wechsler set the stage for the debate over wait-and-see: "[T]he rule against perpetuities that I first learned about fifty years ago . . . and never imagined that people would ever argue about (laughter), or was sufficiently important to argue about, is going to be the subject of a great debate." *Proceedings of 1978 Annual Meeting*, 55 A.L.I. PROC. 45 (1978) [hereinafter *1978 ALI Proceedings*] (remarks of Dir. Wechsler).

In the end—after two years of heated debate—Professor Casner prevailed over Professors Powell, Berger, Lusky, and other wait-and-see opponents. *Id.* at 222–309; *Proceedings of 1979 Annual Meeting*, 56 A.L.I. PROC. 424–81, 483–91, 521 [hereinafter *1979 ALI Proceedings*.] The wait-and-see approach is reflected in Chapter 1 of the volume on donative transfers. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) §§ 1.1-1.6 (1983).

5. At its August, 1986 meeting, the National Conference of Commissioners on Uniform State Laws recommended that the USRAP be enacted in all the states. See *infra* notes 201–07 and accompanying text for the status in early 1986 of the Rule Against Perpetuities in the United States.

6. L. WAGGONER, FUTURE INTERESTS IN A NUTSHELL 300 (1981) [hereinafter L. WAGGONER, NUTSHELL].

7. The late Professor Leach is the acknowledged godfather of the wait-and-see movement. As Professor Waggoner notes: "[T]hrough his writings [he] became such a devoted proponent of the concept that it has come to be identified with him." *Id.* at 293; *see* R. LYNN, THE MODERN RULE AGAINST PERPETUITIES 192–93 (1966) [hereinafter LYNN] . Professor Leach's colleague, Professor Casner, significantly advanced the wait-and-see cause by his efforts as Reporter for the Restatement (Second) of Property. *See supra* note 4. Other advocates include Professors Dukeminier and Waggoner, and the late Professor Maudsley. *See infra* note 9 (citing recent publications by Dukeminier and Waggoner); Maudsley, *Perpetuities: Reforming the Common-Law Rule—How to Wait and See*, 60 CORNELL L. REV. 355 (1975) [hereinafter Maudsley, *How to Wait and See*].

8. The late Professors Mechem, Powell, and Simes steadfastly opposed the wait-and-see approach. *See, e.g.*, Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. PA. L. REV. 965 (1959) [hereinafter Mechem, *Further Thoughts*]; Powell, *How Far Should Freedom of Disposition Go?*, 26 A.B. REC. 8 (1971); Simes, *Is the Rule Against Perpetuities Doomed? The "Wait and See" Doctrine*, 52 MICH. L. REV. 179 (1953) [hereinafter Simes, *The "Wait and See" Doctrine*]. Other opponents include Professors Berger and Lusky. *See 1978 and 1979 ALI Proceedings*, *supra* note 4; Fetters, *Perpetuities: The Wait-and-see Disaster*, 60 CORNELL L. REV. 380 (1975) [hereinafter Fetters, *The Wait-and-see Disaster*]; 5A R. POWELL, THE LAW OF REAL PROPERTY ¶ 827F[3] (P. Rohan ed. 1985). The Rohan work provides an extensive perpetuities bibliography for works before 1980. *Id.* at ¶ 827G.

scholars regarding the appropriate methodology under a wait-and-see approach.[9]

Part III presents the case against the wait-and-see approach by addressing several underlying, but unfounded, assumptions. The most crucial assumption under wait-and-see is that a severe enough problem exists to warrant its adoption. Research, however, reveals a perpetuities violation averaging only one relevant case per year during the eight-year period, 1978–1985.[10]

Part IV makes the case for refining the common law Rule, based in part on a critique of an erroneous decision by the Indiana Supreme Court in 1985.[11] In addition, a statutory scheme for refinement is offered. Although the statutory package partially relies on existing or proposed solutions, the overall package has never been detailed.

In the end, rejection of wait-and-see legislation generally, and the USRAP specifically, is urged. Adopting the wait-and-see approach to the common law Rule Against Perpetuities would be tantamount to buying and using "an atomic cannon to kill a gnat."[12]

I. AREAS OF AGREEMENT BETWEEN WAIT-AND-SEE ADVOCATES AND OPPONENTS

There is a general consensus concerning various aspects of the Rule Against Perpetuities. That the Rule serves a useful societal purpose by

9. Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) [hereinafter Dukeminier, *The Measuring Lives*]; Waggoner, *Perpetuities: Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985) [hereinafter Waggoner, *Perspective*]; Dukeminier, *A Response By Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Waggoner, *Rejoinder By Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985); Dukeminier, *Final Comment by Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985) [hereinafter Dukeminier, *Final Comment*].

10. Perpetuities cases for the twenty-one-year period, 1957–1977, were identified in a memorandum by Professor Powell. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 127, 143, 148–54 (Tent. Draft No. 1, 1978), *reprinted in* 5A R. POWELL, THE LAW OF REAL PROPERTY ¶ 827H [hereinafter Powell Memorandum]. For purposes of this article, I have updated Professor Powell's efforts by identifying American cases during the eight-year period, 1978–1985, which involved the Rule Against Perpetuities. A Lexis search in 1986 produced all cases containing the phrase "Rule Against Perpetuities." In addition, cases (including cases published in the New York Law Journal) which were digested under the heading "Perpetuities" were identified.

The relevant cases from this universe are those which would be governed by the wait-and-see approach to the common law Rule Against Perpetuities under the USRAP. *See infra* note 71 and accompanying text. Cases which did not void an interest under the common law Rule, as well as cases which did not specifically involve a question of validity, are not considered relevant cases.

11. Merrill v. Wimmer, 481 N.E.2d 1294 (Ind. 1985), *vacating* 453 N.E.2d 356 (Ind. Ct. App. 1983). *Merrill* is discussed *infra* in text accompanying notes 221–34.

12. The quotation was Professor (then Dean) Richard Maxwell's description of California's legislative response in 1963 to a commercial transaction case. Dukeminier, *Perpetuities Revision in California: Perpetual Trusts Permitted*, 55 CALIF. L. REV. 678 (1967) [hereinafter Dukeminier, *Perpetuities Revision*].

limiting dead hand control is a viewpoint almost unanimously accepted.[13] Further, most would agree that the perpetuities time period—lives in being plus 21 years—establishes an acceptable outer limit for dead hand control.[14] An English Law Reform Committee concluded as follows: "In the absence of any compelling reasons, whether based on public policy or otherwise (and we can see none), we prefer to leave the permitted period as it is . . . ."[15]

There is also general agreement on how the common law Rule operates. Based on Gray's formulation,[16] interests which will not necessarily vest (or fail to vest) within lives in being plus 21 years are void from their inception.[17] Moreover, vested interests which must either vest (or fail to vest) within the perpetuities period may be invalidated under the infectious invalidity doctrine.[18] Professor Leach described the doctrine's application as follows:

> When part of the gifts in a will or trust violate the Rule, the courts inquire whether what is left can stand by itself . . . without serious distortion of the dispositive scheme of the testator or settlor. If the answer is negative then other gifts—prior, concurrent, or subsequent—are also stricken out.[19]

The doctrine of infectious invalidity suggests another point of agreement. The transferor's intent should be carried out unless effectuation of

13. The English Law Reform Committee which recommended the wait-and-see approach stated as follows: "Granted the necessity for placing some time limit on the vesting of future interests, *which we take to be beyond argument* . . . ." LAW REFORM COMMITTEE, FOURTH REPORT, CMND. NO. 18, ¶ 5 (1956) (emphasis added) [hereinafter ENGLISH REPORT].

The Restatement (Second) of Property provides extensive justification for a rule against perpetuities. *See* RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) 8–10 (1983) (Introductory Note); *see also* L. SIMES, PUBLIC POLICY AND THE DEAD HAND 58–63 (1955) [hereinafter, L. SIMES, PUBLIC POLICY].

14. *See, e.g.*, L. SIMES, PUBLIC POLICY, *supra* note 13, at 68. ("[T]he period of the Rule would seem still to be a workable and practical one."); Waggoner, *Progress Report*, *supra* note 1, ¶ 703.4 ("[T]he traditional period works well enough as it is."). Although Professor Casner suggested the appropriateness of shortening the period, he detected no movement to warrant a departure from the traditional period in the Restatement (Second). *1978 ALI Proceedings*, *supra* note 4, at 226–27 (remarks of Professor Casner).

15. ENGLISH REPORT, *supra* note 13, at 6.

16. "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." J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942) [hereinafter GRAY]. *See generally* Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982).

17. The common law Rule also applies to powers of appointment, including whether a power was validly created and if so, whether it was validly exercised. *See* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1271–1277 (2d ed. 1956 & Supp. 1985).

18. *Id.* §§ 1262-1264; *see infra* note 239 and accompanying text (providing recent examples of infectious invalidity doctrine).

19. Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124, 1147 (1960) [hereinafter Leach, *Hail Pennsylvania*].

that intent contravenes the public policy behind the Rule Against Perpetuities.[20] Further, most would agree that a transferor did not intend to extend dead hand control for too long a period, even though the Rule may be violated by some technicality.[21] All would agree that Professor Leach masterfully identified the major areas of technical violation: the administrative contingency, the fertile octogenarian, and the unborn widow.[22] There is less agreement on whether a violation caused only because an age requirement exceeds 21 years constitutes a technical violation;[23] this article assumes that such violations are technical. Finally, the article treats the all-or-nothing rule as falling within the technical violations area.[24]

There is also agreement that perpetuities violations caused by technicalities may be avoided by competent drafting.[25] For example, the unborn widow problem can be avoided by specifying in the instrument that the widow must have been alive when the interest was effectively created.[26] At a minimum, a violation can be avoided by a saving clause. Professor Casner could not have put it more simply:

> [T]here is absolutely no reason why anybody drafting a trust today should violate the rule against perpetuities. All you have to do is to put in a provision that 21 years after the death of A, B, C and D—naming people—this trust will terminate . . . .[27]

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20. For example, an A.L.I. member stated: "The objective of the law in this area, to me, should be to carry out the conveyor's intent to the greatest extent possible, subject only to restrictions on public policy." *1978 ALI Proceedings*, *supra* note 4, at 269 (remarks by John H. Young).

21. Professor Waggoner considers all perpetuities violations to be mistakes. *See* Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718, 1719–20, 1782–85 (1983) [hereinafter Waggoner, *Perpetuity Reform*].

22. *See* Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643–46 (1938) [hereinafter Leach, *Perpetuities in a Nutshell*]. The literature has been overwhelmed with illustrations and discussions of these traps. *See, e.g.*, Waggoner, *Progress Report*, *supra* note 1, ¶ 701.2 nn.9–11; Waggoner, *Perpetuity Reform*, *supra* note 21, at 1726–47; L. WAGGONER, NUTSHELL, *supra* note 6, at 198–216 (three classic booby traps). USRAP drafts also provide examples and discussion of these traps. *See, e.g.*, UNIF. STATUTORY R. AGAINST PERPETUITIES at 25–27 (Discussion Draft Feb. 1986) (examples 9–11) [hereinafter DRAFT USRAP (Winter 1986)]. Presumably these examples will appear in the official version of the Act. *See supra* note 1.

23. *See* Waggoner, *Perpetuity Reform*, *supra* note 21, at 1726, 1748.

24. Under this rule, class gifts may be invalidated if there is a possibility of fluctuation in the class beyond the perpetuities period. *See* Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329 (1938) [hereinafter Leach, *Gifts to Classes*].

25. *See, e.g.*, Waggoner, *Perpetuity Reform*, *supra* note 21, at 1724–26.

26. *See, e.g.*, DeMello v. DeMello, 19 Mass. App. Ct. 68, 471 N.E.2d 406 (1984), *review denied*, 393 Mass. 1106, 474 N.E.2d 182 (1985).

27. *1978 ALI Proceedings*, *supra* note 4, at 240. A saving clause (referred to by some as a "savings clause") also provides for a "gift over" on trust termination. *See infra* note 178 (example of saving clause).

Finally, there is a unanimous feeling among those who come in contact with it that the common law Rule Against Perpetuities is exceedingly complex. These include law students, law professors, lawyers, judges, legislators, tax personnel, and, of course, nonlawyers. Gray spoke as follows:

> There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. The study and practice of the Rule against Perpetuities is indeed a constant school of modesty. A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it.[28]

Professor Leach also acknowledged the Rule's complexity: "I confess to some predisposition to being overwhelmed on this subject."[29]

II. THE CASE FOR THE WAIT-AND-SEE APPROACH TO THE COMMON LAW RULE AGAINST PERPETUITIES

A. Rationale

The wait-and-see approach developed in response to the alleged harshness of the common law Rule Against Perpetuities.[30] Under the common law Rule, a nonvested interest must be validly created; that is, it

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28. GRAY, *supra* note 16, at xi.

29. Leach, *Forward* to J. DUKEMINIER, PERPETUITIES LAW IN ACTION, at v (1962). Professor Leach's difficulties with the Rule are suggested in his famous Nutshell article wherein he provided the following example to illustrate the severability doctrine:

> [E]xample 34. T bequeaths $1000 to the first son of A who shall become a clergyman; but if no son of A becomes a clergyman, then to B. [The gift over to B "if no son of A becomes a clergyman" plainly includes at least two contingencies: (a) A having no son—which must occur, if at all, at A's death; (b) A having one or more sons, none of whom becomes a clergyman—which cannot be known until the death of A's sons, a time well beyond the period of perpetuities.] A dies without ever having had a son. Nevertheless, the gift to B fails.

Leach, *Perpetuities in a Nutshell*, *supra* note 22, at 655.

The reader (typically a law student) is clearly left with the impression that the disposition to the first son of *A* is valid. In fact, the disposition to the first son of *A* is invalid for the same reason that the disposition to *B* is invalid. The event—a son of *A* becoming a clergyman—will not necessarily occur within lives in being and 21 years. In effect, the $1000 was not validly disposed of under Leach's example.

To his credit, Professor Dukeminier recently acknowledged an error he made in a wait-and-see problem in his widely-adopted casebook, WILLS, TRUSTS AND ESTATES (with S. Johanson). Dukeminier, *The Measuring Lives*, *supra* note 9, at 1706 n.152.

30. *See* Leach, *Reign of Terror*, *supra* note 3.

must be certain on the effective date of creation that the contingency or contingencies which make the interest nonvested will be resolved within the perpetuities period. Under this what-might-have-been approach, nonvested interests can be voided under the Rule despite the virtual certainty of the remote event actually occurring within the perpetuities period.

Wait-and-see advocates object to the common law Rule which operates "in a sledge-hammer fashion" to defeat the transferor's intention.[31] The title of one of Professor Leach's articles evokes our sympathies (and enrages us about the injustices of the common law Rule): *Slaying the Slaughter of the Innocents*.[32] The injustices of invalidity are further compounded. Property winds up in the hands of unintended—instead of intended—beneficiaries.[33]

The advocates further condemn the Rule because it penalizes the intended beneficiaries for the mistakes of lawyers.[34] Because violations can easily be avoided, the common law Rule only traps the unwary lawyer.[35] Further, it is alleged that the wealthy will not suffer because they have competent counsel.[36] As described by Professor Dukeminier, "[T]he wait-and-see doctrine is presented as consumer-protection legislation for the average consumer of legal services."[37]

B. Wait-and-see Solutions

According to wait-and-see advocates, a system must be designed "to grant interests that would have been invalid under the common law Rule a reasonable chance to be valid."[38] Under such a system, a drastic reduction in litigation would allegedly result because the remote event would most likely occur within the waiting period.[39]

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31. Waggoner, *Progress Report*, *supra* note 1, ¶ 701.

32. Leach, *Perpetuities: Slaying the Slaughter of the Innocents*, 68 LAW. Q. REV. 35 (1952).

33. *See, e.g.*, Maudsley, *How to Wait and See*, *supra* note 7, at 364. After positing that perpetuities violations are caused by mistakes, Professor Waggoner invokes the equitable principle of preventing unjust enrichment as a doctrinal basis for the wait-and-see approach. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1719–20. *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).

34. *See, e.g.*, *1978 ALI Proceedings*, *supra* note 4, at 273–74 (remarks of Dean Robert A. Stein).

35. *Id.*

36. *See* W. LEACH & O. TUDOR, THE RULE AGAINST PERPETUITIES 228 (1957); *see also infra* note 190 and accompanying text.

37. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1649. The Restatement (Second) of Property provides the following justification: "The adoption of the wait-and-see approach . . . 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." RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS), ch. 1, Introduction, at 13 (1983).

38. Waggoner, *Perspective*, *supra* note 9, at 1717.

39. *1978 ALI Proceedings*, *supra* note 4, at 249 (remarks of Professor Casner).

Whatever wait-and-see system is constructed, its essential operation involves waiting to see whether a nonvested interest actually vests or terminates within some time period. Assuming the event does not occur within the prescribed time period, the current advocates agree with the Restatement (Second) position[40] that courts should have the cy pres power to reform the interest, which, on "waiting and seeing," eventually turns out to be invalid.[41]

The current dispute, evidenced by a recent debate between Professors Dukeminier and Waggoner, involves the appropriate method for marking off the perpetuities waiting period.[42] Three major alternatives have been suggested: (1) the causal-lives method, (2) a formula method to identify lives, and (3) a period-in-gross approach. The first two alternatives provide a system for identifying the measuring lives; the third alternative is a proxy for the time period produced under a measuring lives approach. Draft versions of the Uniform Statutory Rule Against Perpetuities (USRAP) recommended only the second and third alternatives.[43]

Professor Dukeminier recently provided a comprehensive discussion of the causal-lives method.[44] It involves three steps. First, identify those lives in being who are causally connected to vesting. Second, test for certainty of vesting within the lifetimes of the identified persons plus 21 years. Third, if it cannot be said with absolute certainty that the event will occur within 21 years after the death of any identified person, wait and see whether the event actually occurs within 21 years after the deaths of those identified persons—the measuring lives.

Professor Waggoner argues that the process for identifying causal lives raises perplexing problems.[45] As the reporter for the committee drafting the USRAP, he rejected the causal-lives method "because it was concluded that even perpetuity scholars, to say nothing of non-experts in the field, cannot agree on the precise meaning of [the causal-lives] language."[46]

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40. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5 (1983).

41. *See, e.g.*, Dukeminier, *The Measuring Lives*, *supra* note 9, at 1713. The Uniform Statutory Rule, drafted by Professor Waggoner, also provides for cy pres reformation after the waiting period. USRAP § 3 (1986) (set forth and discussed *infra* text accompanying notes 135–48). The English version of wait-and-see does not have a cy pres component. Perpetuities and Accumulations Act 1964, § 3(1). *See* R. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 232 (1979) [hereinafter R. MAUDSLEY, THE MODERN LAW].

42. *See supra* note 9 and accompanying text.

43. *See* UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft Aug. 1985) (second alternative) [hereinafter DRAFT USRAP (Summer 1985)]; DRAFT USRAP (Spring 1986), *supra* note 1 (third alternative). The Uniform Statutory Rule Against Perpetuities adopts a 90-year proxy period. *See infra* note 71.

44. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1654–74.

45. Waggoner, *Perspective*, supra note 9, at 1718–26.

46. DRAFT USRAP (Spring 1986), *supra* note 1, at 9.

The wait-and-see method under the Restatement (Second) of Property differs from the causal-lives method. Adopted by the American Law Institute in 1979 at Professor Casner's urging,[47] this method purports to identify the measuring lives by prescribing specific categories.[48] As Professor Dukeminier explains, however, persons who were initially listed as measuring lives may cease to be so and persons not initially listed may later become measuring lives under both the causal-lives and Restatement methods.[49]

Professor Dukeminier attacked the Restatement (Second)/Waggoner-backed approach on several grounds: "It is at best an artificial solution, at worst an extension of the dead hand far beyond the necessities of the case . . . ."[50]

Each side masterfully assailed the other's position in the recent debate. Professor Dukeminier stated: "The Restatement criterion for measuring lives . . . contains enough puzzles to keep perpetuities lawyers in court (and in fees!) for years."[51] Professor Waggoner countered:

> The questions go on and on. The bottom line is that the simple one-sentence statute that Dukeminier touts as *the* solution to wait-and-see leaves so many questions in doubt that, as Dukeminier says of the Restatement, it "contains enough puzzles to keep perpetuities lawyers in court (and in fees!) for years."[52]

Professor Waggoner also conceded that problems exist under any system which uses measuring lives to wait-and-see. He acknowledged "[t]he administrative burden of tracing a somewhat rotating group of measuring lives, along with the problems of who the measuring lives should be and how to identify them."[53] He then raised "a fundamental question deserving of serious consideration: should actual measuring lives be used at all?"[54]

As an alternative, Professor Waggoner suggested a period-in-gross method as an approximation—proxy—for the period determined by using

47. *See supra* note 4.

48. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 (1983). There are 33 pages of discussion under this section, together with 21 illustrations. *Id.* at 48–80. Professor Kurtz recently explained Iowa's law, which virtually adopted the Restatement (Second) method. Kurtz, *The Iowa Rule Against Perpetuities—Reform at Last, Restatement Style: Wait-and-See and Cy Pres*, 69 IOWA L. REV. 705 (1984).

49. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1672–73, 1681–1701.

50. *Id.* at 1711.

51. *Id.* at 1694. Professor Dukeminier later concluded: "So much for the Restatement list. It may take years of learned analysis and litigation to solve its sphinxine riddles." *Id.* at 1701.

52. Waggoner, *Perspective*, *supra* note 9, at 1724. The one-sentence statute of which Professor Waggoner speaks is set forth *infra* note 150.

53. Waggoner, *Perspective*, *supra* note 9, at 1724.

54. *Id.*

measuring lives and 21 years.[55] Although the conclusion to be drawn is unclear, Professor Dukeminier chose not to respond directly to this alternative. One can assume that his major objection would lie with the tendency of a period-in-gross method to unnecessarily and undesirably extend dead hand control. Indeed, Professor Waggoner anticipated this objection:

> To be sure, cases can rightly be posed that show that a fixed period of years would allow some families to continue trusts through (or into) more generations than other families. Considering the great benefits of the period-of-years approach, I doubt that this "advantage" to families with shorter longevities is troublesome enough to reject the approach out of hand.[56]

Professor Waggoner actively pursued a period-in-gross method. In November of 1985, Waggoner authored a 100-year-in-gross version of the USRAP.[57] This version abandons the "conventional" measuring lives approach to wait-and-see.[58] The 100-year period allegedly approximates the waiting period which would be produced if a competent attorney employed a well-conceived saving clause.[59] Regarding the factor of dead hand control, Waggoner urged: "Aggregate dead hand control will not be increased beyond what is already possible by competent drafting under the common law Rule."[60]

Professor Waggoner refines his thinking about the period-in-gross method in his most recent article: *A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities*.[61] He determines for hypothetical families that the average age of the youngest life in being at the creation of a nonvested interest would be 6 years. Since that child would have a life expectancy of 69 years under the 1985 Statistical Abstract, adding 21 years produces a period-in-gross of 90 years.[62] Waggoner leaves the exact number of years-in-gross open-ended—somewhere between 90 and 95 years, the latter based on the life expectancy of an infant (74), plus 21 years.

55. *Id.* at 1726–28.

56. *Id.* at 1728.

57. UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft Nov. 1985) (100-year period in gross version) [hereinafter DRAFT USRAP (Fall 1985)].

58. The "conventional" measuring lives methodology is acknowledged in this draft. *Id.* at 6.

59. *Id.* at 6–12; *see infra* notes 162–79 and accompanying text.

60. DRAFT USRAP (Fall 1985), *supra* note 57, at 11.

61. Waggoner, *Progress Report*, *supra* note 1.

62. *Id.* at 704. Alternatively, Waggoner suggests a floating period based on actuarial expectancies. *Id.* An earlier draft prescribed the proxy method:

> The allowable period is 21 years plus the number of years of remaining life expectancy of a [newborn infant] [[5]-year old], rounded off to the nearest whole number, designated in the Total column of the table titled "Expectation of Life and Expected Deaths, by Race, Sex, and Age," or its successor, in the Statistical Abstract of the United States published by the United States Bureau of the Census for the year in which the nonvested property interest or power of appointment was created.

DRAFT USRAP (Winter 1986), *supra* note 22, at 6.

Whatever period is adopted under the proxy method,[63] Professor Waggoner predicts: "The benefit of wait-and-see [will be] provided without the costs associated with it."[64]

As approved by the National Conference of Commissioners on Uniform State Laws, the USRAP provides a 90-year proxy period,[65] plus a cy pres reformation provision.[66] The Act, however, is prospective in application, in that it will only apply to interests created after enactment of the legislation by a state.[67] At the same time, the USRAP sanctions judicial reformation of preexisting documents containing a perpetuities violation.[68]

III. THE CASE AGAINST THE WAIT-AND-SEE APPROACH TO THE COMMON LAW RULE AGAINST PERPETUITIES

A. *The Assumption of Frequent Invalidation Under the Common Law Rule*

The case for wait-and-see rests on a critical assumption: the existing common law Rule causes problems because it frequently invalidates future interests based on unlikely post-creation events. A draft version of the USRAP explains: "[The] Rule is harsh because it *so often* invalidates interests . . . ."[69]

Relevant perpetuities cases during the eight-year period, 1978–1985, were analyzed to determine the frequency of invalidation.[70] "Relevant" refers to those reported perpetuities cases in the United States which (1)

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63. Professor Waggoner mentions another possible solution:

> Instead of *replacing* the proxy approach for marking off the allowable waiting period, the modified version might introduce in limited form a generationally fixed period *in addition to* the period marked off by the proxy. The proposal might, for example, be to provide that an interest that would have been invalid under the common-law Rule is valid nevertheless (1) if it vests within the lifetime of or at the death of a grandchild of the transferor, whether or not that grandchild was in being at the creation of the interest, or (2) if it vests within the allowable period marked off by whichever of the proxies now under consideration the Drafting Committee selects.

Waggoner, *Progress Report*, *supra* note 1, ¶ 703.4 n.22.

64. *Id.* ¶ 704.

65. USRAP § 1 (1986), set forth and discussed *infra* note 71.

66. USRAP § 3 (1986), set forth and discussed *infra* in text accompanying notes 137–48. It is predicted that the cy pres issue will arise infrequently. DRAFT USRAP (Spring 1986), *supra* note 1, at 61.

67. USRAP § 5(a) (1986).

68. *Id.* § 5(b). Judicial insertion of a saving clause into the offending instrument by using the lives determined under the Restatement (Second) list is recommended. DRAFT USRAP (Spring 1986), *supra* note 1, at 93–94. There is no guidance, however, on the gift over portion of the judicially inserted saving clause, i.e., who will take if the nonvested interest does not vest 21 years after the death of the surviving measuring life.

69. DRAFT USRAP (Winter 1986), *supra* note 22, at 8 (emphasis added).

70. *See supra* note 10 (describing research methods).

ultimately involved invalidation of a future interest under the common law Rule Against Perpetuities, and (2) would be subject to the Statutory Rule Against Perpetuities of the USRAP.[71]

For the eight years, 1978–1985, research confirms the voiding of an interest under the common law Rule Against Perpetuities in the following number of reported appellate cases:

1978: One[72]	1982: None
1979: Two[73]	1983: None[76]
1980: One[74]	1984: None[77]
1981: None[75]	1985: Two[78]

71. The Uniform Statutory Rule Against Perpetuities adopted by the National Conference in August, 1986 provides in part as follows:

SECTION 1. STATUTORY RULE AGAINST PERPETUITIES

(a) A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain either to vest or to terminate within the lifetime of an individual then alive or within 21 years after the death of that individual; or

(2) the interest either vests or terminates within 90 years after its creation.

USRAP § 1(a) (1986).

Section 1(a)(1) essentially codifies the common law Rule subject to the minor qualification by section 1(d) that "the possibility that a child will be born to an individual after the individual's death is disregarded." *See* DRAFT USRAP (Spring 1986), *supra* note 1, at 21–32; *see supra* note 1 (explaining reliance upon Spring 1986 draft). Section 1(a)(2) provides the wait-and-see component of the Rule—a 90-year waiting period. *See* DRAFT USRAP (Spring 1986), *supra* note 1, at 32–36. Other portions of Section 1 provide comparable rules for testing whether a power of appointment is validly created. USRAP § 1(b) & (c) (1986); *see* DRAFT USRAP (Spring 1986), *supra* note 1, at 38–40.

Section 4 provides seven classes of exclusions from the Statutory Rule under Section 1, including inapplicability in the nondonative transfer area. USRAP § 4 (1986). Accordingly, the approximately 25 cases from 1978 through 1985 involving perpetuities violations in the commercial (nondonative transfer) area are not considered "relevant." *See infra* text accompanying notes 318–21. The Act also excludes interests, powers, and other arrangements which were not subject to the common law rule or are excluded by another statute. USRAP § 4(7).

This article also excludes donative transfers involving royalty interests. *See* Drach v. Ely, 10 Kan. App. 2d 149, 694 P.2d 1310 (royalty interest created under will violated Rule), *rev'd*, 237 Kan. 654, 703 P.2d 746 (1985) (vested mineral interest not void under the Rule). Although such donative transfers were not excluded from the Act, it was not because the Drafting Committee believed such transactions should be subject to the Statutory Rule. To the contrary, the Drafting Committee believed that certain mineral interests, created by either donative or nondonative transactions, should be invalidated if not vested within a 40-year period. DRAFT USRAP (Spring 1986), *supra* note 1, at 81–84. Ultimately, the committee believed it preferable to provide mineral interest rules through separate legislation. Letter to the author from Prof. Waggoner (May 19, 1986).

72. Connecticut Bank & Trust Co. v. Brody, 174 Conn. 616, 392 A.2d 445 (1978) (1922 testamentary trust). Although Connecticut earlier adopted a limited form of wait-and-see, the statute only applies to interests created after October 1, 1955. CONN. GEN. STAT. ANN. § 45-98 (West 1981).

73. Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979) (1978 will); Nelson v. Kring, 225 Kan. 499, 592 P.2d 438 (1979).

74. Dickerson v. Union Nat'l Bank, 268 Ark. 292, 595 S.W.2d 677 (1980) (1967 testamentary trust). In Berry v. Union Nat'l Bank, 262 S.E.2d 766 (W. Va. 1980), the court exercised its reformation power to save an interest which would have been voided under the common law Rule.

There were also two lower court New York cases involving invalidity based on the manner of exercising a power of appointment.[79]

In summary, the analysis discloses only eight relevant perpetuities cases during the 1978–1985 period.[80] In effect, there was, on the average, but one relevant perpetuities case per year in the United States.[81]

The inescapable conclusion is that no problem of frequent invalidation presently exists under the common law Rule Against Perpetuities. Thus, the case for the wait-and-see approach cannot be justified on this basis.

The same conclusion was reached in earlier periods. In 1955, Professor Simes argued: "I do not think that the hard cases which he [Professor Leach] discusses are of sufficiently frequent occurrence to cause us to overturn the fundamental bases of the Rule."[82] In 1959, Professor Mechem asked: "[H]as there really been a reign of terror, a slaughter of the innocents [as suggested by Professor Leach]?"[83] Mechem's conclusions:

> I doubt it. For one thing, I think if such a charge could be documented, Mr. Leach would have done it. If I am not mistaken, in none of his articles has he collected authorities tending to show that any very great number of wills have currently been the innocent victims of the rule. I have not counted noses (if cases have noses) and I do not assume to set myself up as an authority, but I

75. The court in May v. Hunt, 404 So. 2d 1373 (Miss. 1981), validated a disposition under the common law Rule, but reformed the trust to comply with a unique Mississippi rule on restraining alienation. *Id.* at 1380–81.

76. *See* Merrill v. Wimmer, 453 N.E.2d 356 (Ind. App. 1983), *vacated*, 481 N.E.2d 1294 (1985) (intermediate appellate court exercised its reformation power to save an interest); *see also infra* text accompanying note 226.

77. Barton v. Parrott, 25 Ohio Misc. 2d 8, 495 N.E.2d 973 (Ct. Com. Pl. 1984), involved a will provision which empowered trustees to establish an annual horserace. Because the trustees were authorized to use the property beyond the perpetuities period, this honorary trust was declared void. *See generally* L. SIMES & A. SMITH, *supra* note 17, § 1394. *Barton* is not considered a relevant case since it involved a trust duration issue, as distinct from the USRAP which tests the validity of nonvested interests and powers of appointment. *See supra* note 71.

78. Merrill v. Wimmer, 481 N.E.2d 1294 (Ind. 1985) (discussed *infra* at notes 221–34 and accompanying text); Commerce Union Bank v. Warren County, No. 85-12-011 (Tenn. Ct. App. 1985). *Commerce Union Bank* was reversed in 1986 by the Supreme Court of Tennessee, 707 S.W.2d 854 (Tenn. 1986) (discussed *infra* note 219).

79. *In re* Will of Grunebaum, 122 Misc. 2d 645, 471 N.Y.S.2d 513 (Surr. 1984); *In re* Harden, N.Y.L.J., Sept. 17, 1985, at 13, col. 6 (N.Y. Co. Surr.).

80. This number includes a 1985 Tennessee case which, on appeal in 1986, was held not to violate the common law Rule. *See supra* note 78. There were no reported cases during the eight-year period, 1978–1985, which declared a power of appointment invalidly created. *See supra* note 71 describing subsections 1(b) and (c) of the USRAP (relating to validity of created powers).

81. During this eight-year period, there were three Canadian cases digested under "Perpetuities": *Re* Roberts, 82 D.L.R.3d 591 (Ont. H.C. 1978); *Re* Manning, 84 D.L.R.3d 715 (Ont. App. 1978); *Re* Lawson, 33 N.B.2d 462 (Q.B. 1981). No violation of the common law Rule was found in any of these cases.

82. L. SIMES, PUBLIC POLICY, *supra* note 13, at 64.

83. Mechem, *Further Thoughts*, *supra* note 8, at 966.

> have been browsing through advance sheets and reading perpetuities cases for quite a number of years and it is not my impression that the casualty rate is high. . . . [Even assuming] three or four casualties a year. . . . [or] [d]ouble that . . . it's still a trifle.[84]

Based on Professor Powell's identification of 28 cases of invalidity during the 21-year period, 1957–1977,[85] Professor Berger similarly concluded: "[W]e are asked, in order to deal with the occasional instances where an incompetent lawyer fails to adhere to the limitations of the rule, to accept this beguiling principle of wait-and-see."[86]

Professor Leach responded to Professor Mechem by suggesting other sources of perpetuities problems apart from appellate opinions in which invalidity was found.[87] These included: (1) cases in which the gift was upheld on appeal after being held invalid (or valid) in the trial court, (2) cases which were settled, either before or after, a trial court ruling, and (3) cases where the issue existed but was never raised. Each point bears scrutiny.[88]

First, Leach suggested that appellate cases validating a disposition were relevant. Although he acknowledged that such cases could not illustrate the harsh consequences of the Rule because interests were not invalidated, his concern stemmed from the legal fees which indirectly diminish the property intended for the beneficiary.[89] Professor Leach's concern is a valid

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84. *Id.*

85. Powell Memorandum, *supra* note 10, at 143, 148–54. According to Professor Waggoner's analysis, 22 of these cases involved violations of a noncommercial nature. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1784 n.162.

86. *1979 ALI Proceedings*, *supra* note 4, at 454 (remarks of Professor Berger).

87. Leach, *Hail Pennsylvania*, *supra* note 19, at 1131–32. In reply, Professor Mechem observed: "I can only say that in my experience the reported cases normally afford at least a rough index to the activity in a given area, and they do not suggest to me that the Rule is causing a 'slaughter of the innocents.'" Mechem, *A Brief Reply to Professor Leach*, 108 U. PA. L. REV. 1155 (1960).

88. As Professor Lynn stated: "But Leach's position with respect to reforming the Rule is that of the advocate. His briefs are persuasive, but they are not invulnerable." Lynn, *Reforming the Common Law Rule Against Perpetuities*, 28 U. CHI. L. REV. 488, 491 (1961). In fact, Professor Leach may have overlooked a possible category of unreported or undetectable cases. *See* Merrill v. Wimmer, 481 N.E.2d 1294 (Ind. 1985) (discussing unreported trial court decision); Millwright v. Romer, 322 N.W.2d 30, 31 (Iowa 1982) (citing *In re* Summers, 292 N.W.2d 877 (Iowa Ct. App. 1979)). There is no evidence that this category is significant. *See supra* note 87 (Professor Mechem's observation).

89. Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563 (1952). Leach pointed to *Sears* as follows:

> But the list of parties occupies four full pages of the printed record (229 pages); and after all possible consolidations eight briefs were submitted (417 pages) and six counsel argued orally. The total fees allowed to dozens of counsel and guardians *ad litem* in the main estate and a half-dozen subsidiary estates is a matter of public record, but the additional fees charged to individual clients who stood to lose millions upon an affirmance will never be known; let each have his guess as to the probable total.

Leach, *Hail Pennsylvania*, *supra* note 19, at 1131.

one, and the existence of validating litigation does suggest a reason to refine the Rule.[90]

Second, Professor Leach pointed to settlement activity in the perpetuities area. Indeed, he suggested that the all-or-nothing result of litigation encouraged settlement.[91] In an effort to discover the volume of settlement activity during the 1978–1985 period, court personnel for the surrogate's courts of three major New York counties (representing a combined population of over 3 million) were contacted.[92] The results were rather startling: *There was not even one case settled in these three courts during the eight-year period.*

Mr. Richard B. Covey, one of this country's leading wealth transmission practitioners, was also contacted.[93] Mr. Covey advised that he had never participated in an out-of-court settlement of a perpetuities case, nor had he ever heard of such a practice.

Finally, Professor Leach was concerned about cases where a perpetuities violation existed but was not detected:

> So, my learned friends will say, what harm is done in these cases? Only this: if the defect is voluntarily revealed or an astute internal revenue agent spots it, then the person who has not asserted his rights will find himself subjected to a gift tax liability. Is this the way we want the Rule to work?"[94]

When written in 1960, the federal gift tax exemption level was $30,000.[95] Leach's argument may have had some merit, assuming he was correct that perpetuities violations are confined to dispositions by the less wealthy. The federal gift tax exemption equivalent is now $600,000.[96] On Leach's assumption, there will be no federal gift tax problem. If, on the other hand, perpetuities violations also occur among the wealthy, there should be no federal gift tax problem because the gift tax value of a future

90. *See infra* Part IV.

91. Leach, *Hail Pennsylvania*, *supra* note 19, at 1132.

92. In 1983, the combined population of Bronx, Erie (Buffalo), and New York Counties was approximately 3,600,000. 1984–85 NEW YORK STATE STATISTICAL YEARBOOK 23 (11th ed. 1985).

93. Mr. Covey, a graduate of Harvard College and Columbia Law School, is a partner in the New York City law firm of Carter, Ledyard & Milburn. He is the author of THE MARITAL DEDUCTION AND CREDIT SHELTER DISPOSITIONS AND THE USE OF FORMULA PROVISIONS (1984) and GENERATION-SKIPPING TRANSFERS IN TRUST (3d ed. 1978). He is also the editor and primary author of *Practical Drafting*, a new will and trust drafting service. Mr. Covey serves as special tax counsel to the American Bankers' Association for trust and estate tax matters and speaks frequently at continuing legal education programs and tax institutes. He is a Visiting Adjunct Professor at the University of Miami School of Law, from which he received an Honorary Doctor of Laws degree.

94. *See* Leach, *Hail Pennsylvania*, *supra* note 19, at 1132.

95. I.R.C. § 2521, *repealed by* Tax Reform Act of 1976, Pub. L. No. 94–455, § 2001(b)(3), 90 Stat. 1520 (1976).

96. For gifts after 1986, a credit (not to exceed $192,000) is allowed against gift tax imposed. I.R.C. § 2505(a). Because the gift tax imposed on a taxable gift of $600,000 is $192,000, the credit is equivalent to a gift tax exemption of $600,000.

interest based on some remote contingency would likely be insignificant.[97] Finally, Leach made the unlikely assumption—he cited no examples—that an agent would uncover a violation not previously detected.[98]

B. *Other Assumptions Justifying the Wait-and-see Approach to the Common Law Rule Against Perpetuities*

The case for wait-and-see is premised on other assumptions. These proffered assumptions do not bear up under scrutiny any better than the assumption of frequent invalidation.

Assumption #1: The common law Rule significantly frustrates the transferor's intent by allowing unintended beneficiaries to obtain property.

Consider a disposition, variations of which are commonly offered by wait-and-see advocates:

> *T* devised property in trust to pay income to child *A* for life. After *A*'s death, the corpus is to be equally divided among such of *A*'s children as reach 25. *T* left the residue of his estate to *B*.[99]

T, a widow, was survived by *A* who was childless at the time. The remainder to *A*'s children is void under the common law Rule. The interest passes to *B*.

In the abstract, it is difficult to quarrel with the point that *T*'s intent has been frustrated by invalidating the remainder interest. But consider that *T*'s intent was equivocal—she only wanted her grandchildren to take if they reached 25. Should we be so concerned with frustrating equivocal intent? Further, *T* never knew any of her grandchildren—none had been born within her lifetime. Should we be so concerned if (1) property will not reach persons not in existence at the time of the disposition, and (2) a transferor provides a scheme of distribution in an arbitrary fashion without regard to the eventual need or status of unborn persons? Arguments for this kind of dead hand control—which may be frustrated—make little sense when the power of appointment device is taken into account.[100]

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97. *See, e.g.*, Commissioner v. Cardeza's Estate, 5 T.C. 202 (1945), *aff'd*, 173 F.2d 19 (3d Cir. 1949). For the same reason, state gift taxation, applicable in a handful of states, will not be a factor.

98. If a recent ruling is any indication, the likelihood of detection is remote. In Priv. Ltr. Rul. 8234151 (May 23, 1982), the Service erroneously recognized a provision that terminated a trust 21 years and 11 months after lives-in-being. Under the Rule, actual—not prescribed—periods of gestation are permissible. *See* L. SIMES & A. SMITH, *supra* note 17, § 1224.

99. *See, e.g.*, Leach, *Perpetuities in a Nutshell*, *supra* note 22, at 648 (Example 24).

100. As Professor Leach wrote: "The power of appointment is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." Leach, *Powers of Appointment*, 24 A.B.A. J. 807 (1938).

Assume in the above example that the age was limited to 21, rather than age 25. The remainder interest would then have been validly created. If *A* died survived by one child, age 3, *B* would be entitled to the income from the property for at least 18 years.[101] Indeed, if the child died under 21, *B* would then be entitled to the trust property. Can it be said that *B*, who after *A*'s death would become the owner of the trust property if the disposition was based on age 25, was really an unintended beneficiary?

By voiding the remote interest,[102] the intended beneficiaries will not take under the instrument, but this does not mean they will never take. The "unintended beneficiaries" will probably be the parents of the intended (and usually) unborn beneficiaries. In turn, the parents will likely pass the property on to the intended beneficiaries and do so in a less rigid manner than under the original disposition.

Of course, there may be instances of unintended benefit. The point is that the assumption is not necessarily correct.[103]

Assumption #2: The wait-and-see approach to the common law Rule Against Perpetuities will cause minimal inconvenience, through litigation or otherwise.

On one level, wait-and-see advocates have effectively put the uncertainty of waiting to see into perspective. A waiting period is necessary under the traditional common law Rule approach to see whether the validly-created interest under the Rule actually vests or terminates during the period. Accordingly, the uncertainty under wait-and-see is no more objectionable.[104]

a. Inconvenience During the Waiting Period

Professor Casner once contended that, apart from rare cy pres litigation, litigation will "evaporate, because when you wait and see the interests will

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101. In a few states, the minor child of *A* would be entitled to the interim income by special legislation. *See, e.g.*, CAL. CIV. CODE § 733 (West 1954); N.Y. EST. POWERS & TRUSTS LAW § 9-2.3 (McKinney 1967) (income that has not been disposed of passes to "persons presumptively entitled to the next eventual interest (estate)").

102. Professor Lusky, speaking for the wait-and-see opponents, stated: "Our position is simply that killing a future interest is not the equivalent of murder." *1978 ALI Proceedings*, *supra* note 4, at 257 (remarks of Professor Lusky).

103. *Cf.* Waggoner, *Perpetuity Reform*, *supra* note 21.

104. *See* Maudsley, *How to Wait and See*, *supra* note 7, at 364–65. Because most dispositions are in trust, earlier objections to the lack of marketability under wait-and-see will not be pursued in this article. *See* Simes, *The "Wait and See" Doctrine*, *supra* note 8, at 188–90. Nor does there appear to be a marketability problem under non-trust dispositions. *1978 ALI Proceedings*, *supra* note 4, at 273 (remarks of Fairfax Leary, Jr., an A.L.I. member).

vest in time."[105] More recently, Professors Dukeminier and Waggoner have predicted substantial litigation under wait-and-see methods which require identification of measuring lives.[106]

Professor Waggoner now argues against "traditional" wait-and-see methods which use actual measuring lives because administrative burdens will be imposed during the waiting period.[107] He notes that, unlike the common law Rule, these wait-and-see methods require actual tracing of individuals' lives, deaths, marriages, divorces, births, adoptions in and out of families and so on.[108] He concludes that "keeping track of and reconstructing these events to determine the survivor and the time of the survivor's death imposes an administrative burden wise to avoid."[109] It should be noted that the attending administrative expenses will diminish the benefits for the beneficiaries.

Assuming, *arguendo*, that a period-in-gross (proxy) method will not entail the administrative burdens identified by Professor Waggoner, will there be no inconveniences during the waiting period? Will litigation under a proxy method be unnecessary? Consider the following hypothetical:

> In 1987, *T* devised property in trust to child *A* for life, remainder to *A*'s children for life, remainder to *A*'s grandchildren who are alive at the death of the survivor of *A*'s children. *T* is survived by *A* and 3 children (*W*, *X*, and *Y*).

Shortly before dying in 2027, *A* allegedly fathers child *Z*. Does *Z* receive a share of the income during the trust period? If yes, will trust termination occur when the survivor of *W*, *X*, *Y*, and *Z* dies or when the survivor of *W*, *X*, and *Y* dies? What should the trustee do?[110]

At *A*'s death, the trustee would like instructions from a court on whether *Z* is entitled to share in the trust, and if so, when will the trust terminate. Assuming *Z* is determined to be a child of *A*,[111] a court might allow *Z* to receive income, in part because her inclusion would not violate the common law Rule Against Perpetuities.[112] But should a court determine

105. *1978 ALI Proceedings*, *supra* note 4, at 249 (remarks of Professor Casner).

106. *See supra* notes 51, 52 and accompanying text.

107. Waggoner, *Perspective*, *supra* note 9, at 1724–25.

108. Waggoner, *Progress Report*, *supra* note 1, ¶ 703.2.

109. *Id.*

110. A trustee is entitled to instructions from the court regarding such matters as the proper construction of the instrument and the identity of the trust beneficiaries. *See* RESTATEMENT (SECOND) OF TRUSTS § 259 (1959).

111. Other cases may initially involve adoption questions—adoption out, adoption in, fraudulent adoption, and equitable adoption. *See generally* Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711 (1984). A recent case, *In re* Estate of Best, 66 N.Y.2d 151, 485 N.E.2d 1010 (1985), involved born-out-of-wedlock and adoption issues.

112. *See* L. SIMES & A. SMITH, *supra* note 17, § 649. Because *T* made a class gift to *A*'s children, *Z*, if determined to fall within the class, should receive income for as long as possible.

whether the trust will terminate if *Z* survives her siblings by the half-blood or should it wait-and-see whether *Z* actually survives? Assuming a court should defer construction until the problem actually arises,[113] how should the court decide the construction issue if *Z* is the survivor and the children of *W*, *X*, and *Y* demand distribution? Should a court construe the will—sometime in the twenty-first century—to limit trust duration to the class of *A*'s children alive at *T*'s death, or should it allow inclusion of afterborns? If the court decides that the trust will not terminate until *Z* dies, deferred cy pres litigation may be necessary.

In re Estate of Pearson,[114] a 1971 Pennsylvania Supreme Court decision, provides an actual example of litigation under a wait-and-see statute. The court had to construe Pennsylvania's wait-and-see statute which offered—and still offers—no guidance on determining the measuring lives.[115] Professor Waggoner provided the terms of the testamentary trust and relevant facts:

> The income was to be paid to the testator's brothers and sisters for their lives, apparently with cross remainders [in income] until the death of the last one; upon the death of the last surviving brother or sister, the income was to be paid to the testator's nieces and nephews until the death of the last surviving niece or nephew; upon the death of the last surviving niece or nephew, the income was to be paid to the testator's grandnieces and grandnephews until the death of the last surviving grandniece or grandnephew; and so on [income to younger generation beneficiaries "as long as there are living legal heirs"] until there were no more income beneficiaries, at which time the corpus of the trust was to be delivered to charitable organizations. At his death in 1967, the testator was survived by six brothers and sisters, thirteen nephews and nieces, and twenty-nine grandnephews and grandnieces.[116]

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113. *See* RESTATEMENT (SECOND) OF TRUSTS § 259 comment c (1959) (no advance instructions on questions which may never arise).

114. 442 Pa. 172, 275 A.2d 336 (1971).

115. Effective since 1948, the Pennsylvania wait-and-see statute provides:

> Rule against perpetuities
>
> (a) General—No interest shall be void as a perpetuity except as herein provided.
>
> (b) Void interest-exceptions—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 to members of a class the membership of which is then subject to increase shall be void.

20 PA. CONS. STAT. ANN. § 6104(a) (b) (Purdon 1975).

The statute may apply to interests created before 1948. 20 PA. CONS. STAT. ANN. § 6104(d) (Purdon 1985 Supp.) (as amended, effective June 27, 1978); *see* Levin, *Section 6104(d) of the Pennsylvania Rule Against Perpetuities: The Validity and Effect of the Retroactive Application of Property and Probate Law Reform*, 25 VILL. L. REV. 213 (1980).

116. L. WAGGONER, NUTSHELL, *supra* note 6, at 301–02; Waggoner, *Perpetuity Reform*, *supra* note 21, at 1764. Portions of Professor Waggoner's Michigan article were adapted from his Nutshell work. *Id.* at 1718 n.4.

Professor Waggoner extensively analyzed *Pearson*, including the court's mishandling of the wait-and-see concept.[117] He strenuously objected to the failure of the court to articulate any standard for determining measuring lives. He also deplored the court's refusal to decide whether the charities' remainder interests were initially vested; a finding which would have resulted in validity under Pennsylvania law.[118] According to Professor Waggoner, this refusal constituted an "unwarranted extension of the wait-and-see modification beyond its proper sphere."[119] It also may have cost the estate a valuable estate tax charitable deduction.[120]

Three assumptions will be made about *Pearson*: (1) the trust was effective in 1987; (2) the controlling statute was a 90-year proxy version under a wait-and-see approach; and (3) Pennsylvania's class gift constructional rules applied. Under these rules, Pennsylvania courts presumably carry out a testator's intention by including as many persons within a class as possible.[121]

At some point during trust administration, it will be necessary to determine whether any afterborn nieces and nephews (perhaps unlikely because of elderly parents) and any afterborn grandnephews and grandnieces (most likely) will be beneficiaries under the trust. Further litigation may be required to identify beneficiaries in even younger generations. Because the interests of all of these beneficiaries might vest by the year 2077, a court properly applying the wait-and-see concept should refuse to determine validity before that date.[122] Most likely, some interests in the trust will not vest by the year 2077. At that time, deferred cy pres litigation will be necessary.[123]

In re Frank,[124] a 1978 decision by the Supreme Court of Pennsylvania, is another example of litigation under a wait-and-see regime. In *Frank*, the court was faced with a construction issue: whether a woman who was married after, but alive at, trust creation in 1927, was a beneficiary for trust termination purposes. After noting the retroactive application of Pennsylvania's wait-and-see statute,[125] the court determined that including the

117. L. WAGGONER, NUTSHELL, *supra* note 6, at 301–23; Waggoner, *Perpetuity Reform*, *supra* note 21, at 1762–76.

118. Pennsylvania's wait-and-see statute does not apply if an interest would not have been subject to the common law Rule. 20 PA. CONS. STAT. ANN. § 6104(b)(1) (Purdon 1975). *See In re* Frank, 480 Pa. 116, 389 A.2d 536 (1978) (discussed *infra* notes 124–27 and accompanying text).

119. L. WAGGONER, NUTSHELL, *supra* note 6, at 313.

120. *See id.* at 305. Charitable deductions for transfers in trust after July 31, 1969, must comply with strict rules. *See* I.R.C. §§ 2055(e)(2), 2522(c)(2).

121. *See* McDowell Nat'l Bank v. Applegate, 479 Pa. 300, 388 A.2d 666 (1978).

122. *See* L. WAGGONER, NUTSHELL, *supra* note 6, at 303.

123. *See infra* notes 135–48 and accompanying text.

124. 480 Pa. 116, 389 A.2d 536 (1978).

125. *See supra* note 115.

woman would not violate the common law Rule Against Perpetuities as applied to gifts in default of exercising a power of appointment.[126] *Frank* raises questions about subsequent constructional cases vis-a-vis both Pennsylvania's and other wait-and-see systems.[127]

As under other wait-and-see versions, the USRAP will apply only if the common law Rule is violated.[128] Indeed, wait-and-see advocates have always acknowledged the necessity for litigation. "[A]s Professor Leach himself pointed out . . . a lawsuit is often necessary to establish that a traditional perpetuity violation exists . . . ."[129] In fact, the hypothetical case and the actual cases of *Pearson* and *Frank* suggest that the most frequently litigated issue under any wait-and-see system will be whether the common law Rule was violated.[130] In turn, construction cases will be necessary to determine if persons, typically afterborns, are includable within a class.[131] If included, the common law Rule may be violated.[132] If

126. *Frank* was a 4-3 decision. The majority considered the actuality that the woman was alive at trust creation—an approach not inconsistent with the common law Rule's treatment of gifts in default of exercising a power under the second-look doctrine. *See* Sears v. Coolidge, 329 Mass. 340, 108 N.E.2d 563, (1952). *See supra* note 115 (quoting statute). Two of the three dissenters—equating the second-look doctrine with the wait-and-see approach—objected to a construction which would render the interest void under the common law Rule as it was understood in 1927. *In re Frank*, 480 Pa. 116, 389 A.2d at 543–44; *accord* L. SIMES & A. SMITH, *supra* note 17, § 1276.

127. Because *Frank* did not involve a construction which would violate the common law Rule, applying a wait-and-see approach was not necessary for decision. *Cf. infra* note 134 and accompanying text (suggested approach under the USRAP).

128. USRAP § 1 (1986); *see* DRAFT USRAP (Spring 1986), *supra* note 1, at 21–51. Professor Dukeminier, however, advocates eliminating the common law Rule altogether. *See infra* notes 150 and 256 and accompanying text; *accord* Maudsley, *How to Wait and See*, *supra* note 7, at 370–73.

129. L. WAGGONER, NUTSHELL, *supra* note 6, at 319.

130. An income tax analogy comes to mind. In 1954, Congress enacted a scholarship provision (I.R.C. § 117) to end the case-by-case litigation over whether a receipt constituted an excludable gift. H.R. REP. No. 1337, 83d Cong., 2d Sess. 16, *reprinted in* 1954 U.S. CODE CONG. & ADMIN. NEWS 4017, 4041. Since then, the major litigation issue has been whether the receipt constitutes a scholarship (in effect, a gift) or compensation for services. *See* Bingler v. Johnson, 394 U.S. 741 (1969), and progeny of cases. Once a receipt is determined to constitute a scholarship, complex scholarship rules apply.

131. Tax issues may also arise. For example, assume a beneficiary has a vested remainder interest but predeceases certain income beneficiaries who take as a class. Although the remainder interest will be estate taxable, its value effectively depends on when the decedent's successor will obtain possession. In turn, that question depends on who are the members of the class. Inevitably, the *Bosch* doctrine (Commissioner v. Estate of Bosch, 387 U.S. 456 (1967)) will require federal courts to pass on the propriety of lower state court decisions. *See* Note, Bosch *and the Binding Effect of State Court Adjudication Upon Subsequent Federal Tax Litigation*, 21 VAND. L. REV. 825 (1968).

Valuation questions may also arise when an executor seeks to defer payment of taxes. *See* I.R.C. § 6163 (extension of time for payment on value of future interests); *see also In re* Estate of Gunderson, 93 Wn. 2d 808, 613 P.2d 1135 (1980) (complex formula to defer state death taxes).

132. *See* Connecticut Bank & Trust Co. v. Brody, 174 Conn. 616, 392 A.2d 445 (1978).

excluded, the preferred result under existing law, there may be no perpetuities violation.[133] As reporter for the USRAP, Professor Waggoner expects that courts will incline towards a construction resulting in validity under the common law Rule.[134]

The ultimate impact of litigation during the wait-and-see period will be diminished benefits for the intended beneficiaries as a result of fees of lawyers—the unintended beneficiaries. Although the actual size of the *Pearson* estate was not disclosed, 6 law firms representing 40 clients were ordered to be paid from the estate. In *Frank*, there were 5 law firms representing various beneficiaries.

b. Inconvenience at the End of the Waiting Period

Most wait-and-see advocates agree on what should happen in the event that an interest has neither terminated nor vested within whatever waiting period obtains: deferred cy pres litigation.[135] The transferor's intent will be carried out as nearly as possible, "thereby holding the unavoidable enrichment of unintended takers to a minimum."[136]

The deferred cy pres section under the USRAP provides as follows:

> REFORMATION. Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by [the statutory rule against perpetuities] if:
> (1) a nonvested property interest or a power of appointment becomes invalid under [the statutory rule];
> (2) a class gift is not but might become invalid under [the statutory rule] and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or
> (3) a nonvested property interest that is not validated by [the statutory rule] can vest but not within 90 years after its creation.[137]

133. *See, e.g.*, Joyner v. Duncan, 299 N.C. 565, 264 S.E.2d 76 (1980); Underwood v. MacKendree, 242 Ga. 666, 251 S.E.2d 264 (1978). *See generally* RESTATEMENT OF PROPERTY § 375 (1944).

134. *See* DRAFT USRAP (Spring 1986), *supra* note 1, at 46. Litigation during the waiting period may also be necessary under the USRAP reformation statute. *See infra* note 145 and accompanying text.

135. *See supra* note 41 and accompanying text.

136. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1782.

137. USRAP § 3 (1986).

In addition to 7 single-spaced pages of discussion of the section including 6 complex examples, the USRAP offers the Restatement (Second) as an additional reference.[138]

The complexity of the deferred cy pres approach can be illustrated by an example under the above-quoted statute.[139] Although that example suggests the precise method of reformation, the actual reform ordered by a court will depend on the transferor's "manifested plan of distribution." This may include invalidation of the interest, along with invalidation of valid interests under the doctrine of infectious invalidity.[140] The Restatement (Second)

138. DRAFT USRAP (Spring 1986), *supra* note 1, at 60–67.

139. *Example (3)—Age Contingency in Excess of 21.* T devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30. T was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when T died.

Since the remainder interest in favor of A's children who reach 30 is a class gift, at common law (Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817)) and under this Act . . . the interests of *all* potential class members must be valid or the class gift is totally invalid. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at T's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. There is no validating life, and the class gift is therefore not validated [under the common law Rule]. . . . .

Under [the statutory wait-and-see rule] . . . , the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after T's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under the age of 30 on the 90th anniversary of T's death, the class gift is valid. (Note that at Z's *birth* it would have been certain that *he* could *not* be alive and under the age of 30 on the 90th anniversary of T's death; nevertheless, the class gift could not *then* have been declared valid because, A being alive, it was *then* possible for one or more additional children to have later been born to or adopted by A.)

Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he could be alive and under the age of 30 on the 90th anniversary of T's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the Statutory Rule because Z might die under the age of 30 within the 90-year period following T's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after T's death. Consequently, the prerequisites to reformation set forth in subsection (2) are satisfied, and a court would be justified in reforming T's disposition to provide that Z's interest is contingent on reaching the age he can reach if he lives to the 90th anniversary of T's death. This would render Z's interest valid so far as the Statutory Rule Against Perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Id. at 63–65.

140. Courts are urged not to apply the infectious invalidity doctrine. *See* DRAFT USRAP (Spring 1986), *supra* note 1, at 61.

provides that the ultimate impact of death taxes is a relevant factor in fashioning the relief.[141] Despite the lengthy discussions of deferred cy pres under both documents, neither provides guidance for a court to determine what the manifested plan of distribution was in a particular case.

Consider existing judicial difficulty in ascertaining the intent (the manifested plan of distribution) of a decedent: "[P]robing the minds of persons long dead as to what they meant by words used when they walked this earth in the flesh is, at best, perilous labor."[142] Ascertaining such intent some 90 years after death will be even more perilous. Deferred cy pres will require judges (who will not likely have been born at the time of the transferor's death) to divine the manifested plan of distribution and prescribe a scheme which best approximates that plan. Such a judge will also have to be expert or become expert in state and federal taxation, because the tax impact will be a relevant factor.[143]

Enactment of deferred cy pres legislation will add a class of unintended beneficiaries: unborn lawyers. The staggering fees Professor Leach complained about may be commonplace in deferred cy pres litigation.[144]

For four principal reasons, the response that deferred cy pres litigation will arise only infrequently is unfounded. First, subsections (2) and (3) of the reformation statute ensure that litigation will occur well before the proxy period expires. Under subsection (2), the process can be invoked as soon as one member of a class could call for distribution.[145] Second, the frequency of litigation is mere conjecture.[146] For example, adoptions (fraudulent or otherwise) which can extend trust duration for a considerable period are not taken into account. Third, no account is taken of potential litigation to determine whether the common law Rule was violated; deferred cy pres can be invoked only if the common law Rule was violated.[147]

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141. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5, at 87 (1983) (illustration 8).

142. *See* North Carolina Nat'l Bank v. Goode, 298 N.C. 485, 487, 259 S.E.2d 288, 291 (1979) (quoting with approval Gatling v. Gatling, 239 N.C. 215, 221, 79 S.E.2d 466, 471 (1954)).

143. Relevant tax systems may include federal and state transfer tax systems (gift, estate and/or inheritance and generation-skipping systems), as well as income tax systems.

144. *See supra* text accompanying note 89.

145. *See supra* note 139 (example illustrating early litigation). Similarly, early litigation is possible when a nonvested interest cannot vest within the wait-and-see period. *See* DRAFT USRAP (Spring 1986), *supra* note 1, at 60 (discussing Subsection (3), quoted *supra* in text accompanying note 137).

146. Professor Casner predicted litigation in no more than 10% of the cases. *1979 ALI Proceedings*, *supra* note 4, at 456–57.

147. Courts will have to determine the effect of a prior, but erroneous, decision holding that an interest violates the common law Rule. *See* Merrill v. Wimmer, 481 N.E.2d 1294 (Ind. 1985) (discussed *infra* text accompanying notes 221–34). In effect, res judicata and related questions will be presented. *Compare* Dickerson v. Union Nat'l Bank, 268 Ark. 292, 595 S.W.2d 677 (1980) (no res judicata), *with* Rollins v. May, 603 F.2d 487 (4th Cir. 1979) (opinion of district court adopted by court of appeals) (res judicata bar).

Fourth, even wait-and-see advocates recognize the likelihood of deferred cy pres litigation. Both the Restatement (Second) of Property and the USRAP contain numerous examples—none of them far-fetched—of when deferred cy pres litigation will be necessary.[148]

Assumption #3: The wait-and-see approach to the common law Rule Against Perpetuities simplifies the law.

A critical flaw in wait-and-see systems is the attendant complexity.[149] Each variation begins with the common law Rule and adds on layers of complexity.

Professor Dukeminier extols the virtues of the causal relationship principle because it replaces the what-might-have-been test of the common law Rule.[150] On analysis, however, it is clear that the common law must first be understood to identify the measuring lives.[151] Additionally, Professor Waggoner demonstrates how difficult identifying measuring lives will be by this method.[152] Professor Dukeminier, however, feels that the courts will be able to handle any problems: "[T]his gives . . . judges too little [credit] . . . . I do not doubt that judges can reason just as logically, once they see that the measuring lives for wait-and-see are the persons you test for a validating life at common law."[153] Professor Dukeminier's optimism is not confirmed by the judicial experience to date.[154]

The USRAP adopts a 90-year proxy method, but the wait-and-see component will not apply if an interest does not violate the common law Rule.[155] If, as agreed, the common law Rule is not well understood, is it reasonable to expect that a Uniform Statutory Rule Against Perpetuities

148. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.5, at 81–87 (1983); DRAFT USRAP (Spring 1986), *supra* note 1, at 61–67.

149. Professor Schuyler observed: "[I]f simplicity is a worthy purpose of perpetuity reform, then, on balance, the game of wait-and-see may be hardly worth the candle." Schuyler, *Should the Rule Against Perpetuities Discard Its Vest? (Part II)*, 56 MICH. L. REV. 887, 941 (1958).

150. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1711–13. He would displace the common law Rule with the following sentence: "No interest is good unless it vests within twenty-one years after the death of all persons in being when the interest is created who can affect the vesting of the interest." *Id.* at 1713.

151. Dukeminier, *Final Comment*, *supra* note 9, at 1747.

152. Waggoner, *Perspective*, *supra* note 9, at 1714–24.

153. Dukeminier, *Final Comment*, supra note 9, at 1747.

154. *See, e.g.*, Merrill v. Wimmer, 481 N.E.2d 1294 (Ind. 1985) (discussed *infra* text accompanying notes 221–34). Professor Volkmer discusses three Nebraska cases involving a perpetuities issue which the court (and attorneys) failed to detect. Volkmer, *The Law of Future Interests in Nebraska (Part I)*, 18 CREIGHTON L. REV. 259, 278–81 (1985).

155. USRAP § 1 (1986) (discussed *supra* note 71); *see* Waggoner, *Progress Report*, *supra* note 1, at 701.1.

with an added wait-and-see component will be better understood? Professor Waggoner thinks not. Consider his concerns as a result of the *Pearson* decision:

> *It is uncertain how competently the courts will administer the wait and see modification.* In working a fundamental modification of the Rule Against Perpetuities, the wait and see concept constitutes an enormous disturbance of settled law in a highly technical and indeed arcane area . . . . [T]he danger and uncertainty is that some courts, perhaps many courts, operating under a wait and see regime may misunderstand and misapply the concept. Thus there is the risk of muddled opinions, and of a decline in the quality of jurisprudence in the perpetuity area. To be somewhat more specific, there is even the risk that the wait and see modification would not be restricted to its proper sphere—interests which violate the common law Rule in its traditional form. It would be unfortunate indeed if a court operating under a wait and see regime were to refuse to adjudge the validity of an interest which was valid under the traditional possibilities test on the fallacious ground that the new law requires that we wait to see what actually happens. Raising the spectre of such a misdirected result, or indeed the danger of misconceived judgments even if the operation of wait and see is restricted to its proper sphere, might be dismissed as far-fetched were it not for the fact that the *Pearson* decision shows that the danger is real.[156]

Professor Waggoner also points to another decision which raised "suspicions about courts' ability to administer wait and see."[157] Notwithstanding his misgivings, Professor Waggoner would depend on courts to identify "the various chains of events that will render the interest valid and/or conversely the various chains of events that will render it invalid."[158]

The latest available complete version of the USRAP is a remarkably complex document.[159] It contains over 80 single-spaced pages. There are 25 complex examples under just one of the sections[160]—a number which exceeds the actual invalidating cases during the 8-year period, 1978–1985, by over 300 percent.

The reader might bear in mind the plight of the legislator who will be expected to consider the merits of the USRAP. A Kentucky legislator's response to wait-and-see is instructive: "[T]his is the most complex subject

156. L. WAGGONER, NUTSHELL, *supra* note 6, at 310–11 (emphasis in original).

157. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1776 n.153 (citing Phelps v. Shropshire, 254 Miss. 777, 183 So. 2d 158 (1966), wherein the court confused the wait-and-see doctrine with the common law severability doctrine).

158. L. WAGGONER, NUTSHELL, *supra* note 6, at 320. He adds the following caveat: "In order for this approach to work properly, however, the courts must be able to handle it competently." *Id.* at 321. A proxy method does not obviate the need to identify chains of events; vesting or termination will still depend on the individual family situation.

159. DRAFT USRAP (Spring 1986), *supra* note 1.

160. The example set out *supra* in note 139 illustrates the type of example under the USRAP.

ever brought up in the legislature, and I'm not going to vote for something I don't understand."[161]

Assumption #4: The wait-and-see approach to the common law Rule Against Perpetuities will not unreasonably extend dead hand control because it merely adds a standard saving clause to an instrument.

Wait-and-see advocates claim that their system merely introduces a well-conceived saving clause into an instrument.[162] Consider Professor Casner's description of wait-and-see: "All this really does is to give a person who has not had the good fortune of putting himself in skilled hands the opportunity to have the same benefit."[163]

Although this argument has egalitarian appeal in the guise of consumer-protection, it fails to take into account the differences between standard saving clauses and the saving clause injected into instruments under wait-and-see. The standard saving clause ensures compliance with the Rule but usually terminates a trust well before the maximum allowable period. In contrast, the injected saving clause, especially one based on a 90-year period as sanctioned by the USRAP, encourages dead hand control and fosters litigation.

Professor Waggoner uses the saving clause feature to justify a waiting period of 80 to 100 years.[164] He illustrates how a disposition otherwise violative of the Rule—a disposition conditioned on unborn grandchildren attaining an age in excess of 21—can be saved.[165] All the drafter need do is insert a saving clause which will require trust termination 21 years after the death of the last survivor of a designated group. To assure that young children will be included, Professor Waggoner suggests a group comprised of the surviving descendants of the testator's parents or grandparents.[166] Since such a group will likely contain a young child, adding 21 years to the child's actuarial life expectancy produces a period-in-gross of 80 to 100 years.[167]

Professor Waggoner rejects wait-and-see methods which employ actual measuring lives because of the arbitrariness involved.[168] Instead he urges adoption of a USRAP based on a proxy method.[169] Under the USRAP, courts would also utilize the standardized 90-year time period to reform

161. *See* Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 3, 57 (1960).
162. *See* Dukeminier, *The Measuring Lives*, *supra* note 9, at 1656 & n.25.
163. *1979 ALI Proceedings*, *supra* note 4, at 456 (remarks of Professor Casner).
164. Waggoner, *Perspectives*, *supra* note 9, at 1718–19.
165. *Id.* at 1718.
166. *Id.* at 1718 n.16.
167. *Id.* at 1719.
168. *Id.* at 1726–28.
169. Waggoner, *Progress Report*, *supra* note 1, ¶ 700.

instruments which prescribe excessive waiting periods; for example, 100 or 125 years.[170]

The dead hand control sanctioned by a 90- to 100-year waiting period would not be objectionable to Professor Waggoner. "Since lawyers operating within the Common-law Rule can and do provide such an 'over-insured' period of time for their clients' dispositions to work themselves out, it is hardly unprincipled for the law to grant a similar period of time to clients who unbeknownst to them and their families did not have expert counsel."[171]

It is appropriate to consider how a competent attorney would actually approach a perpetuities problem. Assume a client wishes to leave property in trust with income to her child for life, remainder to unborn grandchildren provided they reach age 25. The attorney would probably advise against the disposition; instead, the attorney would suggest that the child be given a special testamentary power to appoint among her issue, urging that the child seek counsel when exercising the power. Assuming the client persisted, the lawyer would not knowingly violate the Rule. Rather, he or she would accomplish the result within the perpetuities period by trying to convince the client to reduce the age to 21. Alternately, the grandchildren's interests could be made to vest in interest at 21 with delayed possession until age 25.[172] In any event, the lawyer would use a saving clause to be absolutely certain of no violation.[173]

A survey of various saving clause forms reveals two major types, illustrated by the forms of wait-and-see advocates:

Professor Dukeminier's form:

Notwithstanding any other provisions in this instrument, this trust shall

170. The 100-year period-in-gross version provides the following example:

Example (5)—Case of An Interest, As of Its Creation, Being Impossible to Vest Within the Period of the Statutory Rule. T devised property in trust, directing the trustee to divide the income, per stirpes, among T's descendants from time to time living, for 125 years. At the end of the 125-year period following T's death, the trustee is to distribute the corpus and accumulated income to T's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's [sic] descendants who are living 125 years after T's death can vest, but not within the allowable 100-year period of the Statutory Rule. The interest would violate the Common-law Rule because there is no common-law validating life. In these circumstances, a court is authorized by subsection (3) of this section, [*see supra* note 137] to reform T's disposition within the limits of the Statutory Rule. An appropriate result would be for the court to lower the period following T's death from a 125-year period to a 100-year period.

DRAFT USRAP (Fall 1985), *supra* note 57, at 44. *Cf.* DRAFT USRAP (Spring 1986), *supra* note 1, at 66–67 (example of reduction from 100 to 90 years).

171. DRAFT USRAP (Winter 1986), *supra* note 22, at 20.

172. *Cf. In re* Estate of Darling, 219 Neb. 705, 365 N.W.2d 821 (1985) (vesting at birth, with possession postponed until age 25).

173. The competent attorney understands that the Rule is complex; he or she has heeded Professor Casner's simple solution to avoid a violation. *See supra* text accompanying note 27.

terminate, if it has not previously terminated, 21 years after the death of the survivor of the beneficiaries of the trust living at the date this instrument becomes effective.[174]

Professor Casner's form:

If this trust has not terminated within 21 years after the death of the survivor of my issue living on my death, such trust shall terminate at the end of such 21-year period. . . .[175]

As suggested by these saving clauses, people tailor dispositions based on actual family developments rather than on some abstract notion of equal waiting time.[176]

Significantly, saving clauses in practice do not purport to extend dead hand control for a prolonged period.[177] Instead, they are designed to ensure compliance with the Rule; they provide for both trust termination and outright delivery of the property to prescribed persons.[178] Wait-and-see provides no gift over after the waiting period.[179] Instead, a court must determine what the transferor (dead for almost 100 years) would have intended. Further, the property may continue in trust, provided vesting in interest occurs within the prescribed period.

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174. J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 841 (3d ed. 1984).

175. 3 A. CASNER, ESTATE PLANNING 1130 (1980).

176. Consider Professor Simes' view: "What period will take care of the normal desires of the testator who makes a family settlement by way of testamentary trusts? The answer is clear enough. It is lives in being and twenty-one years." L. SIMES, PUBLIC POLICY, *supra* note 13, at 68–69. *See, e.g.*, Read v. Legg, 493 A.2d 1013 (D.C. App. 1985) (trust, drafted by expert using saving clause, will terminate after 60 years); Dennis v. Rhode Island Hosp. Trust Nat'l Bank, 571 F. Supp. 623 (D. R.I. 1983), *aff'd as modified*, 744 F.2d 893 (1st Cir. 1984) (trust termination, based on saving clause, after 71 years).

177. In addition to Professors Dukeminier's and Casner's forms, *see infra* text accompanying notes 173, 174, consider the perpetuities saving clauses recommended by Professors Freeland and Maxfield. *See infra* note 178; *see also* the saving (savings) clauses recommended in the following form books: J. MURPHY, MURPHY'S WILL CLAUSES, form 1:25 (1985); R. PARELLA & J. MILLER, MODERN TRUST FORMS & CHECK-LISTS § 1.3, form 1.3.05 (1st Supp. 1986); 4 J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS, form 9.22 (1984); R. WILKINS, DRAFTING WILLS AND TRUST AGREEMENTS—A SYSTEMS APPROACH, forms 15.20W, 15.21W (rev. ed. 1985).

178. Consider the form recommended by Professors Freeland and Maxfield:

MAXIMUM DURATION OF TRUST

(Avoiding Rule Against Perpetuities)

Notwithstanding anything herein to the contrary, the trusts created hereunder shall terminate not later than twenty-one years after the death of the last to die of those beneficiaries who were living on the date of my death. At the end of such period all such trusts shall terminate and my Trustee shall distribute the undistributed income and principal of such trusts to the current income beneficiaries in the proportions as they are then receiving the income therefrom and if the proportions are not specified, in equal shares to such beneficiaries, absolute and free of trust.

J. FREELAND, G. MAXFIELD & C. EARLY, FLORIDA WILL AND TRUST MANUAL C-97 (2d ed. 1984); *see also* forms cited *supra* note 177.

179. Professor Dukeminier recognizes this shortcoming. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1656 n.25.

If states adopt the USRAP, a 90-year period will likely become the standard in practice.[180] The English experience bears noting. There, lawyers commonly used a royal lives saving clause to prolong the waiting period to the maximum extent possible.[181] A Law Reform Committee recommended adoption of a fixed period of 80 years to attract drafters away from the royal lives approach, but rejected an automatic 80-year period under its wait-and-see system: "[Y]et we do not think that such a period should automatically apply to all limitations, for if it did the period during which it would be necessary to 'wait and see' whether a limitation is valid might in many cases be undesirably extended."[182] The English cases since 1964 suggest that practitioners are using the 80-year option.[183]

The extension of dead hand control is objectionable. Consider Professor Powell's concerns:

> Personally, I believe such a lengthening of the term substantially emasculates the whole salutary purpose of the Rule, namely to restrict the power of the dead hand . . . . To the extent that the wait-and-see rule, in fact, emasculates the rule, I believe it to be to that extent socially bad.[184]

Professor Fetters voiced his concerns: "To select the outer limits . . . as the standard measure makes about as much sense as fixing automobile speed limits at just one mile per hour under that speed which statistically is determined to be involved in the greatest percentage of fatal automobile accidents."[185] As a wait-and-see advocate, Professor Dukeminier's views are significant:

> But in reforming the Rule, reformers should keep clearly in view the primary purpose of the Rule: curtailing the dead hand. The measuring lives for wait-and-see should be carefully limited lest the reform yield too much ground to dead hand control. The wait-and-see saving clause should be no broader than necessary or appropriate in the specific case.[186]

The USRAP's deferred cy pres component will also extend dead hand control. This will likely happen by default.[187] Unless there is a sufficient

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180. *See supra* note 71 (setting forth Statutory Rule Against Perpetuities under the USRAP).

181. ENGLISH REPORT, *supra* note 13, at 6. Leedale v. Lewis, 1980 S.T.C. 679 (Ch.), provides an example of a royal lives clause: The Perpetuity Day' means the day on which expires the period of twenty-one years calculated from and after the death of the last survivor of the descendants of His late Majesty King George the Fifth living at the date of this Settlement.

182. ENGLISH REPORT, *supra* note 13, at 7.

183. *See, e.g.*, Watson v. Holland, [1985] 1 All E.R. 290 (Ch. 1984); *see also* Re Clore [1985] 1 W.L.R. 1290 (Ch.) (vesting date was the earlier of 80 years or 20 years after survivor of royal lives).

184. Powell Memorandum, *supra* note 10, at 136.

185. Fetters, *The Wait-and-see Disaster*, *supra* note 8, at 404.

186. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1710.

187. Professor Waggoner suggests extension by default under the causal-lives method. Waggoner, *Progress Report*, *supra* note 1, ¶ 703.3.

amount of property involved, lawyers are not going to involve themselves in the process. Assuming the reformation process is worthwhile for lawyers, the litigation process may last for several years, further extending dead hand control.[188]

In the final analysis, Americans have not deemed it appropriate to take "full advantage of the rule against perpetuities."[189] This reasonable restraint is why there is presently little concern in this country over dead hand control.

Assumption #5: The wait-and-see approach to the common law Rule Against Perpetuities is consumer-protection legislation for the average consumer of legal services.

Wait-and-see advocates portray their system as being designed for the smaller estates. Professor Leach explained:

> The technicalities of the Rule against Perpetuities are well known to the estate specialists who are found in the large law firms which more often serve clients with large estates; these specialists have less difficulty in avoiding the technicalities and carrying out their clients' wishes. However, it is more difficult for the general practitioner, who often serves the small property owner, to keep abreast of the intricacies of the Rule against Perpetuities while carrying on the many other types of law practice in which he engages. This . . . [wait-and-see doctrine] tends to put the nonspecialist on a par with the specialist and thereby to protect the small-to-moderate property owner who consults the general practitioner.[190]

Professor Leach's subsequent views provide an interesting contrast:

> I daresay that the stratospheric level of the Massachusetts Bar is as sophisticated in perpetuities matters as one is likely to find, but the record is replete with instances in which its members have fallen flat on their distinguished faces with regard to trusts involving huge fortunes of our most prominent citizens.[191]

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188. *Cf.* May v. Hunt, 404 So. 2d 1373 (Miss. 1981) (eight years of litigation).

189. *1979 ALI Proceedings*, *supra* note 4, at 456 (remarks of Professor Casner). Of course, an occasional transferor utilizes the full measure of the period. *See, e.g.*, Klugh v. United States, 588 F.2d 45 (4th Cir. 1978) (1881 will, final disposition in 1988); Estate of Tower, 323 Pa. Super. 235, 470 A.2d 568 (1983), *aff'd*, 506 Pa. 642, 487 A.2d 820 (1984) (1889 will, final disposition not likely before twenty-first century).

190. W. LEACH & O. TUDOR, THE RULE AGAINST PERPETUITIES 228 (1958). Professor Dukeminier agreed:

> My experience in reading hundreds of perpetuities cases tends to confirm Professor Leach's view. I have not yet found a trust or will of a Ford or Rockefeller or Mellon that violated the Rule against Perpetuities; violations usually occur in instruments prepared by lawyers of ordinary skills. Since the Rule is seldom violated by specialists handling huge sums of wealth, the wait-and-see doctrine will have minimal impact on increasing the amount of property subject to the power of the dead hand.

Dukeminier, *Cleansing the Stables of Property: A River Found At Last*, 65 IOWA L. REV. 151, 162 (1979).

191. Leach, *Perpetuities: What Legislatures, Courts and Practitioners Can Do About the Follies of the Rule*, 13 U. KAN. L. REV. 351, 356 n.16 (1965) [hereinafter Leach, *Legislatures*].

Recent cases also suggest that perpetuities issues may arise in substantial estates.[192]

Rather than benefiting the average consumer, wait-and-see legislation will likely benefit the wealthy consumer of legal services. Indeed, if the 90-year period-in-gross version of the USRAP is widely adopted, the estate planning bar will likely encourage their wealthy clients to prolong the duration of trusts to obtain tax benefits.[193] Nor will the deferred cy pres component of wait-and-see benefit the average consumer of legal services. Unless there is a sufficient amount involved, it is unlikely that some unborn lawyer will undertake to immerse him or herself in the arcane world of perpetuities.

Finally, a system which shields lawyers for less than competent practices is hardly consumer-protection legislation. Assuming, *arguendo*, that most interests will vest or terminate within the waiting period, the lawyer who drafted the instrument will escape any consequences for violating the common law Rule.[194] Incompetent lawyers should not be shielded.

Although attorneys may not be expected to master the Rule,[195] it is a

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192. *See* Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397, *cert. denied*, 295 N.C. 95, 244 S.E.2d 263 (1978) (involving over 60 named parties represented by six law firms); *see also* May v. Hunt, 404 So. 2d 1373, 1381 (Miss. 1981) (Sugg, J., dissenting); First Ala. Bank v. Adams, 382 So. 2d 1104 (Ala. 1980) (substantial amount of property).

193. Favorable tax treatment may be secured while property is in trust. See Bloom, *The Generation-Skipping Loophole: Narrowed, But Not Closed, by the Tax Reform Act of 1976*, 53 WASH. L. REV. 31 (1977) (discussing prior law). As under prior law, generation-skipping transfer tax can be postponed by prolonging trusts. I.R.C. §§ 2601-2663, as enacted by the Tax Reform Act of 1986, 99 Pub. L. No. 514, § 1431 100 Stat. ____ (1986). Professor Casner explained why the Rule Against Perpetuities appears as the first topic in the Restatement (Second) of Property:

> I think it is important to note that the subject of donative transfers in property really is the foundation of the subject of estate planning, which is a term that is quite popular these days, and there are a great many people concerned about a program of appropriate estate planning. You really cannot work effectively in the field of estate planning without noting the limitations that you are operating under from the standpoint of property law, which is the basis of the entire subject. Therefore, as we develop this topic, we will from time to time examine it in the light of estate planning problems, which inject into the picture a considerable amount of taxation, income, gift, and estate taxes.

1978 ALI Proceedings, *supra* note 4, at 222–23 (remarks of Professor Casner). In effect, estate planners concerned with minimizing taxes for their clients—those with significant wealth—must understand the interplay of the Rule Against Perpetuities. *See generally* Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation*, 45 ALB. L. REV. 261 (1981).

194. Presumably it would not be malpractice to violate the common law Rule under a wait-and-see system.

195. In the famous case of *Lucas v. Hamm*, the California Supreme Court held it was not malpractice to violate the Rule. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1961). *But see* Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Wright v. Williams, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975) (suggesting less tolerance for a perpetuities drafting violation). Even if a violation by a drafting attorney would constitute malpractice, in at least one state an action may not be maintained by disappointed beneficiaires under a will. *See* Johnston, *Avoiding Malpractice Claims That Arise Out of Common Estate Planning Situations*, 63 TAXES 780, 783–85 (1985) (discussing privity barrier in Nebraska and possibly New York). On the other hand, Iowa courts apparently recognize a

simple matter to avoid a violation by using a saving clause. Society should not protect the lawyer who does not know enough to use a saving clause.[196] If such a lawyer can fail in this area, it is likely his or her services generally may not be of much value to the average consumer of legal services.

Assumption #6: There is a correct version of the wait-and-see approach to the common law Rule Against Perpetuities.

Several versions of wait-and-see have been advanced in recent years. In 1983, Professor Waggoner urged the adoption of the wait-and-see version

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malpractice action, but, incredibly, require discovery of the error by lay persons within the applicable limitations period. Millwright v. Romer, 322 N.W.2d 30 (Iowa 1982). *Romer* is criticized in Kurtz, *supra* note 48, at 754 n.149. Professor Dukeminier suggests the *Romer* decision motivated Iowa to adopt its wait-and-see system. *See* Dukeminier, *The Measuring Lives*, *supra* note 9, at 1656 n.23.

196. Consider the words of Professor Casner: "Nobody who drafts a trust today, familiar with the rule against perpetuities would think of putting in a trust that did not have . . . an overall termination provisions [sic] in it." *1978 ALI Proceedings*, *supra* note 4, at 240. If, after all the attention generated, lawyers and law students do not know about saving clauses, additional publicity could be considered. Bar associations could distribute publicity to their members. Law professors should ensure that their students know that the Rule need never be violated.

Some commentators have argued that the use of saving clauses is inappropriate. *See, e.g.*, Becker, *Understanding the Rule Against Perpetuities in Relation to the Lawyer's Role—To Construe or Construct*, 20 SAN DIEGO L. REV. 733, 759 n.51 (1983). Professor Becker was concerned about possible deviant distribution of principal, for example, distribution of principal which excludes grandchildren. This problem, based on the indiscriminate use of saving clauses, can be avoided by a well-conceived "gift over." Consider Professor Halbach's comment in a widely-disseminated form book:

> The purpose of this [gift over] provision of the saving clause is to provide for an alternative distribution if the cutoff provision terminates the trust before the main provision for distribution becomes operative. It is a difficult provision to draft because it must be adapted to the dispositive scheme of each trust and approximate the original as closely as possible.

Halbach, *Rule Against Perpetuities*, in CALIFORNIA WILL DRAFTING PRACTICE § 12.52, at 577 (1982).

In short, there should be no "deviant distribution of principal" if the transferor designates the beneficiaries of the "gift over." The choices are numerous. *See generally* McGovern, *Perpetuities Pitfalls and How Best to Avoid Them*, 6 REAL PROP., PROB. & TR. J. 155, 175–77 (1971); Moore, *New Horizons in the Grant and Exercise of Discretionary Powers*, 15 INST. ON EST. PLAN. ¶ 600 (1981).

Professor Becker also expressed concern over premature trust termination; specifically, termination while nonbeneficiary children were still alive. Again, the problem can be avoided by discriminate use of saving clauses. Consider Professor Halbach's form and comment thereto:

> Cutoff provision
>
> Any trust created by this Will, or by the exercise of any power of appointment conferred by this will, that has not terminated sooner shall terminate twenty-one (21) years after the death of the last survivor of ———[name or describe class of those best suited to be measuring lives]——— living at my death.
>
> . . . .
>
> COMMENT:
>
> . . . .
>
> The will drafter should choose the group of measuring lives that best suits the particular situation.

Halbach, *Rule Against Perpetuities*, in CALIFORNIA WILL DRAFTING PRACTICE § 12.52, at 575–76 (1982).

Professor Simes argued against saving clauses, recommending instead that an attorney be sure there was no violation. L. SIMES & A. SMITH, *supra* note 17, § 1295. However laudable this ideal, practitioners will use saving clauses. The attorney's obligation is to design a well-conceived clause appropriate for the particular situation.

of the Restatement (Second) of Property: "[L]egislatures contemplating perpetuity reform should . . . enact wait-and-see statutes modeled on the *Restatement (Second)*."[197] During the years 1985 and 1986, Professor Waggoner authored at least four USRAP drafts, including a Restatement (Second) version and three different proxy versions.[198]

In January, 1986, the debate between Professors Dukeminier and Waggoner was published.[199] Although Professor Waggoner raised the proxy method therein, Professor Dukeminier did not respond to it. After 100 pages of debate, Professor Dukeminier, who advocates a causal-lives method, concluded: "I am more convinced than ever that my proposed perpetuities reform statute is the simplest, most understandable, and most easily workable statute yet suggested."[200]

Assumption #7: There is a need for a uniform statutory Rule Against Perpetuities.

A clear diversity among the states regarding their approach to dead hand control is evident.[201] At one extreme is Louisiana which generally requires beneficiaries to be in existence at the time of transfer.[202] The other extreme is represented by the states of Idaho, South Dakota, and Wisconsin which

197. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1785.

198. DRAFT USRAP (Summer 1985), *supra* note 43 (Restatement (Second) version); DRAFT USRAP (Fall 1985), *supra* note 57; DRAFT USRAP (Winter 1986), *supra* note 22; DRAFT USRAP (Spring 1986), *supra* note 1. In addition, Professor Waggoner developed further variations on the proxy method. *See supra* notes 62, 63.

199. *See supra* note 9.

200. Dukeminier, *Final Comment*, *supra* note 9, at 1746.

201. In addition to some rule against perpetuities to limit remote vesting, states may have related (but varying) rules limiting dead hand control. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(a) (McKinney 1967 & 1986 Supp.) (rule against unduly suspending the power of alienation); MINN. STAT. ANN. § 501.11(6) (West 1947) (trust duration rule); ALA. CODE § 35-4-252 (1977) (very restrictive accumulation rule). *See generally* L. SIMES & A. SMITH, *supra* note 17, §§ 1461–1491.

202. Louisiana operates under a prohibited substitution rule. LA. CIV. CODE ANN. § 1520 (West Supp. 1986). As the Supreme Court of Louisiana recently noted: "The purpose of the prohibition is to prevent attempts to tie up property in perpetuity." Succession of Goode, 425 So. 2d 673, 677 n.5 (La. 1982). The principal non-trust exception to the prohibited substitution rule sanctions a usufruct-naked ownership disposition. LA. CIV. CODE ANN. § 1522 (West 1965). This arrangement is roughly equivalent to a life estate-remainder arrangement. *See* 5A R. POWELL, *supra* note 10, ¶ 817. Indeed, the naked owner must be alive on the date of disposition. LA. CIV. CODE ANN. § 1482 (West 1965).

Trust beneficiaries must usually be alive when a trust is created. LA. REV. STAT. ANN. § 9:1803 (West 1965 & Supp. 1986). In rare cases, one or more of the settlor's descendants who are alive when the principal beneficiary dies may be substitute beneficiaries. LA. REV. STAT. ANN. §§ 9:1975, 9:1978 (West Supp. 1986). Special rules govern "class trusts." LA. REV. STAT. ANN. §§ 9:1891–9:1906 (West 1965 & Supp. 1986). *See generally* Oppenheim, *A New Trust Code for Louisiana—Act 338 of 1964*, 39 TUL. L. REV. 187, 208–16 (1965).

effectively do not restrain dead hand control.[203] In between are a majority of states which rely on the common law Rule exclusively; that is, states which have not adopted some wait-and-see method.[204] Finally, there are wait-and-see jurisdictions: states which have adopted limited wait-and-see;[205] and states which have adopted full wait-and-see,[206] including Iowa, which effectively adopted the Restatement (Second) position.[207]

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203. IDAHO CODE § 55-111 (1979); S.D. CODIFIED LAWS ANN. § 43-5-6 (rev. ed. 1983); WIS. STAT. ANN. § 700.16(5) (West 1981). It is true that South Dakota and Wisconsin restrict the undue suspension of the power of alienation. WIS. STAT. ANN. § 700.16(1)(a) (West 1981 & Supp. 1985); S.D. CODIFIED LAWS ANN. § 43-5-1 (1983). For dispositions in trust, however, there will be no suspension problem if the trustee has the power to sell the trust property. WIS. STAT. ANN. § 700.16(3) (West 1981); S.D. CODIFIED LAWS ANN. § 43-5-4 (1983). Idaho has no suspension rule for personalty. IDAHO CODE § 55-111 (1979).

204. Alabama (ALA. CODE § 35-4-4 (1977)); Arizona (ARIZ. REV. STAT. ANN. § 33-261 (1974)); Arkansas (ARK. CONST. art. 2, § 19); California (CAL. CIV. CODE §§ 715.5–715.7 (Deering 1971)); District of Columbia (D.C. CODE ANN. § 45–302 (1981)); Georgia (GA. CODE ANN. § 44-6-1 (1982)); Indiana (IND. CODE ANN. § 32-1-4-1 (Burns Supp. 1985)); Michigan (MICH. COMP. LAWS ANN. § 26.49(1) (Callaghan rev. ed. 1984)); Missouri (MO. REV. STAT. § 442.555 (1965 Supp.)); Montana (MONT. CODE ANN. § 70-1-408 (1985)); New York (N.Y. EPTL § 9-1.1(b)(McKinney 1967)); North Carolina (N.C. CONST. art. 1, § 34); North Dakota (N.D. CENT. CODE § 47-02-27 (1978)); Oklahoma (OKLA. STAT. ANN. tit. 60, §§ 75, 76 (West Supp. 1985)); Tennessee (TENN. CODE ANN. § 24-5-112 (1980)); Texas (TEX. PROP. CODE ANN. § 5.043 (Vernon 1984)); Wyoming (WYO. STAT. § 34-1-138 (republished ed. 1977)). The following states apply the common law Rule in the absence of statutory provisions: Colorado, Delaware, Hawaii, Kansas, Minnesota (only personalty), Nebraska, New Jersey, Oregon, South Carolina, Utah, and West Virginia.

Several of these states have codified refinements of the Rule. *See, e.g., infra* note 292 (cy pres statutes). California has an alternate 60-year period. CAL. CIV. CODE § 715.6 (Deering 1971). *See generally* L. SIMES & A. SMITH, *supra* note 17, §§ 1411–1439.

205. Connecticut (CONN. GEN. STAT. ANN. § 45-95 (West 1981)); Maine (ME. REV. STAT. ANN. tit. 33, § 101 (1978)); Maryland (MD. EST. & TRUSTS CODE ANN. § 11-103 (1974)); Massachusetts (MASS. ANN. LAWS ch. 184A, § 1 (Law. Co-op. 1977)). Florida also appears in this category. FLA. STAT. ANN. § 689.22 (West Supp. 1986). *See* Powell, *Florida's Statutory Rule Against Perpetuities*, 11 FLA. ST. U.L. REV. 767, 810 (1984).

206. The following states clearly employ the causal-lives method: Alaska (ALASKA STAT. § 34.27.010 (1985)); Kentucky (KY. REV. STAT. ANN. § 381.216 (Michie/Bobbs-Merrill 1972)); Nevada (NEV. REV. STAT. § 111.103 (1985)); New Mexico (N.M. STAT. ANN. § 47-1-17.1 (Supp. 1985)); Rhode Island (R.I. GEN. LAWS § 34-11-38 (1984)).

The wait-and-see method is unclear in the following states: Mississippi (judicially adopts wait-and-see); New Hampshire (judicially adopts wait-and-see); Ohio (OHIO REV. CODE ANN. § 2131.08 (Baldwin Supp. 1984)); Vermont (VT. STAT. ANN. tit. 27 § 501 (1975)); Virginia (VA. CODE ANN. § 55-13.1 (Supp. 1985)); Washington (WASH. REV. CODE ANN. § 11.98.130 (Supp. 1986) (trusts only)). *See generally* Dukeminier, *The Measuring Lives*, *supra* note 9, at 1658–59 n.30. Uncertainty also exists in Pennsylvania. *See supra* text accompanying notes 114–27. Illinois has a unique system applicable only for trusts. ILL. ANN. STAT. ch. 30, ¶¶ 191–196 (Smith-Hurd Supp. 1985) *See* Schuyler, *Should the Rule Against Perpetuities Discard Its Vest*, 56 MICH. L. REV. 683, 714–15 (1958).

Professor Dukeminier also discusses wait-and-see adoptions outside the United States. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1655, 1658 n.29. *See generally* L. SIMES & A. SMITH, *supra* note 17, § 1411. England's complex wait-and-see system is comprehensively treated in Professor Maudsley's work. R. MAUDSLEY, THE MODERN LAW, *supra* note 41, at 110–95.

207. IOWA CODE ANN. § 558.68 (West Supp. 1985) (discussed in Kurtz, *supra* note 48).

Wait-and-see advocates have called for a uniform statute for over 30 years.[208] If one had been adopted in 1979, the much-maligned Restatement (Second) method would have been employed.[209] Is there any reason to suspect that any state, let alone a significant number of states, will adopt a USRAP based on a proxy approach? No, because dead hand rules, or the lack of them, are not creating any real problems in this country.[210] The cost of enactment is not worth the effort.[211]

Ultimately, a USRAP is unnecessary. Even if adopted, the USRAP would not apply to interests created before individual state enactment.[212] In light of the recent publicity generated by the USRAP, it is doubtful whether lawyers will draft *new instruments* without inserting an appropriate saving clause.[213] Adoption of this complex system to deal with the isolated violations by transferors not seeking counsel,[214] and with counsel who persist in violating the Rule, cannot be justified. All violations can be handled under refinement techniques.[215]

IV. REFINING THE COMMON LAW RULE AGAINST PERPETUITIES

A. Justification

The paucity of cases holding a nonvested interest void under the common law Rule demonstrates that the Rule is not producing harsh consequences. For this and the other reasons discussed in part III, a wait-and-see system cannot be justified. Nonetheless, the common Law rule can be refined.

Areas which need refinement are suggested by recent cases in the perpetuities area. The few cases which correctly found a violation disclose

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208. *See* Leach, *Legislatures*, *supra* note 191, at 523.

209. To put it mildly, Professor Dukeminier takes a dim view of the A.L.I.-recommended solution in the Restatement (Second):

> What Professor Percy Bordwell said of volumes 1 and 2 of the First Restatement of Property [Bordwell, Book Review, 51 Harv. L. Rev. 565, 570 (1938)], applies with particular force to the list of measuring lives in the Second Restatement: "Legislation is legislation and scholarship is scholarship, but the Institute is not a legislature and its ways are not those of scholarship."

Dukeminier, *The Measuring Lives*, *supra* note 9, at 1680–81.

210. Professor Leach noted that the absence of restrictions on dead hand control has posed no significant problems in Wisconsin. Leach, *Hail Pennsylvania*, *supra* note 19, at 1141.

211. Adoption of the USRAP would also require states to repeal or modify conflicting ancillary rules. *See supra* note 201 (identifying related rules).

212. *See supra* text accompanying note 67.

213. *See supra* note 196.

214. *See, e.g.*, Dickerson v. Union Nat'l Bank, 268 Ark. 292, 595 S.W.2d 677 (1980) (holographic will).

215. *See infra* Part IV.

familiar traps: the unborn widow situation;[216] inclusion of afterborns within a class;[217] and failing to attain an age in excess of 21 years.[218] There were no fertile octogenarian or administrative contingency cases during the period 1978–1985.[219] There were also two violations on exercising a power in favor of persons who were not alive when the power was created.[220] Because it is assumed that the transferors and powerholders do not intend to violate the Rule, but merely fall into some trap, refinement to avoid invalidity would be appropriate.

Refinement is also justified to address the problem of litigation which erroneously invalidates an interest under the Rule. The recent Indiana case of *Merrill v. Wimmer*[221] illustrates how the common law Rule can befuddle bench and bar alike. The case involved the validity of a residuary trust created under the 1970 will of Newell Merrill (testator). The disposition may be summarized as follows:

> Income to testator's three named children, *A*, *B*, and *C*, for the duration of the trust. When testator's youngest grandchild reaches age 25, the trust shall terminate as to two-thirds of the corpus and be divided as follows: one-sixth to *A*; one-sixth to *A*'s children; one-sixth to *B*; and one-sixth to *B*'s children. The other one-third shall continue in trust with income to *C* for life and on his death one-sixth to *C*'s bodily issue and one-sixth to testator's grandchildren living at trust termination or the entire one-third to testator's grandchildren living at trust termination if *C* leaves no bodily issue.

Testator was survived by the following persons: a widow who was not provided for under the will;[222] his three children (*A*, *B*, and *C*) who were in

216. Dickerson v. Union Nat'l Bank, 268 Ark. 292, 595 S.W.2d 677 (1980) (holographic will).

217. Connecticut Bank & Trust Co. v. Brody, 174 Conn. 616, 392 A.2d 445 (1978). This disposition could have been construed to avoid invalidity. *See supra* note 133 and accompanying text.

218. Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Berry v. Union Nat'l Bank, 164 W. Va. 258, 262 S.E.2d 766 (1980), was a trust duration case in which the court reduced the period to 21 years.

219. *See* Nelson v. Kring, 225 Kan. 499, 592 P.2d 438 (1979); Commerce Union Bank v. Warren County, No. 85-12-11 (D. Tenn. May 16, 1985), *rev'd*, 707 S.W.2d 854 (1986), involving the voiding of an executory interest if a designated charity ceased existence. USRAP drafts suggest that such transactions should be subject to a 40-year vesting rule. *See, e.g.*, DRAFT USRAP (Spring 1986), *supra* note 1, at 84–86 (relating to possibilities of reverter, rights of reentry and certain executory interests in realty). The 40-year rule, however, was dropped from the adopted USRAP version. *See* UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft July 31, 1986).

On appeal in 1986, *Commerce Union Bank* was reversed, 707 S.W.2d 854 (1986). The Supreme Court of Tennessee construed the testamentary trust as creating a possibility of reverter, rather than an executory interest. As a result, it held that the common law Rule was not violated because the Rule does not apply to possibilities of reverter. *See generally* L. SIMES & A. SMITH, *supra* note 17, § 1239.

220. *See In re* Will of Grunebaum, 122 Misc. 2d 645, 471 N.Y.S.2d 513 (1984); *In re* Harden, N.Y.L.J., Sept. 17, 1985, at 13, col. 6 (N.Y. Co. Surr.).

221. 481 N.E.2d 1294 (Ind. 1985), *vacating* 453 N.E.2d 356 (Ind. Ct. App. 1983).

222. The decisions do not discuss the spouse's elective share rights. *See* IND. CODE ANN. § 29-1-3-1 (Burns Supp. 1985).

their mid-to-late 40's; and seven grandchildren (five children of *A*, ages 13 to 29, and two children of *B*, ages 11 and 18).

Merrill was litigated in three courts. In the unreported trial decision,[223] the court adopted a probate commissioner's findings that the corpus dispositions to *A* and *B* and their children violated the Rule Against Perpetuities,[224] but that the dispositions to *C* with remainder over did not. *A* and *B* were each awarded one-third of the trust corpus. On appeal, counsel conceded that the intended corpus distributions to *A*, *B*, and their children violated the Rule Against Perpetuities. The three appellate judges agreed that the dispositions to *C* and remainders over did not violate the Rule.[225]

The appellate court announced it would apply the cy pres doctrine to violations under the Rule.[226] Pursuant to this judicially-created power, the court construed the trust beneficiaries as those grandchildren living at testator's death.

The Supreme Court of Indiana, five justices participating, reversed and remanded. In the process, however, the court addressed the alleged perpetuities violation:

> The trial court . . . correctly held that the trust provisions as to the two-thirds (2/3) share designated for [*A* and *B*] and their children were invalid under the rule (statute) against perpetuities . . . . The Court of Appeals also correctly held that trust provisions violated the statute against perpetuities.[227]

The Supreme Court of Indiana also suggested that the doctrine of infectious invalidity would invalidate the dispositions to *C* and others because "they are so interrelated with those for [*A* and *B*] that they cannot be permitted to stand alone, because such would result in significant distortion or defeat of the Testator's underlying objectives."[228] This statement, however, is only dictum because the Court found that the one-third share to *C* and the takers after his death violated the Rule. Why? According to the court, the testator intended that this one-third share not be created until after termination of the two-thirds share, when the youngest grandchild reached 25.[229] The end result was total invalidation of the trust with

223. The results of the trial court decision were discussed in the intermediate appellate court opinion.

224. Indiana has codified the common law Rule as follows:

> TIME IN WHICH AN INTEREST IN REAL AND PERSONAL PROPERTY MUST VEST.—An interest in property shall not be valid unless it must vest, if at all, not later than twenty-one [21] years after a life or lives in being at the creation of the interest. It is the intention by the adoption of this chapter to make effective in Indiana what is generally known as the common law rule against perpetuities.

IND. CODE ANN. 32-1-4-1 (Burns Supp. 1985).

225. Merrill v. Wimmer, 453 N.E.2d 356, 359 (Ind. App. 1983).

226. *Id.* at 361–62.

227. Merrill v. Wimmer, 481 N.E.2d 1294, 1297 (Ind. 1985).

228. *Id.* at 1299.

229. The court acknowledged the "perplexing" effect of the trust: testator's children could not enjoy the corpus because the trust would not terminate until after their deaths. *Id.* at 1298 n.1, 1300.

the property passing by intestacy to *A*, *B*, and *C*.[230]

Merrill was erroneously decided under the common law Rule. The corpus dispositions to *A*, *B*, and their children did not violate the common law Rule. The dispositions to *A* and *B* were indefeasibly vested from testator's death; the dispositions to their children would necessarily vest at the deaths of *A* and *B*.[231] Further, the disposition to *C* for life was good since *C* was a life in being and, in fact, his interest would terminate on his death. Additionally, the disposition to *C*'s bodily issue was good since they would be determined by *C*'s death. The only disposition violating the common law Rule, based on the construction that the trust would not terminate until the youngest grandchild reached 25, was the contingent remainder to the grandchildren surviving trust termination.[232] Only that contingent remainder interest should have passed by intestacy, presuming the doctrine of infectious invalidity would not have required any further invalidation.

The key error made by the trial judge, probate commissioner, eight appellate judges, and countless lawyers was in assuming that a violation exists if a trust could last beyond the perpetuities period. Properly understood, the Rule Against Perpetuities deals with future interests which may vest remotely and not the duration of vested interests in trust.[233] Other courts have made this distinction and have upheld initially vested interests

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230. In the process, the Indiana court declined to modify dispositions violative of the Rule Against Perpetuities:

> The power or function of the court is limited to the construing of a will, that is, the interpretation of the language used by the testator, and it may not make or rewrite the will for the testator under the guise of construction, even to do equity or accomplish a more equitable division of the estate, or for the purpose of making it more liberal and just, or even though interested parties are agreeable thereto. So the courts have no right to vary or modify the terms of a will, or to reform it, even on grounds of mistake, accident, or surprise . . . .

Id. at 1299 (quoting 95 C.J.S. *Wills* § 586).

231. *A*, *B*, and their children were ready to take whenever the preceding estate of *A* and *B* terminated, i.e., when the youngest grandchild reached 25. In effect, there was no condition that these beneficiaries survive trust termination. The discredited "divide-and-pay-over rule"—a condition of survival implied until trust termination—was not discussed in the opinions. *See* RESTATEMENT OF PROPERTY § 260 (1944); L. SIMES & A. SMITH, *supra* note 17, §§ 657–658.

232. After the intermediate appellate court's decision, the following discussion of *Merrill* appeared:

> The last provision is the only one that states a condition of survival and so would be invalid if the youngest grandchild should be afterborn. All the other interests vest immediately or at birth of a grandchild, and that must be within the lifetime of the children—clearly valid. The courts did not construe it that way.

Mortland, *New fiduciary decisions*, 11 EST. PLAN. 56 (1984).

There are, of course, other conditions besides surviving until a certain time which may render an interest nonvested. *See, e.g.*, L. SIMES & A. SMITH, *supra* note 17, § 141 (enumerating various conditions rendering a remainder interest contingent).

233. *See* L. SIMES & A. SMITH, *supra* note 17, § 1391; RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.1 (1983); DRAFT USRAP (Spring 1986), *supra* note 1, at 87–90. *See generally* Downing, *The Duration and Indestructibility of Private Trusts*, 16 CASE W. RES. L. REV. 350 (1965).

or interests which would vest (or fail to vest) within the perpetuities period, despite possession being delayed beyond the perpetuities period.[234]

Refinement is also indicated by those American cases—approximately 20 during the eight-year period, 1978 to 1985—which found no perpetuities violation. These fit into various categories: upholding or construing a saving clause,[235] declaring an interest valid which could not conceivably be invalid under the Rule,[236] and construing a document to prevent a violation.[237]

Litigation upholding a saving clause seems unnecessary. Virtually every American case considering the question has upheld a saving clause. In *Hagemann v. National Bank & Trust Co.*,[238] however, the court held that a clause did not save a violation despite a requirement for trust termination within the period. The court objected to the gift over component of the clause, a provision for the same beneficiaries who would have taken if the trust terminated after the period. But if an interest must vest—indeed become possessory—within the perpetuities period because of a saving clause, dead hand control will not extend too far.

The reason for much of the validating (and invalidating) litigation lies in the operation of the Rule. A violation will enable other parties to succeed to the interest. Thus, an attack is encouraged. If the attack is successful, *Merrill* suggests that, under the doctrine of infectious invalidity, valid interests or even the trust may be voided.[239]

234. *See, e.g.*, May v. Hunt, 404 So. 2d 1373, 1375 (Miss. 1981) ("Citing the elementary principle that the rule against perpetuities does not apply to vested interests . . . ."); Burt v. Commercial Bank & Trust Co., 244 Ga. 253, 260 S.E.2d 306 (1979) (overruling Burton v. Hicks, 220 Ga. 29, 136 S.E.2d 759 (1964)).

235. Norton v. Georgia R.R. Bank & Trust, 253 Ga. 596, 322 S.E.2d 870 (1984); *In re* Estate of Schmitz, 214 Neb. 28, 332 N.W.2d 666 (1983); First Nat'l Bank v. Hampson, 88 Ill. App. 3d 1057, 410 N.E.2d 1109 (1980); First Ala. Bank v. Adams, 382 So. 2d 1104 (Ala. 1980).

236. Cotham v. First Nat'l Bank, 287 Ark. 167, 697 S.W.2d 101 (1985); *In re* Estate of Darling, 219 Neb. 705, 365 N.W.2d 821 (1985); Hulsh v. Hulsh, 431 So. 2d 658 (Fla. Dist. Ct. App.), *cert. denied*, 440 So. 2d 352 (Fla. 1983); Hudson v. deLaval, 382 So. 2d 1124 (Ala. 1980); Donahue v. Watson, 411 N.E.2d 741 (Ind. App. 1980); Dickson v. Renfro, 263 Ark. 718, 569 S.W.2d 66 (1978); Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397, *cert. denied*, 295 N.C. 95, 244 S.E.2d 263 (1978). See also cases cited *supra* note 234 for further examples.

237. Criss v. Omaha Nat'l Bank, 213 Neb. 379, 329 N.W.2d 842 (1983); Sherrod v. Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983); Chicago Title & Trust Co. v. Schwartz, 120 Ill. App. 3d 324, 458 N.E.2d 151 (1983); *In re* Estate of Rosenzweig, 88 A.D.2d 619, 450 N.Y.S.2d 436 (N.Y. App. Div. 1982); Joyner v. Duncan, 299 N.C. 565, 264 S.E.2d 76 (1980); Lewis v. Green, 389 So.2d 235 (Fla. Dist. Ct. App. 1980), *cert. denied*, 397 So.2d 778 (Fla. 1981); Austin v. Dobbins, 219 Va. 930, 252 S.E.2d 588 (1979); Underwood v. MacKendree, 242 Ga. 666, 251 S.E.2d 264 (1978); Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978).

238. 218 Va. 333, 237 S.E.2d 388 (1977).

239. The former situation is illustrated by Connecticut Bank & Trust Co. v. Brody, 174 Conn. 616, 392 A.2d 445 (1978); the latter by Hulsh v. Hulsh, 431 So. 2d 658 (Fla. Dist. Ct. App.) (reversing lower court on point), *cert. denied*, 440 So. 2d. 352 (Fla. 1983).

Validating litigation may also take place because lawyers (and sometimes judges) do not understand the Rule well enough to recognize instances of validity.[240] If it is not malpractice to violate the rule,[241] one would assume that it is not malpractice to litigate a perpetuities case, though it be without merit.[242]

Ultimately, refinement is called for to reduce (and virtually eliminate) litigation under the Rule. Why should courts invalidate interests which everyone agrees should not be invalidated? Why should court time be taken up with validating interests? Why should the share for intended beneficiaries be diminished by legal fees?

B. Suggestions for Refining the Rule

There is general agreement that the common law Rule Against Perpetuities should not invalidate an interest because of some trap, one of Leach's improbable occurrences. Over the years, many have recommended legislation to deal with the specific traps publicized by Leach. For example, Professor Mechem wrote in 1959:

> So, it all seems to me rather sad. The common-law rule is sound in conception and certain in operation. All of the objections to it—mostly its operation in freak cases, to tell the truth—can be eliminated by a few simple modifications of the common-law rule. These would be non-controversial and easy to enforce. A simple solution of a problem whose scope has been greatly exaggerated.[243]

I assume most would agree it would also be desirable to reduce or eliminate validating litigation. Such litigation results in defeating the transferor's intent to the extent the legal fees diminish the shares of the intended beneficiaries.[244]

The common law Rule should be refined by specific legislation to meet the principal objections: invalidation because of a technical violation and undesirable validating litigation. Legislation would include specific statutory repair of the common law traps, together with the judicial power to reform any interest which still violated the Rule.[245] The package would also

240. *See, e.g.*, Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397, *cert. denied*, 295 N.C. 95, 244 S.E.2d 263 (1978); Donahue v. Watson, 411 N.E.2d 741 (Ind. App. 1980).

241. *See supra* note 195.

242. Malpractice in the litigation is another question.

243. Mechem, *Further Thoughts*, *supra* note 8, at 983.

244. *See, e.g.*, Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397, *cert. denied*, 295 N.C. 95, 244 S.E.2d 263 (1978).

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

include statutes encouraging saving clauses and settlement. The suggested legislation is set out in the Appendix.[246]

The first three statutes—saving clause encouragement, settlement authority and specific repairs—will be briefly explained. In addition, the justification for cy pres power will be addressed.

SAVING CLAUSE STATUTE

If a provision in an instrument terminates a nonvested property interest that has not vested 21 years after the death of the survivor of a group of individuals identified by name or by reference to an identifiable class and alive when the period of the common law Rule began to run, that interest is valid. If determining the death of the survivor would be impracticable, the validity of the property interest must be determined as if that provision did not exist.

This statute is designed to publicize and thereby encourage the use of saving clauses. It tracks the language under a draft version of the USRAP[247] which sought to improve upon the Restatement's provision.[248] By sanctioning saving clauses, *Hagemann*[249] would be effectively overruled. This statute also applies to trust provisions and other arrangements whereby termination is based on a period up to 21 years after the death of specified persons.[250]

SETTLEMENT STATUTE

A court may approve a good faith compromise of a perpetuities matter if it is just and reasonable to all parties, including unborn and unascertained

246. Because the refinements are to the common law Rule, a codification of the Rule is necessary. A "simple" solution would continue or slightly modify Gray's one-line formulation. *See supra* note 16. This was the approach under the Model Rule Against Perpetuities. MODEL RULE AGAINST PERPETUITIES ACT, 9C U.L.A. 76 (1957).

A more ambitious undertaking would provide definitions, operating rules, and exceptions. *See* J. GAUBATZ & I. BLOOM, ESTATES, TRUSTS AND TAXES: CASES AND MATERIALS ON THE WEALTH TRANSMISSION PROCESS 17–11, 12 (1983) (identifying areas ripe for codification) [hereinafter J. GAUBATZ & I. BLOOM]. The USRAP moves somewhat in this direction, especially in the powers area. *See* USRAP §1(b) and (c) (relating to validity of powers), §2 (relating to when power or nonvested interest created) (1986). Ultimately, a comprehensive codification of the common law Rule could rival some of the more complex provisions under the Internal Revenue Code. Such an undertaking is beyond the purview of this article.

247. DRAFT USRAP (Summer 1985), *supra* note 43, at 3–4, 16–17, 21–23. Because American lawyers have not attempted to abuse saving clauses—including the use of "royal lives" clauses—it is not expected that the "impractical" standard will be invoked. If problems arise under the standard, there will be time enough to consider limiting the number of permissible lives. For now, violation of the impracticable standard would require a court to use its cy pres power.

248. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.3(1) (1983).

249. *See supra* note 238 and accompanying text.

250. *See* DRAFT USRAP (Summer 1985), *supra* note 43, at 23.

persons. For this purpose, a guardian shall be appointed to represent unborn and unascertained persons.

Designed to publicize and thereby encourage settlements in the perpetuities area, this statute most likely would be declaratory of existing law regarding judicial authority to approve settlements.[251] Its reference to representatives of unborn and unascertained persons—guardians *ad litem*—sanctions judicial settlements which may not have been previously considered.[252]

Clearly, settlement is preferable to litigation under the specific repair or cy pres statutes.[253] These latter provisions should also encourage settlement because they define and effectively limit the potential gain from litigation. Additionally, the settlement statute could be expanded to provide procedures for securing approval of a compromise.[254]

STATUTORY RULES OF CONSTRUCTION

(a) Unless a contrary intention appears, the rules of construction in this section apply if an interest would be void under the common law Rule.

(b) The rules of construction apply in the order set forth in the following paragraphs. A rule shall be applied only if necessary to validate an interest.

This statute provides rules of construction designed to avoid traps which result in perpetuities violations. The technique effectively requires initial determination of invalidity, but owing to the Rule's complexity, determination may be problematic. Assume, for example, invalidity is determined by applying the first two steps under the causal relationship methodology, as follows: "First, we assemble the causally-connected lives, who fix the

251. *See* IV A. SCOTT, THE LAW OF TRUSTS § 337.6 (3d ed. 1967). The proposed statute borrows, in part, from the general compromise statute under the Uniform Probate Code. *See* UNIF. PROBATE CODE §3-1102, 8 U.L.A. 490-91 (1972). It may also be possible to affect an out-of-court settlement. *See id.* § 3-912; *In re* Disston's Estate, 349 Pa. 129, 36 A.2d 457 (1944).

252. As noted, perpetuities settlements, with or without court approval, are not utilized in practice. *See supra* text accompanying notes 92, 93. The reason may be explained as follows: a perpetuities problem invariably affects unborn and unascertained persons, necessitating actual, as distinct from virtual, representation by guardians *ad litem*. In turn, the general authority of guardians *ad litem* to effectuate compromises, let alone compromises on perpetuities matters, is uncertain. *See generally* Begleiter, *The Guardian Ad Litem in Estate Proceedings*, 20 WILLAMETTE L. REV. 643 (1984). Under the Uniform Probate Code, however, unborn and unascertained persons may be bound by court-approved settlements. *See* UNIF. PROBATE CODE §§ 3-1101, 3-1102. These sections also contemplate the appointment of guardians *ad litem*. *See id.* §3-1102 comment.

253. Settlement may be rejected if neither in good faith, nor just and reasonable. *Cf.* UNIF. PROBATE CODE § 3-1102(3); Cotham v. First Nat'l Bank, 287 Ark. 167, 697 S.W.2d 101 (1985)(rejecting settlement because there was no perpetuities violation).

254. *See* UNIF. PROBATE CODE § 3-1102.

limits of the perpetuities period. Second, we test each of these lives in search of a validating life."[255] If, after testing the relevant lives in being, the interest is void under the common law Rule, constructional rules apply rather than a wait-and-see approach.[256] In essence, the specific repair method takes care of identified problems rather than hoping that the problems disappear under the causal-lives or some other wait-and-see version.[257]

The proposed statute provides five constructional rules which apply in the absence of contrary intent. These rules would provide judges and lawyers with specific directions for obtaining a specific result: validation of an interest. In contrast to a system which fails to specify the order in which specific statutes are to be applied,[258] the proposed approach would spare judges (and lawyers) the burden of determining the solution.

RULE 1: ADMINISTRATIVE CONTINGENCIES RULE
RULE 2: FERTILE OCTOGENARIAN RULE
RULE 3: UNBORN WIDOW RULE

(1) Administrative Contingencies

Where the duration of vesting of an interest is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax, or the occurrence of any specified contingency, the instrument shall be construed to require such

255. Dukeminier, *The Measuring Lives*, *supra* note 9, at 1656.

256. At this point under the causal-lives method, we would wait and see whether the remote event occurred within the lifetime of a causally-related life plus 21 years. *Id.*

Professor Dukeminier proposes to eliminate the second step of the causal-lives method—testing for validity under the common law Rule. He asserts it is irrelevant whether an interest violates the common law Rule. *Id.* at 1711. Waggoner objects, noting the unnecessary administrative burdens entailed. Waggoner, *Perspective*, *supra* note 9, at 1725–26. Moreover, Professor Dukeminier's approach would not eliminate application of the common law Rule when construing instruments for both tax and non-tax purposes. *See supra* notes 131–33 and accompanying text.

257. Consider Professor Browder's views:

> The required certainty of vesting is no hardship except in those cases where extremely unlikely possibilities of remote vesting constitute boobytraps for unwary draftsmen. Wait-and-see does remove these pitfalls. But fortunately these extreme cases appear in identifiable patterns, which can be dealt with specifically. New York this year was the first to provide such an alternative to wait-and-see. This alternative has the advantage of rendering such interests valid immediately, while under the wait-and-see rule we may have to wait for a favorable judgment until after the prescribed period of waiting is over.

Browder, *Future Interest Reform*, 35 N.Y.U. L. REV. 1255, 1276 (1960) (footnotes omitted).

258. *See* N.Y. EST. POWERS & TRUSTS LAW §§ 9-1.2, 9-1.3 (McKinney 1967 & Supp. 1986). The complex English system provides rules and an ordering scheme somewhat similar to this proposal. There is one crucial difference: England's wait-and-see regime also applies. *See* R. MAUDSLEY, THE MODERN LAW, *supra* note 41, at 110–95 (discussing Perpetuities and Accumulations Act of 1964).

contingency to occur, if at all, within 21 years from the effective date of the instrument creating such interest.

(2) Unrealistic Birth Possibilities; Possibility of Adoption Disregarded

(A) Where the validity of a disposition depends upon the ability of a person to have a child at some future time, it shall be presumed, subject to subparagraph (B), that a male can have a child at 14 years of age or over, but not under that age, and that a female can have a child at 12 years of age or over, but not under that age or over the age of 55 years.

(B) In the case of a living person, evidence may be given to establish whether he or she is able to have a child at the time in question.

(C) Where the validity of a disposition depends upon the ability of a person to have a child at some future time, the possibility that such person may have a child by adoption shall be disregarded.

(3) Unborn Person Possibility

Where an interest would be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the interest, and such person is referred to in the instrument creating such interest as the spouse, widow, or widower of another person, it shall be conclusively presumed that such reference is to a person in being on the effective date of the instrument.

The first three rules respond to familiar traps publicized by Professor Leach: remote administrative contingencies, the fertile octogenarian, and the unborn widow.[259] The order can effectuate the transferor's (presumed) intention; it is highly doubtful that transferors consider such fantastic possibilities.[260] The language generally tracks New York law,[261] although

259. Leach, *Reign of Terror*, *supra* note 3.

260. Consider a testamentary disposition to sister *S* for life, remainder to *S*'s widower for life, remainder to *S*'s children who survive her widower. Assume the decedent was survived by *S* (60 years old) and three children, *A*, *B*, and *C*. *S* will be presumed incapable of having additional children. Hence, we will know within the lifetimes of *A*, *B*, and *C* whether they survive the widower, whether or not he was alive at decedent's death. By first applying the unrealistic birth construction, the unborn widower will be allowed to take. *Cf.* ILL. ANN. STAT. ch. 30, ¶ 194(c) (Smith-Hurd Supp. 1985) (unborn widow statute applies before fertile octogenarian statute).

261. *See* N. Y. EST. POWERS & TRUSTS LAW § 9-1.3(d) (administrative contingency), § 9-1.3(e) (fertile octogenarian), § 9-1.3(c) (unborn widow) (McKinney 1967 & Supp. 1986). The proposal contains a presumption against unrealistic birth possibilities, but does not resolve the issue of whether and to what extent a person who is born despite the presumption takes. *Compare* N.Y. EST. POWERS & TRUSTS LAW § 9-1.3 and Practice Commentary (McKinney Supp. 1986) (favors taking) *with* ILL. ANN. STAT. ch. 30, para. 194(c) (Smith-Hurd Supp. 1986) (bars taking), discussed in Schuyler, *The Statute Concerning Perpetuities*, 65 NW. U.L. REV. 3, 40–46 (1970).

Unlike the New York and Illinois reform systems, the proposal also sanctions cy pres reformation. *See infra* notes 277–96 and accompanying text. Accordingly, violations not cured by the rules of construction can be resolved from the outset if it can be shown that a transferor contemplated the unusual, *e.g.*, the existence of an unborn widow.

variations are possible.[262]

RULE 4: AGE REDUCTION RULE

(4) Reduction of Age to 21 for Vesting Purposes: Deferred Possession Allowed

(A) If an interest would be invalid under the common law rule because made to depend for its vesting upon any person attaining an age in excess of 21 years, the age contingency shall be reduced to 21 years for vesting purposes only.

(B) Notwithstanding subparagraph (A), possession of the interest shall be postponed to the age specified in the instrument or to age 50, whichever occurs sooner.

(C) Notwithstanding subparagraph (A), the person or persons entitled to the property or enjoyment thereof, from age 21 and until the age prescribed in the instrument, shall continue such entitlement.

The fourth constructional rule differs from traditional age reduction statutes.[263] It requires vesting by age 21, but delays possession until the prescribed age (under 50 years) is reached. In addition, the proposed statute confirms the rights of the intended takers of interim income.[264] Consider the following example:

> *T* in trust to my daughter *A* for life, remainder to *A*'s children who reach age 25. Residue to *B*. *T* is survived by *A* (a widow under age 55) and two children, ages 3 and 7.

Pursuant to Rule 4, the will provision will be construed as follows:

> *T* to *A* for life, remainder to *A*'s children who reach age 21, with payment postponed until each reaches age 25; interim income to *B*.

Assuming the two children alive at *T*'s death reach age 21, their interests will vest, but they will not receive possession until they reach age 25. Interim income will go to *B* as intended. Afterborn children can be included in the class.[265]

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262. Professor Waggoner discusses various alternatives. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1735–55. For example, the Illinois "fertile octogenarian" statute applies to both sexes after age 65 is attained and applies after its "unborn widow" and "age reduction" provisions. ILL. ANN. STAT. ch. 30, para. 194(c) (Smith-Hurd Supp. 1986).

263. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-96 (West 1981).

264. In a few states, additional legislation may be necessary to modify "next eventual taker" rules. *See supra* note 101.

265. Under the constructional "rule of convenience," a class will close when a member can call for distribution. *See* L. SIMES & A. SMITH, *supra* note 17, § 640. In the text example, no afterborn children will be excluded because all potential takers will be determined at *A*'s death.

The principal objection to age reduction statutes, that the intended beneficiary receives possession at too early an age, is solved by Rule 4.[266] The only practical difference between the reformed and original dispositions is if an untimely death occurs between ages 21 and 25.[267] Because the interest will be vested, the child will be entitled to transmit the interest, and the interest will be subject to federal estate tax.[268] The intended taker in default of attaining an age in excess of 21 will still receive interim income, but cannot succeed to the property if the child dies after age 21.

Rule 4 produces two additional benefits in class gift dispositions. First, it prevents the operation of the all-or-nothing rule in excess age cases.[269] Second, it eliminates the necessity of choosing between two constructions: reduction in age or limitation to class members alive at time of creation.[270] By operation of Rule 4—which requires age reduction for vesting purposes only—afterborn members can be included.[271]

Rule 4 would not apply when an interest is nonvested because dependent upon a person failing to attain an age in excess of 21.[272] Although the trap could be overcome by an age reduction statute, the transferor's intention could be better carried out under the court's cy pres power.[273]

RULE 5: CLASS GIFT CONSTRUCTIONAL RULE

(5) Class gift construction

If an interest would be invalid under the common law Rule by including

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266. Professor Waggoner raises this objection. *See* Waggoner, *Perpetuity Reform*, *supra* note 21, at 1757.

267. Since such deaths are most unlikely, the rare frustration of intention may be of no great moment. *But cf.* Freund, *Three Suggestions Concerning Future Interests*, 33 HARV. L. REV. 526, 533 (1920) ("A gift at twenty-one is not logically included in a gift at twenty-five, because the former is a larger gift, and the more is not included in the less.").

268. Technically, estate taxation could be avoided by a timely disclaimer if a child died within 9 months of attaining age 21. *See* I.R.C. § 2518(b)(2)(B).

269. *See* Leach, *Perpetuities in a Nutshell*, *supra* note 22, at 646 (example 18), 649 n.28 (example 24). *See generally* Leach, *Gifts to Classes*, *supra* note 24.

270. For example, the intermediate appellate court in Merrill v. Wimmer, 453 N.E.2d 356 (Ind. App. 1983), *vacated*, 481 N.E.2d 1294 (Ind. 1985), excluded afterborns. *See supra* text accompanying note 226. Professor Leach discussed a solution to this dilemma under a cy pres statute. J. MORRIS & W. LEACH, THE RULE AGAINST PERPETUITIES 35 (1956).

271. *See supra* note 265.

272. Consider the following illustration:

Bequest by T in trust, income to S for life. At the death of S, income to be divided among S's then living descendants until each reaches age 30. When any descendant reaches age 30, his share of the corpus is then to be paid to him. Upon the death of any descendant before age 30, his share of the corpus is to be added to the shares of the other living descendants. At T's death, S is an infant. *Cf.* Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979).

J. GAUBATZ & I. BLOOM, *supra* note 246, problem 17-3 at 17-32 (1983).

273. *See infra* text accompanying notes 277–96.

afterborn persons within a class, afterborns shall be excluded from the class to the extent necessary to avoid a violation under the common law Rule.

Rule 5 codifies the preference for construing class gifts in a manner which results in validation under the common law Rule.[274] Consider the following disposition:

> *T* to *A* for life, remainder to *A*'s children for life, remainder to *A*'s grandchildren who reach age 25. *T* is survived by *A* who is 50 years old and two children, *B* and *C*.

Rule 4 will require vesting of *A*'s grandchildren's interests when each reaches age 21. Yet, the ultimate remainder is void because *A*'s grandchildren will not necessarily be determined within the perpetuities period. *A* could have an afterborn child, *D*. *D* could have children and be the surviving child. Hence the class of grandchildren could vest outside the period. Rule 5 will require trust termination when the survivor of *B* and *C* dies. In addition, *D* can share in income and *D*'s children born before *B* and *C* die can receive corpus.

Rule 5 would solve the all-or-nothing rule's operation in the majority of two-generation cases.[275] Together with Rules 2 and 4, Rule 5 defuses the all-or-nothing rule.[276]

CY PRES STATUTE

If, after application of the foregoing statutes, an interest would be invalid under the common law Rule, a court shall reform the interest within the limits of the Rule by approximating the transferor's intention as nearly as possible. For this purpose, extrinsic evidence shall be admissible.

Specific repair statutes can address the technical violations of the common law Rule. As Professor Waggoner correctly states: "[I]nvalidity in the technical violation cases is so easily reversed by the specific statutory repair method of reform."[277]

Professor Waggoner attempts to justify a wait-and-see regime because it applies in all cases of perpetuities violation—not only those occasioned by

274. *See supra* note 133 and accompanying text. The English system has somewhat similar class gift rules which apply after the wait-and-see period. *See* Perpetuities and Accumulations Act § 4(3), (4), discussed in R. MAUDSLEY, THE MODERN LAW, *supra* note 41, at 143–46.

275. *See* Leach, *Perpetuities in a Nutshell*, *supra* note 22, at 651 (example 27).

276. Professor Leach desired the same result. *See* Leach, *Gifts to Classes*, *supra* note 24. The English system also defuses the all-or-nothing rule but only after its wait-and-see period. *See* R. MAUDSLEY, THE MODERN LAW, *supra* note 41, at 143–45.

277. Waggoner, *Perpetuity Reform*, *supra* note 21, at 1719.

a technical violation.[278] Yet, he fails to identify cases which do not involve technical violations.[279] His earlier words are significant:

> The number of property interests which as of the date of creation are almost but not quite certain to vest if at all in due time, but which do not fall within the categories covered by the specific statutory repair method, is probably infinitesimal. Consequently the fact that the wait and see method saves from automatic invalidity *all* such interests, whereas the specific statutory repair method saves only those which fall within the fertile octogenarian, the administrative contingency, the unborn widow, and the age-contingency-in-excess-of-21 categories is rather insignificant.[280]

There is, however, a method for reaching beyond specific statutory repair by sanctioning judicial reformation: cy pres. The opportunity for cy pres exists when an interest is not saved by some repair statute. This may occur in two situations. First, a specific repair statute may be foregone because cy pres will better effectuate intention. Arguably, cy pres is a better solution when interests are invalid because trusts extend beyond 21 years,[281] and when vesting depends on the failure of a person to attain an age in excess of 21 years.[282]

More importantly, cy pres is appropriate as a backstop to specific repair statutes. Inevitably there will be a case which cannot be repaired. Consider the following:

> Bequest by *T* in trust to *A* for life, remainder to *A*'s children for life (*T*'s grandchildren), remainder to *A*'s grandchildren (*T*'s great-grandchildren). *T* is survived by child *A*, who is 2 years old.

After applying the rules of construction, the remainder to *T*'s great-grandchildren is still void under the common law Rule.[283]

In response, it may be suggested that the above disposition is not a "technical violation," but an unreasonable attempt to extend dead hand

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278. *Id.*

279. Professor Waggoner suggested that certain cases involved non-technical violations, but he did not identify these cases. *Id.* at 1784 n.162.

280. L. WAGGONER, NUTSHELL, *supra* note 6, at 298 (emphasis in original).

281. For example, in Berry v. Union Nat'l Bank, 262 S.E. 2d 766 (W. Va. 1980), a trust was to last for 25 years. Although the court, applying its cy pres powers, reduced the duration to 21 years, a more creative solution could be found. *See* Priv. Ltr. Rul. 8104213 (Oct. 31, 1980) (trust termination in 32 years with saving clause).

282. *See supra* note 272. *See generally* Browder, *Construction*, *supra* note 245.

283. This example differs from the one in the text accompanying note 274 *supra* in one critical respect: *A* has no children. As a result, the remainder to *A*'s grandchildren cannot be validated by Rule 5. *See supra* note 261 (suggesting other cases for reformation).

control to two unborn generations.[284] Hence, invalidation is appropriate, and the remainder should pass to the residuary or intestate takers.

The problem with invalidation is inevitable case-by-case litigation under the infectious invalidity doctrine.[285] The Restatement of Property suggests that a court ask the following question:

> If the [testator or settlor] should now examine his proposed plan of disposition with the parts excised therefrom which have been found to offend the rule against perpetuities, would he decide that his original scheme of disposition would be more closely approximated by invalidating all . . . or part . . . of the balance, or by allowing the balance to take effect in accordance with its terms . . . ?[286]

Although otherwise valid interests will likely be sustained,[287] the legal process—including generation of legal fees—would be involved. If a court must attempt to ascertain intent in cases of invalidity, would it not be preferable to have the court ascertain intent for a constructive purpose?[288] Consider the words of Professor Leach:

> All that is needed is to adopt the cy pres principle . . . . [T]he infectious invalidity rule is simply a *cy pres doctrine based upon an assumption of invalidity of the gift*—the court considers which arrangement would "more closely approximate" the testator's wishes . . . . Just turn this idea around and perform the same process on the assumption of *validity* of the gift within the limits of the Rule—and the job is done; since there is no invalidity at all, but only reformation, there is no infectious invalidity problem.[289]

In fact, Professor Leach approved of the statutory repair method if combined with immediate cy pres: "'Of course, it would also be possible to have the specific provisions, and, in addition, a blanket statute to take care of cases not within any of the particular provisions.' [*I agree one hundred per cent . . . .*]"[290]

The objections to cy pres—including objections by wait-and-see opponents—are based on the necessity for litigation and the potential for rewriting wills.[291] Professor Leach stated in defense:

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284. *See* L. WAGGONER, NUTSHELL, *supra* note 6, at 298.

285. *See supra* text accompanying note 239.

286. RESTATEMENT OF PROPERTY § 402 comment a (1944).

287. *See, e.g.*, Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979). *But see* Connecticut Bank & Trust Co. v. Brody, 174 Conn. 616, 392 A.2d 445 (1978).

288. *See* Browder, *Construction*, *supra* note 245, at 19–20.

289. Leach, *Hail Pennsylvania*, *supra* note 19, at 1149 (emphasis in original).

290. *Id.* at 1150 (emphasis in original). The quoted sentence was written by Professor Simes; the parenthetical statement was Professor Leach's comment thereto. Professor Browder urged the same solution. Browder, *Construction*, *supra* note 245, at 15.

291. *See, e.g.*, Powell Memorandum, *supra* note 10, at 138; L. SIMES, PUBLIC POLICY, *supra* note 13, at 78–79. Professor Simes preferred enactment of specific statutes to deal with any new situations. *Id.*

> The big incentive to perpetuities litigation, and to the threat of litigation that forces serious concession by way of compromise, is its all-or-nothing character. If the contestant wins, the proponent gets nothing. But when the issue is limited to the question of what reformation within the limits of the Rule will most closely approximate the testator's intent, the spectrum of possible choices is very narrow, hardly worth litigating.[292]

Professor Leach's instincts have proven to be correct. From the four states which legislatively prescribe immediate cy pres reformation,[293] only two California cases have been reported. Both involved a violation based on attaining an age in excess of 21.[294] In effect, there would have been no cy pres cases from California—our most populous state—if, in 1963, California had also adopted an age reduction construction rule. Similarly, there have been no reported cy pres cases from the five states after initial judicial adoption of the cy pres doctrine.[295]

Another feature could be added to the cy pres statute, specifically the allowance of extrinsic evidence to ascertain the transferor's intent.[296] This measure would ensure better effectuation of the transferor's intent and in the process, would overcome any concern that a judge may arbitrarily and unwittingly rewrite a will. Finally, settlement would be further encouraged.

C. Note on Powers

This article has not specifically focused on powers of appointment. Because powers are subject to the common law Rule,[297] invalidity can be avoided under the suggested scheme for refinement.[298]

Professor Maudsley also objected to an immediate cy pres approach. *1979 ALI Proceedings*, *supra* note 4, at 464 (remarks of Professor Maudsley).

292. Leach, *Hail Pennsylvania*, *supra* note 19, at 1150.

293. California (CAL. CIV. CODE § 715.5 (Deering 1971)); Missouri (MO. REV. STAT. § 442.555 (1965 Supp.)); Oklahoma (OKLA. STAT. ANN. tit. 60, § 75.76 (West 1971 & Supp. 1985)); Texas (TEX. PROP. CODE ANN. § 5.043 (Vernon 1984)). Although these statutory provisions prescribe reformation whenever possible, the proposal contemplates reform in all situations.

294. Estate of Grove, 70 Cal. App. 3d 355, 138 Cal. Rptr. 684 (1977); *In re* Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

295. Berry v. Union Nat'l Bank, 164 W. Va. 258, 262 S.E.2d 766 (1980); *In re* Estate of Chun Quan Yee Hop, 52 Haw. 40, 469 P.2d 183 (1970); *In re* Foster's Estate, 190 Kan. 498, 376 P.2d 784 (1962); Carter v. Berry, 243 Miss. 321, 140 So. 2d 843 (1962); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891).

296. Extrinsic evidence is admissible in charitable cases involving the cy pres doctrine. *See* G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 437, 442 (rev. 2d ed. 1977). Extrinsic evidence, including testimony from the drafting attorney, has been admitted in infectious invalidity cases. *See In re* Estate of Anziano, 39 A.D.2d 771, 332 N.Y.S.2d 651 (1972), *aff'd*, 32 N.Y.2d 875, 299 N.E.2d 897, 346 N.Y.S.2d 532 (1973).

297. Special rules in relation to powers may apply under the common law Rule. *See* L. SIMES & A. SMITH, *supra* note 17, §§ 1271–1278. *See generally* Berger, *The Rule Against Perpetuities as it Relates to Powers of Appointment*, 41 NEB. L. REV. 583 (1962).

298. New York case law suggests that violations will be repaired when powers are exercised invalidly

V. CONCLUSION

In response to Professor Leach's basic question: "Why should we not 'wait-and-see' . . . ?",[299] we should not "wait-and-see" for the innumerable reasons detailed in this article. The most compelling reason is that the common law Rule has not caused any real problems.[300] Accordingly, we should not "use . . . an atomic cannon to kill a gnat."[301]

Many of the other arguments for rejecting the wait-and-see cannon confirm Professor Powell's suspicions: "The inconveniences, unavoidably generated by the proposal, as to the costliness of litigation, and as to the controversies concerning contingent rights passing from generation to generation have been neither recognized nor adequately considered."[302] Professor Berger's criticism of the Restatement's approach properly extends to all wait-and-see methods: "I am afraid that if we adopt the [Restatement] package . . . wait and see, and remote *cy pres*, we are creating a minefield for future generations."[303]

A case does exist, however, for refining the common law Rule. By refinement, any harsh results under the Rule, as well as unnecessary litigation, can be eliminated. In addition to a statute encouraging settlements, the refinement technique relies upon specific repair statutes.[304]

Detractors claim specific statutes cannot repair all conceivable situations.[305] They also suggest the difficulty in convincing legislatures to act when a new situation arises.[306] The response is that no new traps have been

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under the common law Rule. *See In re* Martin's Will, 58 Misc. 2d 740, 296 N.Y.S.2d 498 (1968) (applying New York's age reduction statute because exercise violated New York's suspension (but also common law) Rule)). Because New York does not have a cy pres provision, some invalid dispositions on exercising powers will not be saved. *See In re* Harden, N.Y.L.J., Sept. 17, 1985, at 13, col. 6 (N.Y. Co. Surr.) (also applying infectious invalidity doctrine).

299. *See supra* text accompanying note 3.

300. Professor Mechem once asked: "Is the common-law rule really working so badly?" Mechem, *Further Thoughts*, *supra* note 8, at 966. The answer is, "definitely not." *See also* Volkmer, *The Law of Future Interests in Nebraska (Part II)*, 18 CREIGHTON L. REV. 601, 649–50 (1985).

301. Dukeminier, *Perpetuities Revision*, *supra* note 12.

302. Powell Memorandum, *supra* note 10, at 128–29.

303. *1979 ALI Proceedings*, *supra* note 4, at 456 (remarks of Professor Berger). Many of Dean Rohan's reservations over the Restatement (Second) version apply to the general wait-and-see approach. See 5A R. POWELL, *supra* note 8, ¶ 827F[3].

304. Even Professor Waggoner acknowledges the virtues of repair statutes:

> In achieving the objective of perpetuity . . . [refinement], the specific statutory repair method holds the disturbance of settled law and know-how to a minimum, operates predictably, and does not interfere with the ability of a litigant to obtain at any time a final judgment that an interest is either valid or invalid. In contrast, the wait and see concept constitutes a fundamental modificaiton of the common law Rule Against Perpetuities.

L. WAGGONER, NUTSHELL, *supra* note 6, at 300.

305. *See, e.g.*, *1978 ALI Proceedings*, *supra* note 4, at 286–87 (remarks of Dean William Schwartz).

306. *See, e.g.*, Leach, *Legislatures*, *supra* note 191, at 358–59.

discovered recently.[307] Assuming, *arguendo*, the validity of the detractors' stance, the unrepaired trap will be repaired (absent settlement) under the court's cy pres power.[308] Unlike deferred cy pres under the wait-and-see approach,[309] cy pres reformation will be relied upon only as a last resort.[310]

In the final analysis, the combination of perpetuities refinement by settlement, specific repair, and cy pres statutes is far preferable to any wait-and-see method.[311] Even if there were more statutes by the former approach, it can be safely predicted that the "swell of the law" caused by the added legislation will be less than the swell resulting from litigation under the wait-and-see approach.[312]

The wait-and-see approach has not been characterized as a "reform" measure in this article. The concept of "reform" does not encompass such elements as: solving a nonexistent problem, encouraging dead hand control, engrafting complexity, fostering litigation, and burdening future generations with problems which can be immediately resolved. In truth, wait-and-see appears to be a misguided attempt to embellish upon the common law Rule. States should seriously consider repealing their wait-and-see legislation.

The true spirit of perpetuities reform involves changing the common law Rule itself.[313] Various reforms have been suggested.[314] For example, the feudal concept of vesting could be discarded; this would effectively require possession within the perpetuities period.[315] But because the common law

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307. This statement excludes traps under commercial transactions. Consider Professor Maudsley's view: "New problems may well arise; but if we find a solution to all those which have appeared since 1680, that should, from a practical point of view, be acceptable." R. MAUDSLEY, THE MODERN LAW, *supra* note 41, at 81.

308. Indeed, Professor Waggoner has extolled the cy pres (reformation) method: "In fact, however, the reformation method does not alter the Rule at all. *It leaves the Rule intact and changes the disposition to conform to the Rule.*" *Langbein & Waggoner*, *supra* note 33, at 548 (emphasis in original).

309. *See supra* text accompanying notes 135–48.

310. *See supra* text accompanying notes 277–96.

311. Professor Fletcher, a wait-and-see opponent, recommended another method of perpetuities refinement. Fletcher, *A Rule of Discrete Invalidity: Perpetuities Reform Without Waiting*, 20 STAN. L. REV. 459 (1968).

312. Professor Leach criticized the "penny-packet statutory method" because it results in "swelling the mass of law." Leach & Morris, *Book Review*, 54 MICH. L. REV. 580, 581 (1956) (reviewing L. SIMES, PUBLIC POLICY, *supra* note 13).

313. Although some would consider abrogation of the rule to be reform, most believe some rule against perpetuities is desirable. *See supra* note 13 and accompanying text. *See* Glenn, *Perpetuities to Purefoy: Reform by Abolition in Manitoba*, 62 CAN. B. REV. 618 (1984) (criticizing Manitoba's repeal of the common law Rule).

314. *See, e.g.*, Deech, *Lives in Being Revived*, 97 LAW. Q. REV. 593 (1981) (advocating fixed term of years in lieu of lives in being). Another reform could limit saving clauses to a period of years, e.g., 50 to 60 years.

315. This proposal was first made by Professor Simes. L. SIMES, PUBLIC POLICY, *supra* note 13, at

Rule has caused no serious problems, major changes are not appropriate. As Professor Simes cautioned: "In the United States there is a long history of attempts to substitute another type of rule for the Rule against Perpetuities. And if anything can be deduced from that history, it is this. All attempts to substitute a new rule have proved to be unsatisfactory."[316]

Minor reforms may be appropriate. For example, Professor Dukeminier justifiably urges changes in the so-called "commercial transactions" area.[317] Such reformation is supported by the litigation brought during the eight-year period, 1978–1985. Of the approximately 100 reported cases, with a 25% invalidation rate, most involved commercial leases, options, and preemptive rights.[318] At the same time, commercial-type transactions can be created by a trust or will disposition.[319] Although all such violations can be avoided by a saving clause, shorter time periods are desirable.[320] Lawyers and law students certainly should be cautioned about the dangers of perpetuities violations in commercial transactions[321] because the number of commercial violations greatly exceeds the number of violations in the donative transfer area.

An additional reform might be considered. Specifically, an attorney could be subject to malpractice liability for drafting an instrument which contains a perpetuities violation without a saving clause. Although malpractice liability is not the ultimate answer,[322] its threat may encourage

80–82. It was later embraced by Professor Schuyler. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?* 56 MICH. L. REV. 683 (1958). Illinois substantially adopted the Schuyler proposal in 1969. *See* Schuyler, *The Statute Concerning Perpetuities*, 65 NW. U. L. REV. 3 (1970) (discussing Illinois legislation).

316. L. SIMES, PUBLIC POLICY, *supra* note 13, at 72. Although the Illinois statute has been criticized, *Further Trends in Perpetuities*, 5 REAL PROP., PROB. & TR. J. 333, 342–45 (1970), there have been no reported cases under the system.

317. *See* Dukeminier, *The Measuring Lives*, *supra* note 9, at 1706–08. By limiting the Restatement (Second) to donative transfers, Professor Casner intentionally barred consideration of the Rule in relation to commercial transactions. *1978 ALI Proceedings*, *supra* note 4, at 225. Professor Powell criticized this decision. Powell Memorandum, *supra* note 10, at 127. As adopted, the USRAP also excludes commercial (nondonative) transfers from its Statutory Rule Against Perpetuities. USRAP § 4(1)(1986).

318. *See, e.g.*, Siniard v. Davis, 678 P.2d 1197 (Okla. 1984) (invalidating a commercial lease); Buffalo Seminary v. McCarthy, 58 N.Y.2d 867, 447 N.E.2d 76, 460 N.Y.S.2d 528 (1983) (invalidating an option); Perry v. Brundage, 200 Colo. 229, 614 P.2d 362 (1980) (invalidating a preemptive rights agreement).

319. *See* Kaufman v. Zimmer, 287 N.W.2d 884 (Iowa 1979).

320. USRAP drafts recommended 40-year duration rules for commercial transactions. *See, e.g.*, DRAFT USRAP (Spring, 1986), *supra* note 1, at 77–86. These rules were deleted from the final draft. UNIF. STATUTORY R. AGAINST PERPETUITIES (Discussion Draft July 31, 1986).

321. The drafter first should ascertain whether the commercial transaction is subject to the Rule. For example, the New York Court of Appeals recently held that preemptive rights (rights of first refusal) in commercial and governmental transactions are not subject to the Rule. Metropolitan Transit Auth. v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 501 N.Y.S.2d 306 (1986).

322. *See* Langbein & Waggoner, *supra* note 33, at 588–90.

universal use of saving clauses.[323] In the process, transferors will determine the beneficiaries on trust termination, instead of courts making that decision under a wait-and-see system.

In the end, wait-and-see must be rejected. It imposes unnecessary and unacceptable burdens for lives not yet in being. It is one thing to write a law review article arguing about wait-and-see.[324] It is quite another to burden society with it.

323. *See supra* note 196.

324. Professor Waggoner remarked that it was "one thing to write a law review article" on the causal-lives method, but another to "apply [it] in actual practice." *See* Waggoner, *Perspective*, *supra* note 9, at 1724.

APPENDIX

SUGGESTED STATUTES TO REFINE THE COMMON LAW RULE AGAINST PERPETUITIES

SECTION 1: SAVING CLAUSE RECOGNITION.

If a provision in an instrument terminates a nonvested property interest that has not vested 21 years after the death of the survivor of a group of individuals identified by name or by reference to an identifiable class and alive when the period of the common law Rule Against Perpetuities began to run, that interest is valid. If determining the death of the survivor would be impracticable, the validity of the property interest must be determined as if that provision did not exist.

SECTION 2: SETTLEMENT AUTHORITY

A court may approve a good faith compromise of a perpetuities matter if it is just and reasonable to all parties, including unborn and unascertained persons. For this purpose, a guardian shall be appointed to represent unborn and unascertained persons.

SECTION 3: RULES OF CONSTRUCTION

(a) Unless a contrary intention appears, the rules of construction in this section apply if an interest would be void under the common law Rule Against Perpetuities.

(b) The rules of construction apply in the order set forth in the following paragraphs. A rule shall be applied only if necessary to validate an interest under the common law Rule Against Perpetuities.

(1) *Administrative Contingencies*

Where the duration of vesting of an interest is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax or the occurrence of any specified contingency, the instrument shall be construed to require such contingency to occur, if at all, within 21 years from the effective date of the instrument creating such interest.

(2) *Unrealistic Birth Possibilities; Possibility of Adoption Disregarded*

(A) Where the validity of a disposition depends upon the ability of a person to have a child at some future time, it shall be presumed, subject to subpararaph (B), that a male can have a child at 14 years of age or over, but

not under that age, and that a female can have a child at 12 years of age or over, but not under that age or over the age of 55 years.

(B) In the case of a living person, evidence may be given to establish whether he or she is able to have a child at the time in question.

(C) Where the validity of a disposition depends upon the ability of a person to have a child at some future time, the possibility that such person may have a child by adoption shall be disregarded.

(3) *Unborn Person Possibility*

Where an interest would be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the interest, and such person is referred to in the instrument creating such interest as the spouse, widow, or widower of another person, it shall be conclusively presumed that such reference is to a person in being on the effective date of the instrument.

(4) *Reduction of Age to 21 for Vesting Purposes; Deferred Possession Allowed*

(A) If an interest would be invalid under the common law Rule Against Perpetuities because made to depend for its vesting upon any person attaining an age in excess of 21 years, the age contingency shall be reduced to 21 years for vesting purposes only.

(B) Notwithstanding subparagraph (A), possession of the interest shall be postponed to the age specified in the instrument or to age 50, whichever occurs sooner.

(C) Notwithstanding subparagraph (A), the person or persons entitled to the property or enjoyment thereof, from ages 21 and until the age prescribed in the instrument, shall continue such entitlement.

(5) *Class Gift Construction*

If an interest would be invalid under the common law Rule Against Perpetuities by including afterborn persons within a class, afterborns shall be excluded from the class to the extent necessary to avoid a violation under the common law Rule Against Perpetuities.

SECTION 4: CY PRES AUTHORITY

If, after application of the foregoing statutes, an interest would be invalid under the common law Rule, a court shall reform the interest within the limits of the Rule by approximating the transferor's intention as nearly as possible. For this purpose, extrinsic evidence shall be admissible.

EXHIBITS 2-4

NOTE: In order to save costs, the articles comprising Exhibits 2-4 have not been reproduced for general distribution. These articles are readily available in law libraries and have previously been distributed. Their citations are:

Exhibit 2

Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo,* 34 UCLA L. Rev. 1023 (1987). [This article was originally distributed with Memorandum 89-53 in May 1989.]

Exhibit 3

Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period,* 73 Cornell L. Rev. 157 (1988). [This article was originally distributed with Memorandum 89-53 in May 1989.]

Exhibit 4

Bloom, *Perpetuities Refinement: There Is an Alternative,* 62 Wash. L. Rev. 23 (1987). [This article was originally distributed with the First Supplement to Memorandum 89-53 in June 1989.]

USRAP Pamphlet

The 40-page pamphlet containing the Prefatory Note, official text of USRAP, and comments published by the Uniform Law Commissioners is also not included with this memorandum. A copy was originally distributed with Memorandum 89-53 in May 1989. We still have a few copies of these pamphlets which will be sent on request until the supply is exhausted.

The pamphlet may also be obtained from the National Conference of Commissioners on Uniform State Laws, 645 North Michigan Avenue, Suite 510, Chicago, IL 60611. Telephone (312) 321-9710.

Cornell University
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853-4901

August 3, 1988

Re: Uniform Statutory Rule Against Perpetuities

To Whom It May Concern:

I am writing to express my support of the Uniform Statutory Rule Against Perpetuities and to correct some misapprehensions about it.

In a recent article in the UCLA Law Review Professor Jesse Dukeminier, an outspoken opponent of the Uniform Rule, states that the 90-year period allowed in the Uniform Rule is a proxy for the discredited device of using the lives of "12 healthy babies" by which to extend the time during which the validity of interests subject to the Rule would remain undetermined. And he argues that the effect of the 90-year period is to extend control of the dead hand substantially beyond that allowed under the common-law version of the Rule Against Perpetuities and by most perpetuity savings clauses.

Professor Dukeminier is simply wrong on both counts. The Uniform Rule's 90-year period is not based on the 12 healthy babies gimmick; there is absolutely no basis for the suggestion that it is. Rather it is based on the average period utilized in common perpetuities savings clauses. And the 90-year period, far from extending dead hand control, merely codifies the waiting period that is provided in perpetuities savings clauses and under the common law. It has always been thought that the common-law perpetuity period of "lives in being plus 21 years" permits dead hand control for about a hundred years. Professor Dukeminier's claim that the Uniform Rule alters the law's compromise between the interests of deceased donors and living donees is quite without foundation. What the Rule really does is to extend the benefit gained by a well-drafted perpetuity savings clause to individuals who cannot afford counsel who are sophisticated in estates and trusts law. In this sense the Uniform Rule strongly serves the public interest.

Professor Dukeminier's views about the policy and effect of the Uniform Rule are idiosyncratic. I do not know of any other scholar in the field of estates and trusts who shares his views. The very substantial weight of opinion by these specialists supports the Uniform Rule. I urge to you to support the Rule.

If I can be of any further assistance, please do not hesitate to call upon me.

Sincerely,

Gregory S. Alexander
Professor of Law

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
Hutchins Hall
Ann Arbor, Michigan 48109

OLIN L. BROWDER
James V. Campbell Professor of Law Emeritus

June 16, 1988

Statement in Support of the
Uniform Statutory Rule Against Perpetuities

This statement in support of the Uniform Statutory Rule Against Perpetuities derives from a lifetime of teaching in that field and also from my special interest as exhibited by my having served as Chairman of the ABA Committee on Rules Against Perpetuities.

When in efforts to reform the common-law Rule against Perpetuities the so-called wait-and-see doctrine was proposed, much difficulty and controversy arose over determining the "measuring lives" to govern the perpetuity period. This always was and still is a perplexing problem for students and practicing lawyers in drafting within the proper limits of the common-law Rule. It was evident under the wait-and-see doctrine that determining measuring lives became a special difficulty exceeding that in dealing with the common-law Rule. When with seeming suddenness the Committee announced that perpetuity doctrine could be framed without any reference at all to measuring lives -- that is, by reference to a 90-year period in gross, the reaction in some quarters was one of disbelief. One certainly cannot dismiss the measuring-lives problem in that fashion under the common-law Rule. But the genius of the Committee's solution lies in its consummate simplicity which, as the Committee has demonstrated, actually works in practice. The ingenuity of it lies in the recognition that the peculiarities of the wait-and-see doctrine carried the seed for the peculiarly apt and simple solution. Yet there may be those who having devoted a lifetime digging through all those old complexities and teaching the way through to others, would recoil in shock that all that effort had now become irrelevant. It is painful sometimes to yield up the old chestnuts. But it must be done, for it really works.

Olin L. Browder

Olin L. Browder

THE UNIVERSITY OF GEORGIA

SCHOOL OF LAW

TO WHOM IT MAY CONCERN:

Re: Uniform Statutory Rule Against Perpetuities

This letter is written in support of the Uniform Statutory Rule Against Perpetuities (hereinafter called the Uniform Act). The Uniform Act provides that an interest is valid if it satisfies the common law Rule Against Perpetuities, or if the interest either vests or terminates within 90 years after its creation. This waiting period would prevent a court from invalidating an interest for 90 years after the testator's death. If the interest either vests or terminates within that period, it would be valid. In the unlikely event that the interest still remained contingent at the end of that time and had not satisfied the com-mon law Rule Against Perpetuities, the gift would be judicially reformed in the manner designed most closely to carry out the testator's intent.

The 90-year period is really an added margin of safety for the draftsman and for his or her client. Since all future interests would be valid for 90 years, no will or trust disposing of the client's property could be struck down for remoteness of vesting during the attorney's lifetime. This would reduce litigation, save money for the testator's family, and virtually eliminate the lawyer's potential liability for drafting a disposition that violates the common law Rule.

I do not believe that the Uniform Act would change the drafting practices of attorneys who now draw wills and trusts. The full 90-year period would be needed in few, if any, cases because virtually all interests created would terminate or vest much earlier than the allowable waiting period. Most clients are not interested in projecting dead hand control to its outermost limits, and I believe that the desires of clients would still continue to be met within the orthodox Rule. But the margin of safety would be there just in case it might conceivably be needed.

Many draftsmen routinely insert a perpetuity saving clause into the will or trust directing that any contingency must end no later than 21 years after the death of the last survivor of a group of lives in being, and requiring distribution to a designated group of takers at the end of the perpetuity period. The 90-year waiting period would operate similar to the usual perpetuity saving clause.

In my judgment, the adoption of the Uniform Act would benefit the client seeking estate planning services. A large

Athens, Georgia 30602

number of our perpetuities cases involve perfectly innocent dispositions where the peculiarities and traps of the Rule either cause gifts to fail or produce wasteful litigation. As Professor

Leach so well put it in his famous Nutshell article, "Wills fail because of inept work of lawyers, not because of excessive demands of testators." Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 669 (1938). The 90-year period would give to every client the benefit of having selected a skilled draftsman even when he or she has chosen a lawyer who is not a perpetuities expert. The Uniform Act would take most of the sting out of the Rule Against Perpetuities. It has my whole-hearted support.

Thank you for allowing me to express my views in support of the Uniform Act.

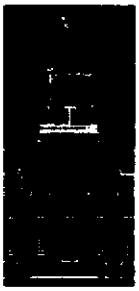
Sincerely,

Verner F. Chaffin
Callaway Professor of Law

VFC:rjc

The University of Iowa
Iowa City, Iowa 52242

College of Law



1847

June 22, 1988

To whom it may concern:

I am writing in support of enactment of the Uniform Statutory Rule Against Perpetuities. Commentators and practitioners have long agreed that the common law rule is unacceptable because it operates harshly to invalidate interests on the possibility that unlikely events may occur, and because only those testators who are unadvised or badly advised suffer its harsh effects. The issue is not whether the common law rule needs reform, but what type of reform the legislature should enact.

The Uniform Rule offers a reasonable, workable, and simple solution. The 90-year waiting period avoids the difficulties of identifying a class of actual measuring lives encountered by the Restatement's formulation of the wait-and-see reform or other proposals looking for lives causally related to vesting. Moreover, it avoids these complexities while achieving the important policy goal of extending the benefits of expert estate planning to all testators.

I appreciate that some, most notably, Professor Dukeminier, who has written extensively in this area and who I greatly respect, disagree with the last proposition. Professor Dukeminier has written that the 90-year waiting period falls far short of an expertly drawn savings clause tailored for a particular disposition. He would prefer legislatures modify the common law rule by authorizing courts to reform the instrument immediately to further the transferor's intent within the constraints of the perpetuities period. This cy pres proposal gives all testators the advantage of a tailor-made savings clause and beneficiaries certainty of the nature of the testator's disposition, but it does so only at the cost to the parties of a lawsuit for every doubtful instrument. I do not believe the benefits of cy pres warrant its costs, and prefer the Uniform Rule's approach.

I come to this conclusion because I believe the claimed advantages of cy pres are illusory. All savings clauses are inherently arbitrary and the 90-year waiting period is no worse than any other savings clause. Focusing on the arbitrary termination time misses the purpose of savings clauses and the 90-year waiting period. Their function is to identify a reasonable amount of time for all contingent interests created by the instrument to vest or fail to vest. Both serve this function equally well.

The benefits of predictability also are overstated. Even after cy pres, the beneficiaries' interests nevertheless remain contingent on the occurrence or nonoccurrence of events during the designated period. Neither cy pres nor the 90-year waiting period produce greater certainty of property ownership during the perpetuities period.

The Uniform Rule neither increases the likelihood of arbitrary termination nor uncertainty of property titles. Instead, it provides an elegantly simple reform to the complex law of perpetuities, and I urge you to consider its adoption.

Cordially,

Mary Louise Fellows
Professor of Law

MLF/ls

UNIVERSITY OF CALIFORNIA, BERKELEY

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO

SANTA BARBARA • SANTA CRUZ

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TELEPHONE (415) 642- 1829

Statement in Support of the Uniform Statutory Rule Against Perpetuities Act

I write this statement to add my voice to those of many practitioners and academicians who support the Uniform Statutory Rule Against Perpetuities Act (USRAPA) and who do not share the objections raised to it by Professor Jesse Dukeminier, even though he is a knowledgeable scholar who has made significant contributions to understanding and reforming the rule against perpetuities.

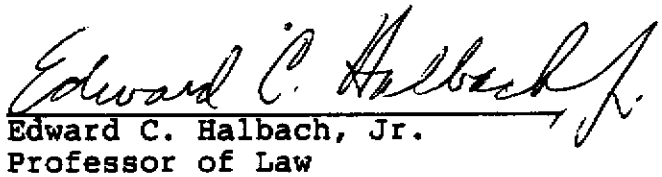
There is potential merit both in the approach advocated by Professor Dukeminier and in the USRAPA approach, but each requires careful working out in detail. This work has been done in USRAPA. Most observers agree that the details have not been sufficiently worked out in the other approach, which was tried and eventually rejected in the American Law Institute's Restatement of Property Second (ALI) project, for which I serve as an adviser; that part of the ALI project ended up with a most unfortunate variation with which almost no one is now pleased. A legislative solution offers greater freedom in solving the perpetuities problems than does a mere re-writing of common law (the normal ALI goal). The result of the liberated approach in USRAPA is very promising in terms of public policy concerns and in terms of simplicity and fairplay for transferors and their beneficiaries.

I personally believe that a return to the approach Professor Dukeminier advocates would be preferable to the ALI rule, but I believe that approach would require major additional work beyond what has been done in its few existing legislative models. Furthermore, the added details and even the end result will inevitably be controversial, especially among those less generally sympathetic to that approach than I. By contrast, USRAPA has not generated widespread controversy, but offers what has become broadly accepted as a good, workable solution to a problem that has plagued us for decades. Incidentally, this is a problem that could well become more serious in the immediate future because of tax incentives encouraging the use of long-term trusts, especially the new $1 million exemption under Chapter 13 of the Internal Revenue Code of 1986.

As a member of the Joint Editorial Board for the Uniform Probate Code when the question of perpetuities reform came up earlier in that body, I initially preferred to see efforts made along the same approach that Professor Dukeminier favors. I have become a convert, however, now that I see the results of the finished USRAPA project while continuing to feel that the necessary work on the other approach has not been done. (On the problems with the other approach, I generally agree with Professor Lawrence Waggoner, USRAPA's Reporter, who has in the last few years debated these matters with Professor Dukeminier at length in the law reviews.)

Finally, I believe also that uniformity is important in perpetuities matters. Many estates from which trusts are funded, plus the effects of powers of appointment, involve multi-state sources or contacts. Without uniformity many and serious conflict of laws problems will result. It may be some years before all or nearly all of the states will act on a modern reform, but when the job is done we should not indefinitely have to cope (in planning, in administration and in court) with two basically inconsistent types of solutions.

The need for perpetuities reform is quite generally recognized, as is the desirability of uniformity. Under the present circumstances it seems equally apparent -- even to an initial doubter like myself -- that the best solution is USRAPA. I am pleased therefore to join in recommending this statute for consideration by the law improvement commissions and legislatures of the various American jurisdictions.



Edward C. Halbach, Jr.
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Tuscaloosa, Alabama 35487-1435

Office of the Dean

June
1988

TO WHOM IT MAY CONCERN:

FROM: Thomas L. Jones
Vice Dean and Alumni (Class of '36) Professor of Law
Alabama Commissioner on Uniform State Laws

RE: The Uniform Statutory Rule Against Perpetuities

The purpose of this memorandum is to make a general statement concerning, but also to give my strong support for, **The Uniform Statutory Rule Against Perpetuities.**

As all attorneys, and many laypersons, know, the common-law Rule Against Perpetuities can lead to some very harsh results particularly where there has been inadequate planning. Except for reverence for a rule of very long standing, there remains little to recommend a strict application of the Rule. For many years, lawyers and judges alike have sought ways to alleviate the uncertainty of its application and relief from undesired and unintended results of its application. Probably one of the more notable efforts to provide relief from the common-law RAP has been the attempts to promote a "wait-and-see" doctrine. The "wait-and-see" doctrine has been promoted extensively by Professors Leach and Casner of the Harvard Law School and strongly supported by Professor Jesse Dukeminier, presently of the UCLA Law School. These attempts to promote the "wait-and-see" rule have been through suggested statutes, recommendations for judicial adoption without prior statutory adoptions, and recommendations for revision of the "black-letter" statements in the Restatement of Property. The "wait-and-see" doctrine promoted in these efforts has continued to measure the period for application based on a life or lives in being at the time the interest was created. The "wait-and-see" doctrine based on this modification, while recognizing a need for revision, has been adopted, either by statute or judicial decisions, in a relatively small number of jurisdictions. Professor Jesse Dukeminier today probably is the strongest advocate (recognizing that Professor Casner, though retired, would strongly disagree

with this rating) of the "wait-and-see" doctrine so modified, as an alternative to the strict application of the common-law RAP.

The National Conference of Commissioners on Uniform State Laws [NCCUSL] has been requested on several occasions to review the Rule Against Perpetuities and to suggest legislation that will provide more certainty to the Rule in order to carry out more nearly the probable intent of the transferor property owner. In 1986, the NCCUSL promulgated the Uniform Statutory Rule Against Perpetuities. The NCCUSL is an organization of 250+ attorneys representing every state plus the District of Columbia and Puerto Rico. Professor Lawrence Waggoner, of The University of Michigan Law School, served as the Reporter for the suggested statute. He worked with a drafting committee of practicing attorneys and law teachers, who are experts in property law. The various drafts of the proposed statute were reviewed on a line-by-line basis by all of the Commissioners at least twice over a two-year period. The proposed statute was reviewed further through the American Bar Association by a much broader number of attorneys from all parts of the country and from all types of law practices. It also was reviewed by other interested groups, such as judges, real estate groups and trust officers. Every attempt was made to have the proposed statute revising the common-law RAP reviewed for recommendations by as broad a base of interested persons as possible.

The Uniform Statutory Rule Against Perpetuities also adopts a "wait-and-see" approach, but it achieves more certainty by using as the outside limit a time period not necessarily related to a specific life or lives in being.

It was (and is) the considered judgment and consensus of all of these various interest groups that **The Uniform Statutory Rule Against Perpetuities is the most viable alternative to the common-law Rule Against Perpetuities,** which essentially is still the majority rule in the United States. The Uniform Statutory Rule Against Perpetuities has received broad acceptance in concept by attorneys who draft and construe these wills, trusts and conveyances, by judges who must construe these legal documents, and by fiduciaries who often have to construe these instruments in fulfilling their administrative duties.

Professor Dukeminier continues to support and advocate a different alternative. Professor Dukeminier has devoted an enormous amount of time over several years, perhaps more than three decades, to analyzing the Rule Against Perpetuities and seeking solutions to the problems presented by the Rule in its common-law form. While I have a very high regard for Professor Dukeminier, both professionally and as a friend, this is an issue on which reasonable persons can differ. I too have taught property law for two decades. In my judgment, Professor Dukeminier simply does not offer the better solution to the problems. The Uniform Statutory Rule Against Perpetuities certainly appears to a broad base of interested persons and to me to be the superior proposal, for providing the desired relief, of the alternatives that have been suggested. **I strongly recommend The Uniform Statutory Rule Against Perpetuities to you as a viable solution to an old, old problem in the law.**

This statement is general, but if I can be of help in making more specific comments concerning the details of the recommended statute or in answering specific inquiries, please do not hesitate to contact me. My telephone number is No. [205] 348-5750. For more detailed analyses of The Uniform Statutory Rule Against Perpetuities I also recommend Professor Waggoner's law journal discussions of the recommended statute.

The recommended statute is worthy of your consideration and review. If you do that, I am confident that you will support its adoption and enactment.

* * * * *

TLJ/jw

SHELDON F. KURTZ

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June 28, 1988

To Whom It May Concern:

I am writing this letter to support the adoption of the Uniform Statutory Rule Against Perpetuities. I do so with mixed emotions for I have only the greatest respect, admiration and affection for Professor Jesse Dukeminier who is the principal opponent of this legislation.

Professor Dukeminier is a forceful advocate for perpetuity reform although he advocates a different route- wait-and-see. I have also supported perpetuity statutory reform through wait-and-see along the lines of the ALI's Restatement approach and authored the Iowa Perpetuity Act. Nonetheless I feel that the best hope for much needed national reform lies in neither Professor Dukeminier's nor the ALI's work but in the final product of the Commissioners on Uniform State Law.

The modern movement towards perpetuity reform begins in the late 40's and early 50's but has been one sad tale after another. Most scholars, if not all scholars, agree the common law rule is unduly harsh, unforgiving and in need of reform. Most scholars agree that any one of the reforms, "wait-and-see," cy pres (reformation) or a fixed maximum perpetuity period is preferable to the common law Rule against Perpetuities. Thus it seems to be true that some reform is better than no reform.

But scholars and ultimately the other members of the legal profession disagree on which reform is the best reform. And, in my judgment the debate and quarrels have lasted too long. Thus, I support the Uniform Rule not because it is the best reform, although it may be. Rather I support it because it may be the best (and perhaps only) solution that currently has the support of a broad spectrum of knowledgeable academics and thoughtful practitioners which has any possibility of being legislatively adopted nationally. Enactment of such reform could end this overly long albeit at times edifying and always entertaining debate and provide society with the benefits of a uniform national rule.

The common law rule against perpetuities is one of the few areas of law relating to property transfers that plagues both bench, bar and scholars in understanding and application. I think it is important that perpetuity reform receive a national solution. While we historically treat the law of wills and trusts as a local matter, in fact in our mobile society, one never knows which state's law will govern the disposition of property rights and at what point in time and upon what person's death state law regarding perpetuities will be invoked. A simple solution, as offered by the Uniform Act, that is easily understood and for the most part easily applied with little administration cost, including judicial intervention in the construction of

will or fashioning of document reform is worth serious consideration by every legislator.

Sincerely,

Sheldon F. Kurtz
Percy Bordwell Professor

SFK/le

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

John H. Langbein
Max Pam Professor of
American and Foreign Law

1111 East 60th Street
Chicago, IL 60637
(312) 702-9584

2 June 1988

Statement in Support of the
Uniform Statutory Rule Against Perpetuities

As a member of the Illinois delegation to the National Conference of Commissioners on Uniform State Laws, and a specialist in advanced property law, I followed closely the drafting and promulgation of the Uniform Statutory Rule Against Perpetuities (USRAP).

In my judgment, USRAP represents a brilliant, simple, and equitable solution to the legendary pitfalls of the common law rule. USRAP will effectively eliminate the scourge of innocuous blunders that defeat the expectations of ordinary persons, while fully preventing the varieties of dead-hand control of property that the common law rule rightly seeks to suppress.

USRAP embodies the results of a generation of judicial activity and legal scholarship. There is an overwhelming consensus among academic experts who have studied the matter that USRAP represents the optimal solution to the perpetuities problem. No solution to a problem that is susceptible to so many potential solutions will acheive unanimous support from academic lawyers, many of whom have treasured the common law rule for its intellectual exercise. Perpetuities law is a much beloved field among teachers of advanced property law; widespread enactment of USRAP, by curing the standard perpetuities defects, will dethrone the study of perpetuities law from its present prominence in law school curricula. But nostalgia for the intricacies of the old law hardly justifies perpetuating its injustices.

Accordingly, I commend USRAP to legislators in every American jurisdiction.

John H. Langbein

National Conference of Commissioners on Uniform State Laws
645 North Michigan Avenue, Suite 510, Chicago, Illinois 60611 - (312) 321-9710

June 29, 1988

To Whom It May Concern:

In drafting the Uniform Statutory Rule vs. Perpetuities Act, the Commissioners on Uniform State Laws carefully reviewed the suggestions of several legal scholars, including those of Professor Dukeminier. As you know, the common law rule is a complicated one often leading to frustration of the testator's intent. That caused the leading practitioners to devise complicated savings clauses which were not used by less sophisticated estate planners and the general public in preparing wills.

The Uniform Act therefore represents an effort to provide a legal structure which is practical and at the same time limit "dead hand" control. All proposals were carefully evaluated and the final product received almost unanimous support by the Uniform Law Commissioners. Uniformity of law among the states is a most desirable objective to protect American citizens whose property is located in different states. The Uniform Act is designed to reach that objective and it is supported by the great majority of legal scholars as well as practicing lawyers.

The National Conference is hopeful that every state will soon have the Uniform Act in effect.

Cordially,

William J. Pierce
Executive Director

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
Ann Arbor, Michigan 48109

ALLAN F. SMITH
Professor Emeritus
508 Legal Research Building

June 15, 1988

To Whom It May Concern:

In your consideration of the possible adoption of the Uniform Statutory Rule Against Perpetuities, I hope these comments will serve to encourage your favorable response. I am the co-author of Simes and Smith on Future Interests, a treatise which is generally regarded as authoritative on matters related to that subject matter. I have taught in the Property field for more than 20 years.

I am aware that Professor Jesse Dukeminier of U.C.L.A. has criticized the proposed Uniform Act in articles appearing in the California, Columbia and U.C.L.A. Law Reviews, and has advocated a different solution to what is admittedly a problem requiring statutory correction. While I respect the scholarship of Professor Dukeminier, I believe that his criticisms are not valid ones, and that the solution proposed in the Uniform Act is vastly superior to that which he proposes.

The common law Rule Against Perpetuities has been a marvelous area for law teachers, because it is highly technical, and requires great intellectual discipline in those who seek to master its intricacies. Its practical consequences, however, have been generally harmful to testators and beneficiaries of property dispositions. Interests have been struck down, because of hypothetical possibilities, which in no way were likely to violate the basic policy promoted by the Rule. It is rather a trap for the unwary, and for more than a generation, we have sought a way to eliminate the unnecessary harm caused by the Rule and yet preserve the policy it promotes. In my judgment, the proposed Uniform Statutory Rule Against Perpetuities Act does just that. It limits the time during which the "dead hand" of a decedent can control property use and yet preserves for decedents opportunity for reasonable dispositions which will not be frustrated because of the unreasonable technicalities of the common law Rule.

It is not easy to find a statutory solution to difficult, technical problems of the common law. A number of states have made piecemeal efforts to get rid of one or more of the undesirable effects of the common law Rule. The beauty of the proposed Uniform Act is that it sweeps away, for a limited time, all the pitfalls which defeat reasonable expectations. The

thorough study which preceded its promulgation by the Conference of Commissioners on Uniform State Laws has produced an Act which has justifiably attracted a truly remarkable breadth of support among scholars and practitioners alike. I believe that Professor Dukeminier stands almost alone in his objections.

I hope this Uniform Act will be adopted by all states.

Sincerely,

Allan F. Smith

Allan F. Smith

AFS:ngd

Office of the Dean

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TWIN CITIES

Law School
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(612) 625-1000

Statement in Support of the Uniform Statutory Rule Against Perpetuities Act

by Robert A. Stein, Dean
University of Minnesota Law School

The purpose of this statement is to associate myself with the distinguished scholars and practitioners who have expressed support for the Uniform Statutory Rule Against Perpetuities Act. I participated in the development of the Uniform Act as a member of the Conference of Commissioners on Uniform State Laws. Before that, I was significantly involved in perpetuities reform activity as an Advisor to the Reporter for the Restatement, Second, Law of Property (Donative Transactions), which adopted the significant perpetuities reform of "wait-and-see".

The Uniform Act was prepared to reflect the "wait-and-see" reform adopted in the Second Restatement of Property. It is promulgated in order to provide each of the states with carefully drafted legislation which will achieve the recommended reform.

The Uniform Act goes beyond the Restatement significantly by including a period in gross of 90 years for the wait-and-see period. This is a significant improvement, because it frees the court of the necessity of tracing several lines of descent to determine the length of the permissable period. By selecting a period in gross, the Uniform Act provides a wait-and-see period substantially the same as the length that would be provided by the use of measuring lives in most common family situations. The Restatement of Property, being a work that restates previously decided law, was unable to include such a revision in concept. In that sense the Uniform Act builds upon and is a significant improvement upon the Restatement (Second) Perpetuities Reform.

I urge you to adopt the Uniform Statutory Rule Against Perpetuities Act. It has been carefully written with the assistance of many of the leading property scholars in the country, and it has been thoroughly reviewed and critiqued by leading practitioners who are specialists in the area of planning and drafting estate plan instruments. The Uniform Act will ensure that the intentions of individuals with respect to the disposition of their property will not be frustrated by inadvertent theoretical violations of the rule against perpetuities. The Uniform Act is a very beneficial addition to the law of every jurisdiction in ensuring that the wishes of its citizens with respect to the disposition of property can be

achieved in a manner that does not violate the public policy of the state.

Robert A. Stein
Dean

RAS:dtr

THE UNIVERSITY OF GEORGIA

SCHOOL OF LAW

Statement in Support of Uniform Statutory Rule Against Perpetuities Act (USRAPA)

By
Richard V. Wellman
Alston Professor of Law
University of Georgia
School of Law

The purpose of this statement is to encourage legislators and others interested persons to support enactment in their state of the Uniform Statutory Rule Against Perpetuities Act. The statement is made in response to claims by Professor Jesse Dukeminier of University of California at Los Angeles School of Law that USRAPA should not be enacted and that there is deep division about the merits of the proposal within the academic community across the nation.

I have worked with perpetuities and related matters in the fields of Property, Trust and Probate law throughout my thirty-five years of law teaching. I am active in the American Law Institute, the American College of Probate Counsel, and the National Conference of Commissioners on Uniform State Laws. I have been closely associated with the Uniform Probate Code since the sixties when I served as Chief Reporter for the UPC project.

I have also worked closely with Professor Lawrence W. Waggoner of the Michigan Law School on many projects, including USRAPA for which he served as Reporter. I am quite familiar with USRAPA, and with Professor Dukeminier's writings regarding reform of the Rule Against Perpetuities. I am also familiar with his "wait and see" statute as enacted in Kentucky, Nevada and Alaska.

Professor Dukeminier stands virtually alone among law teachers of my acquaintance in his opposition to USRAPA. In my view, his concern with this uniform law is emotional rather than intellectual in nature, perhaps reflecting irritation that he was not invited to participate in ALI and NCCUSL deliberations that led to USRAPA's formulation. In any event, his objections are frivolous, his preferred solution (his own version of "wait and see" legislation) is seriously flawed and has been repealed by the USRAPA enactment in Nevada, and his exhortations against USRAPA have contained serious distortions.

Widespread enactment of USRAPA would achieve badly needed unification of law on a fundamental point of property that has caused trouble for generations. The proposed statutory rule offers a conservative solution that carefully respects all

Athens, Georgia 30602

currently popular techniques for minimizing the dangers of the ancient rule. USRAPA is also supportive of the needs of trustees to be relieved of responsibilities for ascertaining and tracing "measuring lives" as a hidden condition to their ability to carry out trusts according to their terms.

USRAPA has been enthusiastically endorsed by knowledgeable attorneys and professors in all parts of the country. Its enactment should be strongly supported.

Richard V. Wellman
May 26, 1988

EXHIBIT 6

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

GAIL BOREMAN BIRD
Professor of Law

16 June 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto CA 94303-4739

Dear John:

I recently received the tentative recommendation proposing the adoption of the Uniform Statutory Rule Against Perpetuities. I am writing to object to the recommendation. The primary ground for my opposition is that California's current perpetuities statutes are perfectly adequate. The cy pres approach, especially when coupled with California's other reforms of the common law rule, works; litigation has been practically non-existent. In the common parlance, "if it ain't broke, don't fix it."

In his thorough examination and analysis of the various types of possible perpetuities reforms, Professor Bloom reports that nationwide there were only eight perpetuities cases during the period 1978 - 1985: "In effect, there was, on the average, but one relevant perpetuities case per year in the United States." Bloom, Perpetuities Refinement: There Is An Alternative, 62 Wash.L.Rev. 23, 35 (1987). Thus there has hardly been a problem of rampant invalidation of interests under the common law rule. Furthermore, California's cy pres statute (Civil Code Section 715.5) would serve to remedy any problems that might arise.

My only suggestion for reform would be to adopt Professor Bloom's suggestion that "[a]nother feature could be added to the cy pres statute, specifically the allowance of extrinsic evidence to ascertain the testator's intent. This measure would ensure better effectuation of the transferor's intent and in the process, would overcome any concern that a judge may arbitrarily and unwittingly

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rewrite a will. Finally, settlement would be encouraged." Id. at 73.

In conclusion, the current California perpetuities rule appears eminently workable and I do not believe that any major change is warranted.

Very truly yours,

Gail Boreman Bird

Gail Boreman Bird

UNION UNIVERSITY
ALBANY LAW SCHOOL
80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208
518-445-2355

IRA MARK BLOOM
PROFESSOR OF LAW

June 28, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMoully:

I understand that the Commission is considering whether California should adopt the Uniform Statutory Rule Against Perpetuities (USRAP). I thought you might find it helpful to have some further input in reaching your decision, including the enclosed copy of my law review article, Perpetuities Refinement: There Is An Alternative, 62 Washington Law Review 23 (1987).

At the outset, I wish to associate myself with Professor Dukeminier's advice, so eloquently expressed in his June 9th letter, that California not adopt USRAP. The following points may be of interest in your ultimate decision on USRAP.

I. Academic Opposition to USRAP

Based on responses to my perpetuities article, I can represent that a substantial number of law professors are opposed to USRAP. If you like, I would be happy to supply names once permissions have been obtained. I can tell you that USRAP opponents include prominent scholars at the most prestigious law schools in this country.

II. Reasons for Not Adopting USRAP

USRAP is the latest version of the wait-and-see approach to the common law Rule Against Perpetuities. In my article I argue why the wait-and-see approach generally, and USRAP specifically, should not be adopted by any state. I suggest that the principal reason for rejecting USRAP is that the non-problem (the infrequency of perpetuities violations) does not justify a complex and unnecessary solution (the adoption of USRAP). In other words, the assumption of frequent invalidation because of the common law rule is not confirmed.

In my article (pages 38-58), I also attempt to address questions raised by USRAP including the following:

* Will USRAP unreasonably extend dead hand control?

* Will USRAP simplify the law?

* Will USRAP only cause minimal inconvenience?

* Does USRAP constitute consumer-protection legislation for the average consumer of legal services?

* Is there a need for a uniform statutory Rule Against Perpetuities?

You also might take into account that the 90-year waiting period under USRAP is prospective in effect. Thus, if California adopts USRAP a dual system will operate for decades under which judicial involvement still will be required to reform any violations under the existing system. Of course, the California experience to date suggests almost no involvement because of the non-existence of the problem.

III. New York and USRAP

I recently spoke with the Director of New York's Law Revision Commission. He advised that the Commission is aware of USRAP but that it is not presently under serious consideration by the Commission. In addition, as the vice-chair of a committee of the Trust and Estates Section of the New York State Bar Association, I am unaware of any current interest that the section has in recommending adoption of USRAP.

IV. CY PRES

California already has a wonderful solution to deal with the **infinitesimal** number of cases involving perpetuities violations in the donative transfer area: cy pres. Even Professor Leach, the godfather of the wait-and-see movement, favored immediate cy pres. Why change something that works in the rare instances when a problem arises? Although some suggest that reformation has not been perfect under immediate cy pres, understanding of course the rarity in which the process has been invoked, less perfection should be anticipated when judges and lawyers almost a century later attempt to divine a transferor's intent under USRAP's deferred cy pres approach.

V. USRAP Ignores the Commercial Area

If there is a problem with Rule violations, my research discloses that it is in the commercial area. By excluding the commercial area from the common law and 90-year proxy periods, USRAP does not solve the problem because in many instances a more limited time period is appropriate. Therefore, by adopting USRAP California would not effectively address the commercial side which is relatively more in need of resolution than the donative side.

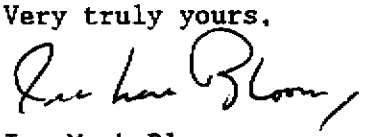
VI. Why Bind Unborn Generations On Dead Hand Control?

By adopting USRAP it is likely that a 90-year saving clause will become the standard, the default system. If later generations object to the extension of dead hand control, they will nonetheless be saddled with these controls because repealing legislation will likely be limited to prospective transactions. Do we render a service to future generations by binding them to 90 years of dead hand control?

VII. Conclusion

I would urge that the Commission not recommend adoption of USRAP in California. Although USRAP attempts to solve a problem (unintentional perpetuities violations), there is no evidence that the problem exists. Assuming, arguendo, that perpetuities violations are a problem in California, California's present system has been and will be more than adequate. The inordinately complex system under USRAP also has the potential for creating many problems, including the extension of dead hand control under standardized 90-year saving clauses. In the final analysis, you might ask what benefit California would derive by enacting USRAP.

Very truly yours,



Ira Mark Bloom
Professor of Law

IMB/b
Enc.

UNIVERSITY OF MISSOURI-COLUMBIA

School of Law
Columbia, Missouri 65211

June 15, 1989

Mr. John H. DeMoully,
Executive Secretary,
California Law Revision Commission,
4000 Middlefield Road, Ste. D-2,
Palo Alto, California 94303-4739

Dear Mr. DeMoully:

Professor Jesse Dukeminier of the University of California, Los Angeles, has sent me a copy of his letter of June 9, 1989, opposing enactment in California of the Uniform Statutory Rule Against Perpetuities.

Professor Dukeminier and I have not always agreed on perpetuities matters but, in this case, I agree whole-heartedly with everything that he says in opposition to the Uniform Statutory Rule Against Perpetuities. The present California immediate reformation cy pres statute, Civil Code §715.5, is similar to Missouri Revised Statutes §442.555, which was drafted by me and enacted in 1965. See Fratcher, The Missouri Perpetuities Act, 45 Mo. L. Rev. 240 (1980). In my opinion, immediate reformation cy pres is much better than "wait and see."

My objections to the Uniform Statutory Rule Against Perpetuities are set out in §62.10 of SCOTT ON TRUSTS (4th ed. by Fratcher, 1987, and 1989 Supplement) and in §1230 of the 1989 Supplement to SIMES AND SMITH ON FUTURE INTERESTS. The objection which strikes me as being the most serious is that stated in numbered paragraph 2 at the top of page 3 of Professor Dukeminier's letter, "Wait-and-see makes title uncertain for the waiting period. Not knowing whether an interest is valid may cause serious inconvenience to the parties." After mentioning that England adopted "wait and see" in 1964, the section in SCOTT continues:

> There are two differences between the English situation and that in this country which raise questions about how "wait and see" will work here. First, in England all future interests are beneficial interests under trusts and the trustee has statutory powers to sell and mortgage the fee simple and to give long leases, so outstanding contingent future interests do not make property inalienable. Second, only the contingent future interest that may vest too remotely is void under the English decisions; prior interests created by the same instrument do not fail. In this country there is a doctrine of infectious invalidity under which the courts assume power to strike down present and other vested interests and future interests that are certain to vest on time.

> Some of these courts have taken the position that a will is like a class gift: if any limitation in the will violates the rule against perpetuities, the entire will is void. Others strike down the provisions only if they think that the settlor or testator, if apprised of the invalidity of part of his disposition, would prefer intestacy or total invalidity of the trust to enforcement of those parts that do not violate the rule. . . .
>
> Although the official comments to Sections 1 and 3 of the Uniform Statutory Rule Against Perpetuities state that it should be deemed to abolish the American doctrine of infectious invalidity, the act itself does not mention the doctrine. Hence, there is danger that, after a trust has been administered in accordance with its terms for 90 years, a court might strike the entire trust down ab initio, making void the conveyances, mortgages and leases made by the trustee and subjecting the trustee to liability for all payments made to the beneficiaries.

Suppose a California will bequeathing the residue to a trustee to pay the income in equal shares to children Alice, James and Molly, remainder in principal as to the shares of Alice and Molly to their issue per stirpes and as to the share of James to the first Vegetarian to become Governor of California. The remainder in the share of James is void under the common law rule against perpetuities. Under the present California statute its invalidity can be determined immediately and the court can determine now what is to happen to it. If the whole trust is struck down now, Alice, James and Molly will take the residue as heirs on intestacy. Under the Uniform Statutory Rule Against Perpetuities it would be necessary to wait 90 years to determine the validity of the remainder. If no Vegetarian becomes Governor by the end of the 90 years, the court may then determine that the whole trust was void ab initio. If so, all administrative acts of the trustee were ineffective; people who dealt with him will be liable to whoever took under the wills of the heirs. These may include the devisees of the third wife of Alice's second husband.

Substantial amendments might improve the Uniform Statutory Rule Against Perpetuities but I agree with Professor Dukeminier that the present California statute is the best solution to the perpetuities problem.

Sincerely yours,

William F. Fratcher

William F. Fratcher,
Professor of Law
Emeritus

cc: Prof. Dukeminier

Duke University
School of Law
Durham, North Carolina
27706

JUN 2 8 1989

RECEIVED

Richard C. Maxwell
Harry R. Chadwick, Sr.
Professor of Law

(919) 684-2427

June 24, 1989

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear John:

Although I am now a former Californian, my professional interest in property law continues to be focused on that state. I have recently been made aware of the proposal to replace Cal. Civ. Code § 715.5 with the Uniform Statutory Rule against Perpetuities. I do not intend to burden you with a scholarly discussion on the issue. I know you are well supplied with that heavy commodity. I have, of course, taught the Rule for many years, and have had occasion to publish comments on its application to mineral transactions. The purpose of this letter is to join in the submission on the subject written by Jesse Dukeminier to you and dated June 9, 1989. I find his analysis impeccable and his arguments very convincing.

I hope this letter finds you in good health. I will retire from Duke at the end of this month but will continue to teach one semester a year for the time being.

Best wishes,

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO SANTA BARBARA · SANTA CRUZ

SCHOOL OF LAW
405 HILGARD AVENUE
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June 19, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMoully:

Jesse Dukeminier showed me a copy of his letter to you regarding the Uniform Statutory Rule against Perpetuities. I also teach and write on this subject. I agree with most of Jesse's points. I do not share his concern about lawyers taking advantage of USRAP to draft 90-year trusts to avoid the generation-skipping tax. Even before there was a generation-skipping tax, very few lawyers took advantage of the maximum limits of the common law Rule which are roughly equivalent to USRAP, as the drafters assert. With a generation-skipping tax, despite its liberal exemptions, there is less incentive rather than more to create long-term trusts, regardless of what happens to the Rule.

In my view, the real impact of USRAP will not be on sophisticated estate planning (which will go on much as it always has), but on home made wills or those drafted by less skilled lawyers. There are very few of these which raise perpetuity problems (somewhat surprisingly, since law students have so much trouble understanding the Rule). The two cases cited by Jesse are typical, Grove and Ghiglia. In the latter, the court reduced the age from 35 to 21 under Civil Code 715.5. This would not be necessary under USRAP since the trust would probably have terminated within 90 years. Age reduction is questionable because it may cause grandchildren to get property when they are too young to handle it. Age reduction would not have been necessary (even without USRAP) if the court had reformed or construed the will to include only the grandchildren who were born prior to the testator's death (as the court did in Grove). The court could also have used Civil Code 715.5 to read into the will a standard savings clause, as Professor Browder suggested many years ago.

Even though the court could have reached a better result under existing law, perhaps Ghiglia is an argument for USRAP, but to me

Grove is a stronger argument against it. The court's reformation of the will in that case would not have been necessary under USRAP, but some litigation would have been needed to figure out what this ambiguous home-drawn will meant. The case is a good example of Jesse's point about USRAP leaving families "strait-jacketed with unsuitable and unchangeable provisions" for 90 years.

The reduction-of-litigation argument for USRAP is a mirage (1) because perpetuities cases are so rare, and (2) the cases that do arise come from poorly drafted wills that require judicial construction, with or without the need to modify them to comply with the Rule.

USRAP may be better than other versions of wait and see, because it avoids the knotty problem of ascertaining the measuring lives. But wait and see is itself a dubious "reform." Incidentally, a few weeks ago Georgia joined the many states which have rejected it.

I do not think USRAP will do as much harm as Jesse suggests, but I think it will do more harm than good. Basically the question is whether courts can do a better job of reforming wills under Civil Code 715.5 than unsophisticated drafters who "plan estates" under the license afforded to them by USRAP. My reading of most of the perpetuities cases decided in this country over the past 40 years leads me to favor the courts, even though I do not always agree with their results. I know this is the age of "deregulation," but we have not yet abolished all controls over air safety or allowed anyone who feels like it to fly an airplane.

Sincerely,

William McGovern

William M McGovern
Professor of Law

UNIVERSITY OF CALIFORNIA
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June 30, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear John:

I stand squarely with my colleague, Professor Gail Boreman Bird, and with Professor Jesse Dukeminier, in opposing the adoption in California of the Uniform Statutory Rule Against Perpetuities. I think we should all be grateful to Professor Dukeminier for his imaginative analysis and persistent criticism of the Act.

I sat through the debates on the American Law Institute reform of the Rule Against Perpetuities in 1978 and 1979 and at that time I prepared a draft of a memorandum to be submitted in due course to the Commission. I came to the conclusion that the California statutory system, after revisions in 1917, 1951, 1959 and 1963, was superior to the Restatement version of the wait-and-see rule. My principal argument was that immediate cy pres was vastly superior to cy pres after the full period of the rule against perpetuities. The 90 year alternative period of the Uniform Act postpones the application of cy pres even further.

Professor Dukeminier in his articles (and especially in "The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo" [34 UCLA Law Rev. 1023 (1987)], fairly criticizes the drafters of the Uniform Act for neglecting the policy considerations that were so important to the great scholars in the field.

I do not think that Lewis Simes, Richard Powell or Barton Leach would have accepted the 90 year alternative provision of the Uniform Act. The dead hand has been over extended. The Act invites long-term indestructible trusts, and accumulations for too long a period. The Act causes some additional inalienability and causes increased uncertainty and anxiety on the part of living beneficiaries during an excessive waiting period.

I think the best statutory plan now available is the one recommended in the recent article by Professor Ira Mark Bloom. "Perpetuities Refinement: There Is An Alternative" [62 Wash.L.Rev. 23 (1987)]. His plan is essentially the New York statute, with immediate cy pres. This is very close to the present California statute. I favor concentrating our attention on the few refinements that would improve the California statute.

There is no need for California to be in a rush to gain uniformity. I agree with Professors Bloom and Dukeminier that uniformity is far away. There are too many states with some form of the wait-and-see rule. New York, with its traditional disapproval of long-term indestructible trusts, is not likely to accept the Act.

At two times in recent history there were possibilities of finding common ground. At the 1969 meeting of the American Law Institute, at the height of the debate between former Reporter Richard Powell and current Reporter James Casner, Professor Powell's successors at Columbia offered to accept a limited wait-and-see rule based on Leach's Massachusetts statute. They said Professor Powell would agree. Professor Casner refused. More recently, when Professor Dukeminier sent his memorandum to Professor Lawrence W. Waggoner, the Reporter for the Uniform Act, there might have been some give and take. (Professor Edward Halbach has suggested that he might have favored such a course).

If we were dealing with angels, who had never written anything, who had no turf to protect, we might have a uniform statute someday. We might draft a statute that eliminated the common pitfalls (like the New York statute), that adopted a limited wait-and-see rule (like the Massachusetts statute) with vesting and cy pres postponed only until life beneficiaries died. The statute would adopt the Dukeminier measuring lives, and would have no long "period of procrastination" (as the New York Revisers put it). All the great scholars, living and dead, would have had to yield something, would have achieved something, and the nation might have a uniform law.

In the meantime, let us stay with the present California statute.

Sincerely,

Russell D. Niles

RDN:pcm

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CHARLES H. WHITEBREAD
GEORGE T. PFLEGER PROFESSOR OF LAW

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June 26, 1989

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. DeMoully:

I write in opposition to the adoption of the Uniform Statutory Rule against Perpetuities. As a professor of gifts, wills, and trusts at the University of Virginia from 1968-1981 and from 1981 to the present at the University of Southern California, I have analyzed the existing California cy pres statute and find it clearly preferable to the Uniform Statutory Rule against Perpetuities.

I have read and endorse the letter sent you by Professor Jesse Dukeminier of UCLA. I hope his views will carry the day.

Very truly yours,

Charles H. Whitebread

Charles H. Whitebread

CHW:klw

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW
405 HILGARD AVENUE
LOS ANGELES, CALIFORNIA 90024-1476

June 9, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Dear John:

Re: USRAP

I have received your staff draft recommending the adoption in California of the Uniform Statutory Rule against Perpetuities, replacing Cal. Civ. Code § 715.5, which provides for judicial reformation of any interest that violates the Rule against Perpetuities. I wish to restate my opposition to it in summary fashion (well, at least in shorter form than my article).

I.

The Testimonials

I turn first to the testimonials, to get them out of the way of the issue. I observe in them the Uniform Steamroller in action. These testimonial letters are by most distinguished professors, many of them friends of mine, but almost all of whom are associated with the Uniform Laws in one connection or the other. It is important for the Commission to note that my article in UCLA Law Review criticizing USRAP was published after USRAP had been circulated among the Uniform Professorial Group and approved by the relevant bodies. The views expressed in these testimonials would be entitled to more credence, I suggest, had not the authors already committed themselves to USRAP before my criticism appeared. It is quite natural for persons to rise to defend their creative product from subsequent attack.

Although I am portrayed in some of these letters as the principal (or only) opponent of USRAP, this is so far from the truth as to border on misrepresentation. The opponents of wait-and-see are numerous and well-known, at least in academic circles. Indeed, it is particularly telling of what scholars outside the Uniform Group think of USRAP to observe that, since USRAP was promulgated, all of the published scholarly articles (save the Reporter's) have been negative or unenthusiastic about USRAP. I include my article, The Uniform Statutory Rule against Perpetuities: Ninety Years in Limbo, 34 UCLA

L. Rev. 1023 (1987); Professor Bloom's article, Perpetuities Refinement: There Is an Alternative, 62 Wash. L. Rev. 23 (1987) (strongly preferring cy pres to USRAP); Professor Haskell's A Proposal for a Simple and Socially Effective Rule against Perpetuities, 66 N.C. L. Rev. 545 (1988) (arguing for the Delaware statute referred to below); and Professor Fletcher's Perpetuities: Basic Clarity, Muddled Reform, 63 Wash. L. Rev. 791 (1988) (arguing for wait-and-see as relevant events unfold plus cy pres).

II.

The Issue

The issue before the Commission is not what kind of wait-and-see statute is preferable, a matter I debated with Professor Waggoner. It is whether wait-and-see for 90 years is preferable to the cy pres doctrine we have in California.

Since this is the issue, the Commission should have the benefit of Professor Bloom's highly-regarded article comparing wait-and-see and cy pres. See Bloom, 62 Wash. L. Rev. 23, supra. It is not mentioned in the materials sent me. Bloom's article is far and away the best comparison of wait-and-see and cy pres yet published. With great care and insight, Bloom extensively documents the case against wait-and-see with empirical factual studies. He is quite critical of USRAP. His article, published a few months earlier than my own, makes a powerful case for specific correctives and cy pres. I am sending you a copy, and I ask you to circulate copies of it to persons who receive probate material from you. My UCLA Law Review article did not discuss cy pres in any depth; it only criticized USRAP. Now that the Commission is asked to recommend replacing our cy pres statute with wait-and-see, the bar should have before it the best case for cy pres of which I am aware.

I hope the Commission will not take the view that USRAP should be adopted just because it is a Uniform law. The fact that it is a Uniform law does not necessarily make it better than existing California law. Some Uniform laws have not been adopted in any state. Several have been adopted only in a few. The California Law Revision Commission has an obligation, I suggest, to resist the drum beat of the Uniform Group and decide independently whether USRAP is better for California than our existing reformation statute.

III.

What's Wrong with USRAP

The criticisms of wait-and-see have been three:

1. Wait-and-see extends the power of the dead hand to control property.

2. Wait-and-see makes title uncertain for the waiting period. Not knowing whether an interest is valid may cause serious inconvenience to the parties.

3. Perpetuities violations are so rare that wait-and-see legislation, with potential adverse consequences, is not justified. As Professor Bloom says, quoting Dean Richard Maxwell of UCLA in a similar situation, USRAP is tantamount to using "an atomic cannon to kill a gnat." Bloom, 62 Wash. L. Rev. at 25.

I address here only the extension of dead-hand control. USRAP, in my judgment, will extend the effective reach of the dead hand by about 50 percent and will validate for 90 years many trusts that are unsuitable or objectionable from a viewpoint of public policy. To understand this, we must consider what the effect of a 90-year waiting period will be on different kinds of will and trust drafters.

A. Trusts drafted by lawyers. Experienced estate planners almost always insert a perpetuities saving clause in their trust instruments. The saving clause is intended only to cure any overlooked perpetuities violation; it is not intended to actually govern the duration of the trust (save when a miraculous violation occurs). My inquiries of lawyers and trust companies in California and New York (see Dukeminier, 34 UCLA L. Rev. at 1045-46) revealed that almost all trusts end within 60 years. When governed by traditional perpetuities law, trusts rarely are drafted so as to exceed 60 years in actual duration.

A 90-year perpetuities period gives lawyers an easy way to draft a 90-year trust. Will they do this? It seems highly likely they will where tax savings can be gained thereby. Raymond Young of Boston, a member of the USRAP drafting committee, predicted in 12 Probate Notes 245 (1987) that under USRAP lawyers would draft 90-year trusts to avoid the generation-skipping transfer tax.[1] Mr. Young wrote:

> [T]he 90 year permissible period for vesting (with perhaps another eighty years additional for vested interests to run their course), coupled with a generation skipping transfer tax exemption of $1 million ($2 million per married couple), may lead to a great increase in long term trusts. Professional fiduciaries and financial planners can be expected to market such trusts aggressively, with testators feeling that this is an opportunity they must take advantage of.

---

1. The Internal Revenue Code of 1986 imposed a generation-skipping transfer tax of 55% at the death of the life beneficiary of a trust, when estate tax is not imposed on that event. This effectively ends the exemption of life estates from death transfer taxes. The Code provides an exclusion from GST tax of $1 million ($2 million per married couple) settled in a trust for as long as the local perpetuities period allows.

The estate planning literature is now beginning to generate suggestions that lawyers should draft "perpetuities period" trusts to take advantage of the generation-skipping tax exemption. See, for example, Plaine, 13 Prob. Notes 18 (1987).

Professor Bloom agrees with Mr. Young. If a 90-year perpetuities period is adopted, he writes, "the estate planning bar will likely encourage their wealthy clients to prolong the duration of trusts to obtain tax benefits." Bloom, 62 Wash. L. Rev. at 54.

In his report to the California Law Revision Commission recommending USRAP, Mr. Collier suggests that lawyers will not start drafting 90-year trusts. The USRAP Drafting Committee, he reports,

> made inquiries in the State of Wisconsin, which has no rule against perpetuities [applicable to trusts] in its law, and found that there was no tendency of trusts from other jurisdictions to move into Wisconsin to avoid the limitation of the rule against perpetuities nor was there any practice among Wisconsin lawyers, so far as could be ascertained, to write documents creating trusts in perpetuity. Notwithstanding Civil Code Section 715.6, lawyers in California do not normally draft 60-year trusts.

The past practice of Wisconsin lawyers is not surprising. They drafted trusts lasting about as long as those drafted by California lawyers because these trusts are suitable for any reasonable client's needs. In California, lawyers have not taken advantage of the maximum perpetuities period allowed by lives in being plus 21 years; their clients don't need it to carry out their plans. Neither have California lawyers drafted 60-year trusts. A 60-year trust doesn't fit the actual lives and deaths of the client's beneficiaries, and if the client is interested in a really long trust, the lawyer can create a trust for about 100 years using actual lives. The generation-skipping tax, however, drastically changes this picture by putting tax pressure on clients and lawyers to draft long-term trusts.

I do not see in Mr. Collier's report nor in the staff report any reference to the generation-skipping transfer taxation exemption and its probable effect on the increase in long-term trusts. This ought not to be hidden under a lot of technical discussion. The proponents of USRAP ought to come right out and say that an advantage of USRAP is that it enables estate planners to easily draft a long-term (90-year) trust for clients seeking tax advantages.

Now it may be asked: "Well, if lawyers are going to draft long-term trusts to take advantage of GST tax exemptions, why not make it easy for them by using a 90-year period rather than lives-in-being-plus-21-years to govern the trust duration?" That is a fair question, and an important one for the Commission to face. My answer is this: I do not believe in making it too easy to draft long-term dynastic trusts. Persons who want such trusts should go to experienced estate planners who can, under the common law Rule, draft a

trust lasting approximately 100 years, and the law should put pressure on dynasts to seek an expert's knowledge and competence. In drafting trusts to last several generations, and through unpredictable changes in circumstances, knowledgeable estate planners put in appropriate powers (both in the trustee and in the beneficiaries) to give flexibility to deal with changes in the family, in the tax laws, or in the economy. Thus families whose ancestor consulted a knowledgeable specialist have little to fear from a trust. But families whose ancestor consulted a nonspecialist, who "easily" drafted a 90-year trust, may be straitjacketed with unsuitable and unchangeable provisions.

If the public is served by routing people who want dynastic trusts to knowledgeable specialists, then the law should not make it easy for others to create these trusts. Mr. Raymond Young's remarks quoted above implicitly contain a warning: If 90-year trusts are permitted, he expects "professional fiduciaries and financial planners . . . to market such trusts aggressively." Will such trusts be well-drafted, and individualized for the particular family, or will they be routinized -- resulting in many problems later? There is, I submit, a substantial risk of the latter.

In addition to opening the public to dangers from inexpert estate planners, USRAP may bring do-it-yourself books into the 90-year trust market. The do-it-yourself wills shelf in the UCLA law library is bulging and well-thumbed. As I look at it, one book that jumps out at me is Dacey's How to Avoid Probate!; complete with will and trust forms of every sort. If a 90-year perpetuities period is adopted, I would expect Dacey's publishers to have a new form for a 90-year trust, and probably a badly drafted one. If you think that millionaires do not consult Dacey and similar manuals, you should remember that, with rising real estate prices, there are many ordinary, middle-class Californians sitting on million-dollar houses. Some of these people, fearing the effect of federal estate and generation-skipping taxes on their inheritable capital, may decide to use easy 90-year trust forms, with unfortunate results for their beneficiaries. It will be sad if the law lets this happen.

Because it is difficult to understand, the Rule against Perpetuities exerts a socially beneficial pressure against the easy creation of long-term trusts. Perhaps it is debatable whether the increase in dead-hand control from the rich seeking private tax benefits is in society's interest. But, in any event, it is surely not in society's interest to make it easy for the dead hand to increase its grasp.

B. <u>Trusts in homemade wills</u>. Apart from controlling family trusts, another purpose of the Rule against Perpetuities is to protect the public from testators exercising their power over resources in socially objectionable ways for a long period after their deaths. USRAP permits these caprices to continue for 90 years. Here are some examples (variations on actual cases):

1. A bequest in trust for the care of my dog Trixie and her progeny.

2. A bequest in trust forever to take care of my private family mausoleum.

3. A bequest in trust forever to serve free California wine at the state bar conventions.

4. A bequest in trust forever to support the Rock Mountain Hunting Club.

5. A bequest in trust for 200 years, to accumulate the income, and then to pay accumulated income and principal to my oldest descendant bearing my surname then living.

The first four of these bequests are void because the noncharitable purpose trusts can endure more than lives in being plus 21 years. The fifth bequest is also void for violation of the Rule. Under USRAP the trusts established under these bequests are apparently valid for 90 years!

The extension of dead-hand control in these cases to 90 years seems highly objectionable as a matter of public policy. Remember: The 90-year period is not applicable only to trusts drafted by lawyers. It is applicable to trusts drafted by anyone. It is applicable to what Professor Langbein calls the "trailer park" practice of law.

IV.

The Virtues of Cy Pres

The cy pres statute in California limits itself to what I regard as the only proper object of perpetuities reform: curing the perpetuities violation. It has very little potential for extending the dead hand, certainly none at all for creating 90-year trusts. Almost without exception, cy pres has been approved by academics. The only disagreement is whether reformation should take place immediately, at the testator's death (as California law provides), or at the end of a wait-and-see period.

The main objection to immediate cy pres is that reformation of a perpetuities violation requires a lawsuit, which is costly. If we wait and see, reformation may not be necessary. On the other hand, a reformation lawsuit at the end of 90 years might be a nightmare. Professor Bloom predicts it will result in complex litigation with "staggering fees" to ascertain the testator's intent after 90 years. Bloom, 62 Wash. L. Rev. at 46. Professor Fletcher observes, "The Uniform Act postpone[s] the availability of reformation for a very long time. Evidence will be sketchy and unreliable; affected people will not be able to plan, and the opportunity to effect a substantial

shortening of the time for certainty will have passed." Fletcher, 63 Wash. L. Rev. at 838 n.64.

The objection to immediate cy pres -- the cost of a lawsuit -- seems considerably overstated. California Civ. Code §715.5, providing for cy pres, was enacted in 1963. In the 26 years since there apparently have been only two reported cases in California reforming perpetuities violations. In one, an age contingency of 25 was reduced to 21 in order to save the gift. Estate of Ghiglia, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974). In the other, the draftsman had overlooked the presumption of fertility; the court saved the gift by construing the class of beneficiaries to exclude unborn children of unborn children. Estate of Grove, 70 Cal. App. 3d 355, 138 Cal. Rptr. 684 (1977). Two cases in 27 years does not support a claim of costly litigation.

The reason why there is little litigation under a cy pres statute, I suggest, is that perpetuities violations rarely occur and when they do they fall into known fact patterns. The reform a court will adopt in a particular fact pattern usually is either ruled by precedent or is fairly obvious. The two California cases cited above are examples of the two most common violations of the perpetuities rule: (1) inserting age contingencies over 21 and (2) overlooking the presumption of fertility (the "fertile octogenarian").[2] The California courts have indicated how these will be dealt with, so lower court judges can construe similar wills accordingly. The "unborn widow" problem has been specifically solved by a statutory provision that a gift to the widow of a person alive at the testator's death is conclusively presumed to be a gift to a person in being. Cal. Civ. Code § 715.7. These two California cases and the statute solve the three problems that are always used to justify reform.

If the Commission takes seriously a claim that our cy pres statute has resulted in costly fees in unreported litigation, I think it should undertake an empirical study among lawyers to assay the validity of this claim. If this claim can be supported, there is a very easy solution: Adopt the specific correctives to perpetuities violations provided by the New York statutes, and use cy pres only when these specific correctives are not applicable. This is Professor Bloom's preferred solution.

As for myself, seeing no evidence that cy pres results in costly litigation, I believe the California statute is an excellent -- indeed, the best -- perpetuities reform. I would stick with it.

---

2. In research I did into over a hundred years of Kentucky cases in 1960, I found that 55% of perpetuities violations involved an overlooked presumption of fertility and 22% involved excessive age contingencies. Dukeminier, Kentucky Perpetuities Law Restated and Reformed, 49 Ky. L.J. 3, 110-12 (1960).

V.

The Second Best Alternative: Abolish the Rule against Perpetuities Entirely and Have Only a 110-Year Perpetuities Period

USRAP is a contraption worthy of Rube Goldberg. It preserves the common law Rule, with all its ancient lore and technicalities. It preserves the ephemeral distinction between vested and contingent interests, the distinction between "vested in interest" and "vested in possession," the class gifts rule and the exceptions for gifts to subclasses and per capita gifts. These are not abolished. In fact, they are spelled out on page after page after page in USRAP and its commentary.

USRAP makes it terribly hard for teachers. On the one hand, we are supposed to teach students the common law Rule, which has not been abolished, while on the other hand, we must tell them that no instrument they draft can possibly violate the Rule during their lifetimes. Does anyone think the students will have any interest in learning the technicalities of the Rule?

There is merit in the argument that we ought to get rid of all this ancient learning. And there is a fairly easy way of doing this: Abolish the common law Rule's application to trusts and provide that no trust can endure more than 110 years. Delaware has done this. Delaware Code Ann. tit. 25 § 503 (Supp. 1988), enacted in 1986, provides that the common law Rule against Perpetuities does not apply to trusts. At the end of 110 years, each trust must terminate, if it has not already terminated, and the principal is distributed as provided in the trust instrument or, if there is no provision, to the income beneficiaries.

As I understand it, the reason why USRAP does not abolish the common law Rule is because the 90-year period might be too short to cover some very exceptional trust where the life beneficiary was an infant when the trust was created. The life beneficiary might live longer than 90 years and thus the remainder might vest at the end of a life in being more than 90 years after creation of the trust. The Delaware statute takes that possibility into account by providing for a 110-year period; no one -- in this country -- lives to 110.

USRAP makes it very easy for the dead hand to extend its power for 90 years. This is, I have argued, very objectionable. Nonetheless, if USRAP had really simplified the law and abolished all the arcane mysteries of the Rule against Perpetuities, as applied to trusts, there would be something good to say about USRAP. It would have done us a good in exchange for the bad. But there are no compensating benefits in USRAP.

If the Law Revision Commission decides that the dead hand's reach should be extended for a period of years in gross, then I strongly urge it to abolish application of the Rule against Perpetuities to trusts. If we must have more dead-hand rule, for private tax benefits, the public should get a compensating

benefit. The Delaware statute is preferable to USRAP. Professor Haskell recommends the Delaware approach in his article in 66 N.C. L. Rev. 545, referred to above.

I am far from convinced, however, that the Delaware statute is preferable to cy pres.

VI.

USRAP and Restrictions on Land Use

USRAP is inconsistent with the policy underlying Cal. Civ. Code § 885.030. Under this statute powers of termination (including what are sometimes known as possibilities of reverter and rights of entry) are valid for 30 years only. After that time, they terminate. A comparable executory interest will be valid for 90 years under USRAP. To illustrate:

> Illustration 1: O conveys land to Charity, but if it ceases to use the land for designated charitable purpose, O has power of termination. O's power ends after 30 years under Cal. Civ. Code § 885.030.
>
> Illustration 2: O conveys land to Charity, but if it ceases to use the land for designated charitable purpose, then to A and her heirs. A has an executory interest valid for 90 years under USRAP.

Surely it makes no difference in policy whether O or A holds the forfeiture interest; either interest ties up the use of land. O and A should be treated alike and given the same time period for the existence of their interests.

As I recall, this matter arose before the Commission many years ago when § 885.030 was recommended. At that time, the executory interest case (Illustration 2) was not dealt with because executory interests are almost always drafted so as to violate the Rule against Perpetuities. It was assumed that void executory interests would be reformed by a court to be valid either for A's life or for 21 years. They were thus deemed to have approximately the same duration as powers of termination (30 years). If USRAP is adopted, however, executory interests are valid for 90 years, which is three times as long as the period applicable to powers of termination.

USRAP brings a potential malpractice trap here. A lawyer can get the USRAP 90-year period for his client O by using two pieces of paper: First piece, O conveys as in Illustration 2; second piece, A (a straw) conveys her executory interest to O. O now has an executory interest good for 90 years. If a lawyer does not use two pieces of paper when the client asks for a forfeiture restraint for as long as the law allows, is the lawyer guilty of malpractice?

VII.

The Staff's Reasons

The Commission staff draft, at page 9, summarizes its reasons for supporting USRAP. I have responded to the fourth and fifth reasons earlier in this letter. I now have some brief comments on the first three reasons given by the staff.

First, the staff draft says USRAP is "an easily administered rule, eliminating a number of complexities and ambiguities associated with the traditional rule." This is a most mysterious claim, unless made tongue-in-cheek. USRAP does not abolish the complexities of the common law Rule. They all remain with us and are spelled out at excruciating length in the staff commentary.

As for the claim that USRAP is "easily administered," only a wild Irish imagination could so portray a statute that requires 70 single-spaced typed pages to explain! Anyone who contemplates voting for USRAP should try to read it through. It is tough going, tougher than Gray's original classic. (And Gray claimed, too, that he was describing a "clear and simple" rule!) Understanding USRAP is especially difficult because of the use of idiosyncratic language -- such as "validating side of the rule" and "invalidating side of the Rule" -- which is not in the current vocabulary of lawyers.

The staff's second reason for supporting USRAP is that it offers a significant degree of unity among the states. I believe the staff is overly optimistic. I have labored in this field for 35 years, and unified reform is an illusion. In fact, Professor Leach did not favor it; he thought states should be laboratories for different reforms, and time would tell which was better.

The key state in any unified reform is New York, which has far more wealth in private trusts than any other state. New York reformed the Rule in 1960 by adopting specific cy pres correctives for most perpetuities violations. I understand that New Yorkers are quite satisfied with this. The center of opposition to wait-and-see has been New York. Professor Powell, who taught at Columbia for almost 40 years and wrote a great treatise on property, led the opposition. The opposition continues in professors in many New York law schools: Professors Berger at Columbia, Bloom at Albany, Fetters at Syracuse, and Rohan at St. John's. The New York legislature has always been more jealous of the power of the dead hand than any other legislature. Before the 1960 reforms, New York had the tightest perpetuities rule of any state. The New York estate planning bar -- highly experienced and knowledgeable and well-compensated -- has carefully guarded its territory. I cannot believe the New York estate planning bar would want to open the door to financial advisers peddling 90-year trusts. I am told by professors and lawyers in New York that USRAP has no chance of adoption there.

As for the other states, the opposition to wait-and-see continues to be widespread, strong, and unabating. Many states have reform legislation enacted in the 1950s and 1960s, which -- judging from the reported cases -- has resulted in few problems. Likely these states will prefer to stay with a tried and workable reform like cy pres than to risk adopting a statute as controversial as USRAP. For example, in a recent Mississippi case, Estate of Anderson, 541 So.2d 423 (1989), the Supreme Court extensively reviewed all perpetuities reform and announced it was completely satisfied with its own reforms, which include cy pres. The court specifically referred to USRAP and said, "there would appear no need here for legislation on the subject."

Professor Bloom concludes that USRAP will not be adopted by a significant number of states because the Rule against Perpetuities is "not creating any real problems in this country. . . . Adoption of this complex system to deal with the isolated violations [of the Rule]. . . cannot be justified." Bloom, 62 Wash. L. Rev. at 58.

The third reason the staff draft presents for USRAP is that USRAP eliminates commercial transactions from the Rule. It is my belief that the California Supreme Court went a long way in doing just that in Wong v. Di Grazia, 60 Cal. 2d 525, 386 P.2d 817 (1963). But if a specific statute on the matter is desirable, it can be a short statute of a paragraph.

VIII.

Conclusion

I believe California's simple cy pres statute has worked well and is far preferable to the formidably complex provisions of USRAP. I hope the Commission will recommend leaving our statute in place, and not recommend that we embark on the uncharted and troubled waters of a 90-year wait-and-see period.

Sincerely,

Jesse Dukeminier

Jesse Dukeminier
Professor of Law

JD/2018/dhb
Enc: Bloom Article

UNIVERSITY OF CALIFORNIA, LOS ANGELES UCLA

BERKELEY · DAVIS · IRVINE · LOS ANGELES · RIVERSIDE · SAN DIEGO · SAN FRANCISCO SANTA BARBARA · SANTA CRUZ

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June 28, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

CA LAW REV. COMM'N
JUL 3 1989
RECEIVED

Dear John:

Re: USRAP

1. In case you haven't seen Pound v. Shorter, 377 S.E.2d 854 (Ga. 989), I enclose a copy. In this case the Georgia Supreme Court unanimously rejected wait-and-see. In footnote 3, the court summarizes the problems with wait-and-see and USRAP.

2. I wish to call your attention to Professor Leach's complete approval of cy pres. Leach is the old master who started perpetuities reform:

> "[I]n my view cy pres offers a total and simple solution." Leach, 108 U. Pa. L. Rev. 1124, 1149 (1960).
>
> "One way to put the Rule against Perpetuities in its place is to change the penalty for violation. At present the penalty is: Invalidate the whole interest -- and sometimes a lot more as well. Professor Simes says: Cut the interest down to size by applying the rule of cy pres, permitting the court to reform the gift in such a way that the testator's wishes are carried out to the greatest extent permitted by the Rule.
>
> "I agree to this, and indeed I said it first." Leach & Tudor, The Rule Against Perpetuities 201 (1957).
>
> "A word of caution is in order: This is a job for the repair shop, not the scrap yard. Anyone who thinks it would be a good idea to abolish the Rule against Perpetuities and enact an invention of his own as a substitute should familiarize himself with the confusion invariably attendant upon this type of venture." Id. at 196.

I believe Leach's word of caution is entirely appropriate with regard to the Uniform drafting group's invention of its own.

Sincerely,

Jesse Dukeminier
Professor of Law

JD/2018/dhb
Enclosure

259 Ga. 148

POUND et al.

v.

SHORTER et al. (Two Cases)

Nos. 46328, 46344.

Supreme Court of Georgia.

April 6, 1989.

Trustee under will filed petition to determine validity of a trust created thereunder. The Superior Court, Muscogee County, Rufe E. McCombs, J., found item created a perpetuity and decreed trust be terminated and life beneficiary have fee ownership. Residual beneficiaries appealed. The Supreme Court, Weltner, J., held that trust violated rule against perpetuities, in providing for income to testator's son's widow for life, as widow could conceivably have been unborn at time of testator's death.

Affirmed.

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1. **Perpetuities** ⇐4(15)

"Wait-and-see" exception to rule against perpetuities would not be applied to determine whether widow of son of testator, who could conceivably have been born after testator died thus invalidating a trust, was in fact born before testator's death.

2. **Perpetuities** ⇐4(15)

Trust created by will, which provided that in the event testator's then *unmarried* son died, leaving neither child nor children of deceased wife, but leaving a surviving wife, income from trust would be paid to wife during her life, and upon her death corpus would go to children and descendants of testator's brother and sister, was invalid under rule against perpetuities, as son could conceivably marry woman who had not been born at time of testator's death. O.C.G.A. § 44-6-1.

Edward S. Grenwald, Verner F. Chaffin, H. Quigg Fletcher, Hansell & Post, Atlanta, for Barbara Swift Pound, et al.

Marcus B. Calhoun, Jr., Davidson & Calhoun, P.C., Aaron Cohn, Cohn & Cohn, P.C., Columbus, D. Lurton Massee, Jr., Kilpatrick & Cody, John A. Wallace, King & Spalding, Atlanta, Cecil M. Cheves, Page, Scrantom, Harris & Chapman, P.C., Columbus, for Mildred W. Shorter, et al. in No. 46328.

Aaron Cohn, Cohn & Cohn, P.C., Columbus, for Gabriel Jeremiah Pound, et al.

Marcus B. Calhoun, Jr., Davidson & Calhoun, P.C., Columbus, John A. Wallace, King & Spalding, D. Lurton Massee, Jr., Kilpatrick & Cody, Thomas C. Shelton, Thomas C. Harney, Atlanta, Cecil M. Cheves, Page, Scrantom, Harris & Chapman, P.C., Columbus, Edward S. Grenwald, Hansell & Post, Atlanta, for Mildred W. Shorter, et al. in No. 46344.

WELTNER, Justice.

When Elizabeth Shorter died in 1929, her will created a trust that provided for her one unmarried son as follows: "In trust further, should my son die, either before or after my death, leaving neither child, nor children of a deceased wife surviving him, but leaving a wife surviving him, to pay over the annual net income arising each year from said trust property, in quarterly installments each year, to the wife of my said son, during her life, and upon the death of the wife of my said son, to thereupon pay over, deliver and convey, in fee simple, the corpus of said trust property to the children and descendants of children of my brother ... and sister....."

The son married in 1953 and died in 1987, survived by his widow. He left no descendants. After his death, the trustee bank filed a petition to determine the validity of the trust item. The trial court found that the item created a perpetuity and decreed that the trust be terminated and that the son's widow have fee ownership. Fifty-two lineal descendants of Elizabeth Shorter appeal.

1. The Rule against Perpetuities, adopted first by the legislature in 1863, provides: "Limitations of estates may extend through any number of lives in being at the time when the limitations commence, and 21 years, and the usual period of gestation added thereafter. The law terms a limitation beyond that period a perpetuity and forbids its creation. When an attempt is made to create a perpetuity, the law will give effect to the limitations which are not too remote and will declare the other limitations void, thereby vesting the fee in the last taker under the legal limitations." OCGA § 44–6–1.

[1] 2. We have undertaken a study of both the rule against perpetuities and an alternative approach, commonly called "wait and see."[1] Fifteen states have adopted some form of the "wait and see" approach, and all have done so through legislation.[2] We conclude:

(1) that the traditional rule against perpetuities has been effective so far in Georgia, judging by the few cases brought to invalidate grants, and the even fewer invalidations; and

(2) that the alternative "wait and see" approach has many problems, including initial uncertainty (which is avoided by the traditional rule) and the necessity for selecting a method by which to determine the length of the waiting period.[3]

3. We are not convinced that the goals of certainty and early vesting will be served by adopting the alternative, and accordingly decline to do so.

[2] 4. As the will encompasses the possibilities that the son might marry a woman who was unborn in 1929 (a life *not* "in being") and then predecease her, it violated the rule against perpetuities.

Judgment affirmed.

All the Justices concur.

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1. "The wait-and-see principle permits a court to consider the actual sequence of events occurring after the creation of the interest. Any interest that might possibly be too remote is valid, if under the facts as they actually occur, the interest vests within the period of the Rule." Chaffin, *The Rule Against Perpetuities as Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 1982, 16 Ga.L.Rev. 235, 345.

2. Ten states have adopted an unlimited form of the "wait and see" modification. These are Alaska, Iowa, Kentucky, New Mexico, Nevada, Ohio, Pennsylvania, Virginia, Vermont and Washington. Alaska Stat. § 34.27.020 (1983); Iowa Code § 558.68 (1983); Ky.Rev.Stat. § 381.216 (1972); 1983 N.M. Laws 246; Nev. Rev.Stat. ch. 111 (1983); Ohio Rev.Code Ann. § 2131.08 (1982); Pa.Cons.Stat.Ann. § 6104(b) (1975); Va.Code § 55–13.3 (Supp.1982); Vt.Stat. Ann. tit. 27, § 501 (1975); Wash.Rev.Code § 11.98.010 (1981). The other five have a limited "wait and see" alternative; these are Connecticut, Florida, Maine, Maryland and Massachusetts. Conn.Gen.Stat.Ann. § 45–95 (West 1960); Fla.Stat.Ann. § 689.22(2)(a) (West Supp.1979); Me.Rev.Stat.Ann. tit. 33, § 101 (1978); Md.Est. & Trusts Code Ann. § 11–103(a) (1969); Mass. Gen. Laws Ann. ch. 184A, § 1 (West 1977). See Chaffin, The Rule Against Perpetuities in Georgia, (1984); Waggoner, *Perpetuity Reform*, 1983, 81 Mich.L.Rev. 1718.

3. The problems may be summarized as follows: (1) there is actually no severe problem of grants being invalidated due to a violation of the rule against perpetuities; (2) technical violations of the rule can be avoided by competent drafting, so only unwary counsel is trapped by the rule; (3) there is a big problem of expense and inconvenience during the waiting period; (4) there is an increase in litigation due to the alternative doctrine; (5) much of the testator's estate is diverted to lawyers' fees; (6) most alternative statutes provide for cy pres litigation at the end of the waiting period if the interest has neither vested nor failed, and that litigation is difficult and expensive due to the passage of time; and (7) the alternative does not simplify the perpetuities law. Bloom, *Perpetuities Refinement: There is an Alternative*, 1987, 62 Wash.L.Rev. 23.

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LAWRENCE W. WAGGONER
Lewis M. Simes Professor of Law

July 5, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study L-3013, Uniform Statutory Rule Against Perpetuities

Dear John:

I write in reference to Study L-3013 recommending enactment of the Uniform Statutory Rule Against Perpetuities (Uniform Act) in California. As you know, I was the Reporter for the Uniform Act and have taken an interest in perpetuity reform for many years. I appreciate receiving copies of the additional materials submitted to the Law Revision Commission on this proposal.

The Drafting Committee and I have no misgivings about the Uniform Act. We very much hope for a California enactment. Nevertheless, the letters from Professor Dukeminier and others suggesting the retention of the current California perpetuity reform measure -- the immediate cy pres statute -- lead me to suggest that, if the Law Revision Commission desires a further round of study before approving the Uniform Act for adoption in California, I would welcome that further review. The Commission Staff is known for its professionalism, competence, and impartiality. A further study of the Uniform Act by the Staff would provide an opportunity for all views to be thoroughly examined and tested with care and deliberation.

The basic approach of the Uniform Act is broadly categorized as wait-and-see plus deferred reformation. It may be noted that, during the Drafting Committee's deliberations, Professor Dukeminier urged the Committee to adopt this same basic approach, not the immediate cy pres approach which he now embraces, except that he wanted the Committee to measure the allowable perpetuity

period by causal-relation measuring lives plus 21 years.

In any event, the Uniform Act contains four principal features:

> 1. A contingent future interest (or power of appointment) that is valid under the common-law Rule Against Perpetuities remains valid. This is an important point because it means that the profession can continue to draft for initial validity and can continue to use standard perpetuity-saving clauses; there is no need to adjust current practice.
>
> 2. A contingent future interest (or power of appointment) that would have been invalid under the common-law Rule is given up to 90 years to work out validly. This is the wait-and-see feature of the Uniform Act. The Uniform Act simplified the process of measuring this period by substituting a flat 90 years for the period that would be produced on a case-by-case basis by the controversial measuring-lives approach. The 90-year period is designed to approximate the average margin-of-safety period provided under the wait-and-see method using actual measuring lives (or by standard perpetuity saving clauses).
>
> 3. A contingent future interest (or power of appointment) that does not work out validly within the 90-year period becomes invalid but is subject to reformation to make it valid; within this constraint, the reformation is to come as close as possible to the transferor's manifested plan of distribution.
>
> 4. Commercial transactions are exempted from the Rule Against Perpetuities. (A statutory 30-year time limit on options in gross, rights-of-first refusal, etc., is a quite desirable supplement to this feature.)

Essentially, this method can be described as a <u>"judicial hands-off" approach</u> to perpetuity questions -- "hands-off," that is, except in those very rare instances in which intervention via judicial reformation really becomes necessary.

The Drafting and Review Committees that produced the Uniform Act were composed of Henry Kittleson (Florida) as chairman of the Drafting Committee; then Chief Justice Norman Krivosha of the Supreme Court of Nebraska as chairman of the Review Committee (he attended many of our meetings and took an active part in the process); Justice Marian Opala of the Supreme Court of Oklahoma; many able practitioners; Dean Robert Stein of the University of Minnesota Law School; Charles A. Collier, Jr. (California) as the ABA Advisor; James Pedowitz (New York) as the ABA Section of Real

Property, Probate and Trust Law Advisor; Raymond Young (Massachusetts) as the American College of Probate Counsel Advisor; and Ray Sweat (California) as the American College of Real Estate Lawyers Advisor.

The Uniform Act has the endorsement of the following important national groups:

-- the American Bar Association, on the unanimous recommendation of the Council of the ABA Section of Real Property, Probate and Trust Law

-- the Board of Regents of the American College of Probate Counsel (unanimous)

-- the Board of Governors of the American College of Real Estate Lawyers (unanimous)

-- the Joint Editorial Board for the Uniform Probate Code (unanimous, by vote taken in February 1989)

Though promulgated less than three years ago, the Uniform Act has been enacted in seven states:

-- Connecticut, repealing its former limited form of wait-and-see statute

-- Florida, repealing its former full-scale type wait-and-see statute that failed to specify how the waiting period was to be determined

-- Michigan, adopting wait-and-see for the first time

-- Minnesota, adopting wait-and-see for the first time (effective date deferred)

-- Nevada, repealing its former causal-relation type wait-and-see statute, the type advocated by Professor Dukeminier throughout the last 35 years or so

-- Oregon, adopting wait-and-see for the first time

-- South Carolina, adopting wait-and-see for the first time

On its way to enactment in many of the above states, the Uniform Act has benefitted from endorsements by councils of state bar groups and law revision commissions. Many of these groups included local academic lawyers in their membership who were instrumental in supporting the Act's adoption.

In addition, the Uniform Act is endorsed in written letters by leading scholars in the field, such as Alexander, Browder, Chaffin, Halbach, Thomas Jones, Kurtz, Langbein, Fellows, Stein, Allan Smith, and Wellman. I wish to note that Professor Dukeminier's letter seeks to dismiss the endorsements of these prominent scholars by suggesting that "almost all of [them]" have a Conference connection. Yet, of the eleven, only five that I know of are affiliated with the Uniform Laws Conference in one connection or another. They are Jones, Langbein, Stein, and Wellman, who are Commissioners; and Halbach, who is an ABA Representative to the Joint Editorial Board for the Uniform Probate Code. Alexander had a connection several years ago as the reporter for an act on living probate, but no act was ever produced and the project was abandoned by the Conference. If the others now have or ever have had a connection to the Uniform Laws Conference, I am unaware of it. Other academics, also quite unconnected to the Uniform Laws Conference, have also written or spoken to me privately expressing approval of the Uniform Act.

An Act that has met the test at so many different levels and in so many different forums surely cannot fairly be labeled "Waggoner's phantom ship"[1] or "a contraption worthy of Rube Goldberg."[2]

This brings me to an extremely important point. Perpetuity reform is essentially a line-drawing exercise. Any line-drawing exercise will necessarily admit of many potential solutions. The challenge in developing uniform perpetuity legislation is to identify a single line out of many possible ones. Put differently, there can be a variety of ways to accomplish the goal that we all share. The choice of one solution from the many is not likely to please persons who have devoted effort in good faith to a different solution. The problem is not that the other solutions do not work or cannot be made to work. <u>The problem is that a Uniform Act can adopt only one solution</u>. If on balance the adopted solution works well, then greater uniformity can be achieved over time.

The cause of uniformity is a worthy one. Professor Halbach's letter sets forth the case for uniformity:

> Many estates from which trusts are funded, plus the effects of powers of appointment, involve multi-state sources of contacts. Without uniformity many and

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[1] Dukeminier, The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo, 34 UCLA L. Rev. 1023, 1068 (1987).

[2] J. Dukeminier letter to John DeMoully of June 9, 1989, p. 8.

serious conflict of laws problems will result.

Now that a Uniform Act has finally been promulgated and is the subject of an emerging yet still fragile consensus, the cause of uniformity ought not be lightly shunted aside. Again, as Professor Halbach notes:

> It may be some years before all or nearly all of the states will act on a modern reform, but when the job is done we should not indefinitely have to cope (in planning, in administration and in court) with two basically inconsistent types of solutions.

The Drafting Committee and I fully believe that a careful, independent review of the arguments will conclude that the balance of advantages favors the Uniform Act.

I am enclosing memoranda addressing some of the concerns that have been raised. I stand ready to supply the Staff with additional position papers responding even more fully to these concerns or to any other concern that arises in the course of the Commission's deliberations.

Yours sincerely,

Lawrence W. Waggoner
Lewis M. Simes Professor of Law
Reporter, Uniform Statutory Rule Against Perpetuities

Encls.

TO: CALIFORNIA LAW REVISION COMMISSION

FROM; LAWRENCE W. WAGGONER, Simes Professor of Law, University of Michigan Law School; Reporter, Uniform Statutory Rule Against Perpetuities

DATE: July 5, 1989

SUBJECT: FREQUENCY OF PERPETUITY VIOLATIONS AND PERPETUITY CASES

I conducted a WESTLAW computer check of cases in which the phrase "Rule Against Perpetuities" appeared, for the years 1987 and 1988 and for the first six months of 1989 -- a 2 1/2 year stretch. The result: 82 state cases and 14 federal cases, many of which are unreported cases.[1]

Drawing conclusions about the frequency of violations of the common-law Rule Against Perpetuities from the number of reported appellate decisions is misleading. Many perpetuity violations go undetected, making it a matter of luck as to which ones are cut down and which ones escape. See, e.g., Fruehwald, Rule Against Perpetuities Savings Clauses, 30 Ind. B. A. Res Gestae 378 (1978). Ms. Fruehwald found:

> After reviewing the [Indiana] Supreme Court's decision in Merrill [v. Wimmer, 481 N.E.2d 1294 (Ind. 1983)], this author had an opportunity to review some wills and trusts prepared by various Indiana practitioners.... While it was not surprising that several of the documents this author reviewed violated the [R]ule, it was surprising that so few of the documents contained 'savings clauses' designed to save the bequest if the [R]ule was violated.

Furthermore, the number that are detected and litigated may not be accurately reflected by the number of reported appellate decisions. As indicated above, many of the cases that showed up on the computer check were unreported cases.

In addition, Charles A. Collier, Jr., Esq., the American Bar Association Advisor to the USRAP Drafting Committee represented to the Committee that in Los Angeles County a number of perpetuity violations have been reformed, without appeal, by the lower courts under the California reformation statute, Cal.Civ.Code § 715.5.

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[1] In the press of time, I have not been able to inspect the opinions or synopses of all of these cases; some of them, on inspection, may turn out not to be true perpetuity cases.

Notice, too, that perpetuity violations can occur even when a saving clause is inserted, as in the not infrequent instances of irrevocable inter-vivos trusts that incorrectly gear the perpetuity-period component of the saving clause to lives in being at the settlor's death.

TO: CALIFORNIA LAW REVISION COMMISSION

FROM: LAWRENCE W. WAGGONER, Simes Professor of Law, University of Michigan Law School; Reporter, Uniform Statutory Rule Against Perpetuities

DATE: July 5, 1989

SUBJECT: INFECTIOUS INVALIDITY UNDER THE UNIFORM ACT

Professor William F. Fratcher of the University of Missouri-Columbia has previously corresponded directly with me raising his concerns that USRAP does not abolish the doctrine of infectious invalidity.

Professor Fratcher and I agree that that doctrine ought to be abolished under USRAP. I concur in the statement of the Law Revision Commission Staff in the Third Supplement to Memorandum 89-53 that the Comments to USRAP, together with the statutory section on reformation, are sufficient to abolish that doctrine. However, in deference to Professor Fratcher's contrary view, I have worked with him on a statutory provision that could be added as subsection (b) to Section 3. I am surprised that his June 15 letter to you did not mention this and did not enclose a copy of that statutory provision, since he has given me reason to believe that he is satisfied with that statutory provision and intends to publish and recommend it in the 1990 pocket supplements to Scott on Trusts and Simes and Smith on Future Interests.

In any event, I enclose a copy of a version of Section 3 that incorporates our statutory draft, in case the Staff or Commission comes to the conclusion that statutory language is necessary. I add a simpler alternative as well, which also does the trick.

I stress that neither statutory provision has been submitted for approval to the Drafting Committee of the Uniform Statutory Rule Against Perpetuities nor to NCCUSL. As the Reporter for the Act, however, I can say that in my opinion they are both entirely consistent with USRAP and its Comments; indeed, each is declaratory of the views expressed in the Comments. Even so, statutory drafting is an enormously difficult business in this area, and so I offer these provisions as a working draft for the Law Revision Commission Staff to study and possibly improve upon, if statutory language is thought desirable on the question.

SECTION 3. REFORMATION.

(a) Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by Section 1(a)(2), 1(b)(2), or 1(c)(2) if:

(1) a nonvested property interest or a power of appointment becomes invalid under Section 1 (statutory rule against perpetuities);

(2) a class gift is not but might become invalid under Section 1 (statutory rule against perpetuities) and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) a nonvested property interest that is not validated by Section 1(a)(1) can vest but not within 90 years after its creation.

(b) The court's authority to reform under this section is limited to prospective reformation, effective no earlier than the filing of the petition for reformation. In reforming, the court may prospectively alter existing interests or powers and create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. The court shall not retroactively (i) strike down, limit, or alter the title, powers, conveyances, mortgages, leases, or other acts of a trustee or (ii) invalidate a conveyance, mortgage, or lease given by a person who was in peaceable possession before the filing of the petition for reformation. The common-law rule known as the doctrine of infectious invalidity is abolished.

[a simpler alternative]

(b) The common-law rule known as the doctrine of infectious invalidity is abolished.

TO: CALIFORNIA LAW REVISION COMMISSION

FROM: LAWRENCE W. WAGGONER, Simes Professor of Law, University of Michigan Law School; Reporter, Uniform Statutory Rule Against Perpetuities

DATE: July 5, 1989

SUBJECT: SAMPLE RECENT CASES COMPARING THE UNIFORM ACT WITH IMMEDIATE CY PRES

The current California perpetuity statute adopts the immediate cy pres method. The Uniform Act adopts the method of wait-and-see with deferred reformation.

The approaches are fundamentally inconsistent. The immediate cy pres method is a "judicial hands-on" approach to perpetuity reform, under which every violation of the common-law Rule Against Perpetuities, except those saved by a specific provision such as Cal. Civ. Code § 715.7, creates a potential court case.

The Uniform Act adopts a "judicial hands-off" approach--hands off, that is, except in those rare instances in which judicial intervention via reformation really becomes necessary. The Uniform Act will provide a nearly litigation-free environment insofar as perpetuity matters are concerned.

This memorandum compares the application of the two approaches in the context of two recent perpetuity cases:

> Estate of Anderson v. Deposit Guaranty Nat'l Bank, 541 So.2d 423 (Miss. 1989); and
>
> Arrowsmith v. Mercantile-Safe Deposit and Trust Co., 313 Md. 334, 545 A.2d 674 (1988).

Note that both of these cases involved lawyer-drawn wills. Neither involved a home-made will or other document. Neither involved a fanciful disposition such as "to my dog Trixie and her progeny" or "to the first vegetarian who becomes governor of California."

1. Estate of Anderson v. Deposit Guaranty Nat'l Bank

The Facts. The facts of Estate of Anderson v. Deposit Guaranty Nat'l Bank, 541 So.2d 423 (Miss. 1989), are quite simple. The testator's will, drafted by a lawyer, created a trust to last for 25 years from the date of the admission of the will to probate. The income was to be used for the education of the descendants of the testator's father. The trust was to terminate at the end of the 25-year period, at which time the trust corpus was payable to the testator's nephew, Howard Davis or, if Howard is not then living, to the heirs of Howard's body.

The testator, a childless bachelor, died in 1984. The testator had a brother and a sister, but they predeceased him. The testator was survived, however, by his brother's four children and seven grandchildren; and by his sister's child and five grandchildren -- in all, there were 17 surviving descendants of his parents.

Violation of Common-law Rule. The testator's trust violated the common-law Rule Against Perpetuities. The reason was that the contingent remainder in the corpus might not vest within a life in being plus 21 years because all 17 of the descendants of the testator's father living at the testator's death might die within four years after the testator's death!

The Actual Holding. The Supreme Court of Mississippi expressed grave impatience with the fact that the common-law Rule would strike down this quite reasonable trust. The court took two bold steps to avoid that result: the court judicially adopted the wait-and-see method, using causal-relation lives; and (2) the court sanctioned reformation via judicially inserting a perpetuity saving clause into the instrument. To my knowledge, this is the first appellate decision ever to do that.

There is a feature of the Anderson case that is striking indeed, which is how closely the facts fit the rationale of the 90-year period of the Uniform Act. As pointed out in Waggoner, "The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Period," 73 Cornell L. Rev. 157, 166 & footnote 30 (1988), the youngest measuring life under wait-and-see -- whether causal-relation lives are used or the Restatement (Second)'s list is used -- is likely to be the transferor's youngest descendant living at the transferor's death (or, in the Anderson case, the youngest descendant of the transferor's parents). In the approximation used by the Uniform Act to develop the 90-year period, the youngest measuring life, on average, was taken to be

about 6 years old.[1]

The Anderson court identified the measuring lives as the beneficiaries of the trust -- the descendants of the testator's father living at the testator's death. The youngest of these descendants was Polly Douglas Robertson, a one-year old granddaughter of the testator's deceased brother. In addition to Polly, there were several other young descendants who also were identified as measuring lives -- a 2-year old grandson of the testator's deceased sister, a 3-year old granddaughter of the testator's deceased brother, and a 5-year old grandson of the testator's deceased brother.

If Polly, the youngest, lives out her statistical life expectancy of 74.6 years (if a sex-neutral table is used),[2] and if the 21-year period following her death is added in,[3] the wait-and-see period marked off in the Anderson case would turn out to be about 96 or 99 years. (Even if Polly dies prematurely, at least one of the other young descendants is likely to outlive his or her statistical life expectancy, so the period will work out about the same either way.) Note also that this would be about the same margin-of-safety period of time that a standard perpetuity saving clause would have produced also.

Of course, the actual trust in Anderson will last only 25 years. The fact that the allowable period adopted by the court is in the high 90's, and the fact that the Uniform Act marks off a 90-year period for all cases, will not make the trust in Anderson last longer than 25 years. It just simply means that there will be a quite long, quite harmless, and quite ignored unused end-portion of the allowable period.

Note well that the solution adopted by the Mississippi Supreme Court -- wait-and-see or, in the alternative, judicial insertion of a standard perpetuity saving clause -- allowed the testator's trust to go ahead without any change at all in its terms. The testator's intent was not defeated or altered in any way. There was a cost, however: the cost of the lawsuit and the appeal all the way to the state supreme court.

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[1] The 90 years was derived by adding 21 years to the 69 years of remaining statistical life expectancy of a 6-year old (21 + 69 = 90).

[2] See Table 109 of the 1989 Statistical Abstract of the United States.

[3] The court indicated it would add that period in. See 541 So.2d at 431.

California Immediate Cy Pres Statute. How would the Anderson case have been decided under the California immediate cy pres statute? There is no appellate court precedent in California -- or in any other state to my knowledge, except for the recent Mississippi Anderson decision -- for judicially inserting a perpetuity saving clause. Rather, California precedent suggests that the court would reduce the term of the trust to 21 years. If this approach were adopted, the testator's quite reasonable intent would have been defeated -- the trust would not have been invalidated in its entirety, as under the common-law Rule, but the terms would have been altered.

Perhaps the California courts of today, despite the earlier appellate court precedent, would be inclined to apply the immediate cy pres statute differently. Rather than reduce the term of the trust to 21 years, the California courts of today might do what the Mississippi court did -- reform by judicially inserting a standard perpetuity saving clause. This approach would not alter the testator's intention, but it would still require the cost of a lawsuit.

And, if in fact the California court were to break new ground and sanction the judicial insertion of perpetuity saving clauses, the margin-of-safety period marked off by these judicially inserted saving clauses would add up to around the same period as the 90-year period the Uniform Act adopts without the cost of judicial intervention.

Would Professor Bloom's statute have avoided the cost of this lawsuit? No. It contains no specific provision relating to 25- year trusts. Instead, the general cy pres provision of section 4 would have to be invoked, putting the case in the same posture as under the current California immediate cy pres statute. A lawsuit would still have to be brought to determine whether to reform by reducing the term of the trust to 21 years or, instead, to insert the saving clause.

Uniform Act. Had the Anderson case been governed by the Uniform Act, Mr. Anderson's quite reasonable trust would have gone into effect as he intended, the trustee would now be using the income for the education of the descendants of his father as he intended (without the deduction of lawyer's fees to pay for both sides of a perpetuity challenge), and at the end of the 25-year period the corpus would be distributed.

No court would have had to figure out how to reform it to save it or partially save it. No lawyers would have been hired to argue different sides of the case. No court would ever even have heard of a perpetuity problem in the trust.

2. Arrowsmith v. Mercantile-Safe Deposit and Trust Co.

The Facts. Arrowsmith v. Mercantile-Safe Deposit and Trust Co., 313 Md. 334, 545 A.2d 674 (1988), is a more complicated case. George H. C. Arrowsmith died in 1983, leaving a will dated July 29, 1982. George's 1982 will, drafted by a lawyer, expressly revoked all prior wills and exercised a testamentary power of appointment over some $7 million in assets of an irrevocable inter-vivos trust created by his mother in 1953.

By his will, George exercised his power of appointment by creating a trust. Most of the corpus of that trust was to be held for George's three children, Edith Ann (born in 1959), Jeffrey (born in 1961), and Stephen (born in 1962). At George's death, therefore, Edith Ann was about 24 years old, Jeffrey was about 22, and Stephen was about 21. None had children of their own.

George's trust did not grant the children a right to the income from their respective shares. Rather, the trustee was given discretionary power to pay the income to them or accumulate it; and the trustee was also given the discretionary power to invade the corpus of each child's share for the child's support and maintenance.

Upon the death of each child, that child's share was to be divided among that child's then living descendants, per stirpes; if none was then living, then to that child's then living brothers or sister, with the share of any deceased brother or sister going to that sibling's then living descendants, per stirpes.

The Actual Holding. The Maryland court invoked the common-law Rule Against Perpetuities and held the remainder interests in the corpus of each child's share to be invalid. In addition, the trustee's discretionary powers over income and corpus were also invalid. Result: The court held that George's trust was entirely invalid, and the property was ordered distributed outright to each child in one-third shares. George's intention was fully defeated.

California Immediate Cy Pres Statute. Under the California immediate cy pres statute, the court is to save George's trust "to the extent that it can be reformed or construed within the limits of [the common-law Rule] to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent."

There is a dearth of appellate court opinions under the immediate cy pres method. So far, all the appellate court decisions in and out of California have involved interests that were invalid because of an age contingency in excess of 21 or a period in gross exceeding 21 years, and except for the recent Anderson case, above, the court reformed the disposition to lower the age contingency to 21 or reduce the period in gross to 21.

The lack of appellate guidance in a case like Arrowsmith makes it hard to feel confident about what type of reformation a court working under this statute would be willing to approve. Maybe a California court of today would be willing to insert a perpetuity saving clause. If so, the approach is the equivalent of giving the case the benefit of wait-and-see, but in an inefficient way because of the cost of the lawsuit.

If the court really were to strain to reform George's trust to let it take effect as far as possible and still comply with the common-law Rule, the court might eliminate the trustee's discretionary powers over income and corpus and instead give each child a right to the income for life. This would save the income interest for each child.

A more sophisticated approach would be to validate the trustee's discretionary powers for the 21-year period following George's death, and then give each child a right to the income for the remainder of that child's life. That would allow the trustee to exercise the discretionary powers until each child was in his or her mid-40's.

What about the remainder interest in the corpus at each child's death? How could those interests be reformed to make them valid and still come fairly close to George's intent? A reasonable possibility is to "vest them in interest" as of 21 years after George's death or as of the child's death, whichever event occurs first. This again is not too bad a result, because as noted the children would then be in their mid-40's and would probably have then completed their child-bearing. Note that "vesting in interest" is quite different from "vesting in possession." The trust would not be terminated prematurely, which means that distribution of the corpus would still be postponed until each child's death.

Note that under this hypothesis, validation of George's trust requires the complete or partial elimination of the discretionary powers of the trustee over income and corpus, rendering the trust less flexible than originally drafted!

Would Professor Bloom's statute have avoided the cost of this lawsuit? No, because there is no specific provision in the

statute governing a case like this. The general cy pres provision of section 4 would apply, causing a lawsuit to determine how best to reform this trust to comply with the common-law Rule.

Uniform Act. In contrast to the immediate cy pres method, the application of the Uniform Act to this case is simplicity itself.

First, no immediate litigation would be required and more than likely no litigation would ever be required.

Second, the trust would go into effect as written, with the discretionary powers of the trustee fully operable for up to 60 years.[4]

Remember the ages of George's children at his death -- Edith was 24, Jeffrey was 22, and Stephen was 21. Add 60 years to their ages and you get age 84 for Edith, age 82 for Jeffrey, and age 81 for Stephen. Edith's share would be valid and distributed to her descendants if she dies at age 84 or under; Jeffrey's share would be valid and distributed to his descendants if he dies at 82 or under; Stephen's share would be valid and distributed to his descendants if he dies at 81 or under.

If all three children die under these ages, no court contact at all would be required under the Uniform Act. Statistically speaking, each child is more likely than not to die under these ages, given that life expectancy now is 75 years on average. This is not to suggest, of course, that it is not quite possible for one, two, or all three of these children to live into low 80's.

Deferred Reformation Under the Uniform Act. Because there is a possibility in this case that judicial intervention really would become necessary, I now turn to that possibility, to see how the deferred reformation feature of the Uniform Act would operate. Suppose, then, that Stephen lives beyond 81. A reformation suit would then be in order as to Stephen's share. How would the court reform? I submit that the notion that such a case would generate complex litigation with staggering fees is a

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[4] At common-law, and under the Uniform Act, the perpetuity period begins running when George's mother created the original trust, in 1953. Under the Uniform Act, this would means that, as of George's death in 1983, 60 years would remain of the allowable period before any interest or power in the trust would become invalid and subject to reformation.

smokescreen. The court would seldom be engaged in hearing extrinsic evidence as to George's intent, for there likely will be none. The language of the reformation section of the statute requires the court to be guided by the transferor's "manifested plan of distribution." Transferors manifest their plans of distribution in the language of the instrument. The written terms of the trust will provide the guidance as to how to reform "in the manner that most closely approximates the transferor's manifested plan of distribution," within the constraint of vesting all interests within the allowable period.

One of the advantages of a Uniform Act is the opportunity to use the Official Comments to give guidance to courts in a variety of cases. As to a case like Arrowsmith, the court will find considerable guidance in those Comments. In fact, Example (2) in the Comment to Section 3 is nearly exactly on point. The court will find that Stephen is like Z in that example. Working under that example, the court should be willing to approve the following modifications to the terms of Stephen's share:

> (1) the trustee's discretionary power over the income and corpus would be eliminated as of the expiration of the allowable period, probably substituting for Stephen a vested right to the income for the remainder of his life; and
>
> (2) the court will vest the remainder interest in the corpus of Stephen's share in his descendants, per stirpes, who are living as of the expiration of the allowable period, with possession delayed until Stephen dies (which should not be very many more years).

"Dead-hand Control" Comparison. Note that under the reformation suggested above under the immediate cy pres method, the trust will be permitted to last just as long as the Uniform Act permits it to last -- for the life of each of George's children. There is no difference between the two methods on that score.

A Final Comment. The overall lesson of this memorandum is extremely important to any decision-maker considering which type of perpetuity reform legislation to favor. The lesson is: The immediate cy pres method keeps the judicial perpetuity pot boiling. The Uniform Act cools that pot down by creating a nearly litigation-free perpetuity environment.

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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July 12, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Re: USRAP

Dear John:

I wish to respond to a memorandum of Professor Waggoner, enclosed in his letter of July 5, 1989, comparing USRAP with cy pres. Professor Waggoner claims that USRAP will result in less litigation than cy pres. It is my belief that the precise opposite is more likely to be the case.

I have two reasons for this prediction. First, one of the chief effects of USRAP will be, as Professor McGovern has pointed out in his letter to the Commission, the saving for 90 years of poorly drafted trusts that violate the Rule. Poorly drafted trusts are litigation-breeders. Second, USRAP abolishes the rule, incorporated in Cal. Civ. Code § 715.5, that an instrument shall be construed so as to avoid violating the Rule. This constructional rule often has the effect of closing classes of beneficiaries so as to exclude persons born after the testator's death. Keeping the class open long after the testator's death opens the door to litigation about who comes into the class under future changing circumstances in the family.

To illustrate this, take a trust "for the issue of Nina." Such a trust was litigated in In re Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983). The court closed the class of issue as of the testator's death because if the class were allowed to remain open indefinitely, it would violate the Rule against Perpetuities. Presumably the California court would come to the same result under Cal. Civ. Code § 715.5.

Under USRAP, the trust for the issue of Nina would continue for 90 years, and include afterborn issue as well as issue in being at the testator's death. Few constructional questions produce as much litigation as who comes within a class of "issue." Will this class include legally (or equitably) adopted issue, illegitimate issue, stepchildren who would have been adopted but for a legal barrier, children adopted out of the family, children

produced by means other than sexual intercourse? The Restatement (Second) of Property, Donative Transfers §§ 25.1 - 25-9 (Tent. Draft No. 8, 1985) contains a 151-page discussion of this topic, with notes citing a slew of cases. Under Cal. Civ. Code § 715.5, all of these questions -- and litigation -- will be avoided where, to save the gift, the court closes the class of issue at the testator's death.

What Professor Waggoner fails to recognize is that construing the gift to avoid the Rule against Perpetuities, and reforming it if necessary, often has an extremely beneficial effect in avoiding other kinds of litigation that will arise from poorly drafted trusts extended for 90 years.

Sincerely,

Jesse Dukeminier
Professor of Law

JD/2041/dhb

EXHIBIT 11

The University of Michigan
Law School

Ann Arbor, Michigan 48109-1215

LAWRENCE W. WAGGONER
Lewis M. Simes Professor of Law

Hutchins Hall
(313) 763-2586

October 16, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study L-3013 - Uniform Statutory Rule Against Perpetuities

Dear John:

I write to comment upon Professor Dukeminier's letter dated July 12, 1989, in which he refers to my memorandum of July 5, 1989, entitled "Sample Recent Cases Comparing the Uniform Act with Immediate Cy Pres."

Professor Dukeminier's letter argues that the Uniform Act will lead to more, not less, litigation. To prove his argument, Professor Dukeminier's letter cites the case of In re Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983), in which the Supreme Court of Nebraska, to avoid a perpetuity violation, closed a class of "issue of Nina Carden" as of the testator's death. Professor Dukeminier argues that under the Uniform Act, the class would not be closed as of the testator's death, and that the trust would be allowed to continue for 90 years, during which "much" litigation would arise as to whether adopted or illegitimate children, etc., are included in the class.

For the reasons outlined in the enclosed memorandum, I do not believe the Criss case supports Professor Dukeminier's argument. Contrary to Professor Dukeminier's argument, a California court operating under the Uniform Act would very likely close the class of "issue of Nina Carden" as of the testator's death, just as the Nebraska Supreme Court did in the actual Criss case, thereby avoiding any potential litigation concerning the status questions Professor Dukeminier predicts would cause "much" litigation.

I thoroughly regret the length of the enclosed memorandum. It often takes more effort to untangle a questionable analysis of a case than to advance one, and this is such a situation. Hence, the need to respond to Professor Dukeminier's short letter in some detail.

One of the objectives of the Uniform Act is to create a nearly litigation-free environment insofar as perpetuity matters are concerned. Put specifically, the objective is to limit perpetuity litigation to purposive cases by eliminating cases of the wasteful variety, such as Estate of Anderson, the recent Mississippi case discussed in my July 5 memorandum, in which the validity of a 25-year trust was litigated.

Like Anderson, most trusts, by far, will have terminated by their own terms far short of the expiration of the vesting period allowed by the Uniform Act, and will never need to be litigated. This limits perpetuity litigation to the purposive variety, which for the most part are those few cases in which the allowable vesting period has actually been exceeded and reformation has truly become necessary. An occasional purposive case can also arise where the constructional preference for validity (which, contrary to Professor Dukeminier's letter, is not abolished by but continues under the Uniform Act) plays a part in resolving an ambiguity that would have had to be resolved no matter what perpetuity law or perpetuity reform is in effect. In re Trust of Criss is a case of this sort, as the enclosed memorandum demonstrates.

The basic point of my memorandum of July 5 was to show that the Uniform Act achieves the objective of eliminating wasteful, nonpurposive perpetuity litigation, such as arose in Estate of Anderson. The validity of that basic point is undeniable. Although my July 5 memorandum used only Estate of Anderson and another recent case to demonstrate that point, the point can be endlessly demonstrated, with case after case after case.

The fact that the Uniform Act eliminates perpetuity litigation of the wasteful variety is one of the Act's great strengths, undoubtedly accounting in part for its support from the American Bar Association, the American College of Probate Counsel, the American College of Real Estate Lawyers, the Joint Editorial Board for the Uniform Probate Code, and leading academic lawyers such as Professor Halbach, not to mention its enactment in nearly twenty percent of the states in its two-and-a-half years of existence. Under the wait-and-see/deferred-reformation approach of the Uniform Act, almost none of the perpetuity cases that have ever been litigated in this country would have been litigated.

Yours sincerely,

Larry Waggoner

Encl.

TO: CALIFORNIA LAW REVISION COMMISSION

FROM: LAWRENCE W. WAGGONER, Reporter, Uniform Statutory Rule Against Perpetuities

SUBJECT: An Analysis of In re Trust of Criss Under the Uniform Act

DATE: October 16, 1989

In his letter of July 12, 1989, Professor Dukeminier puts forth the proposition that the Uniform Statutory Rule Against Perpetuities (Uniform Act or USRAP) would lead to more, not less, litigation. As proof, Professor Dukeminier's letter cites the case of In re Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983).

I do not believe the Criss case supports Professor Dukeminier's proposition.

Professor Dukeminier's letter states:

> To illustrate [the proposition], take a trust "for the issue of Nina." Such a trust was litigated in In re Trust of Criss, 213 Neb. 379, 329 N.W.2d 842 (1983). The court closed the class of issue as of the testator's death because if the class were allowed to remain open indefinitely, it would violate the Rule Against Perpetuities. Presumably the California court would come to the same result under Cal. Civ. Code § 715.5.
>
> Under USRAP, the [Criss] trust for the issue of Nina would continue for 90 years, and include afterborn issue as well as issue in being at the testator's death. Few constructional questions produce as much litigation as who comes within a class of "issue." Will this class include legally (or equitably) adopted issue, illegitimate issue, stepchildren who would have been adopted but for a legal barrier, children adopted out of the family, children produced by means other than sexual intercourse? The Restatement (Second) of Property, Donative Transfers §§ 25.1 - 25-9 (Tent. Draft No. 8, 1985) contains a 151-page discussion of this topic, with notes citing a slew of cases. Under Cal. Civ. Code § 715.5, all of these questions -- and litigation -- will be avoided where, to save the gift, the court closes the class of issue at the testator's death.

My own analysis of the Criss case differs from Professor Dukeminier's: I believe that, were the Criss case governed by the Uniform Act in California, it is reasonable to expect that:

(1) a California court would still close the class of issue as of the testator's death (just as the Nebraska court did in the actual Criss case); and

(2) even if not, the status questions raised by Professor Dukeminier would be very unlikely to lead to additional litigation.

To give a fair analysis of the Criss case, a more thorough statement of the facts is required than Professor Dukeminier's description of the case as involving "a trust 'for the issue of Nina.'" (I attach the full opinion in the Criss case as Exhibit D.)

The Facts. The Criss trust is considerably more complicated than one "for the issue of Nina."

The testator, Clair Criss, died in 1952, leaving a will devising the residue of his estate in trust. The trustee, the Omaha National Bank, was to pay the income to his widow, Mabel Criss, for life plus whatever amounts of principal the trustee deemed necessary; at Mabel's death, the principal was to pour over into an inter-vivos trust created by Mabel in 1942, to be administered according to the original and unmodified terms of that receptacle trust.

A somewhat unusual feature of this case is that, following Clair's death, his widow Mabel renounced her interest in the residuary trust created by his will and elected to take a forced share in his estate. This had the effect of accelerating the pour-over provision, so that the residue of Clair's estate immediately poured over into Mabel's inter-vivos trust.

Mabel's inter-vivos trust reserved for Mabel a right to receive a monthly allotment of $200 from the income for her lifetime. Upon her death, a $200 monthly allotment from the income was to go to each of nine individuals or units:

1. Nina G. Engler;

2. Nina Carden;

3. the issue of Nina Carden, as one unit;

4. Mrs. Deane Criss;

5. Minnie Smith and Stella McDonald, as one unit;

6. Sally Mahoney;

7. Margaret Kunce;

8. Leolla Chambers;

9. Fannie and Leonard Cross, as one unit.

The court held that Mabel's renunciation caused her to be treated as if she predeceased her husband, Clair. This, the court held, had the dual effect of (i) terminating her right to a $200 monthly income allotment for her lifetime, and (ii) accelerating the above nine $200 monthly income allotments, so that "these income beneficiaries should have begun receiving payments as of the date of death of [the testator] Clair C. Criss [in 1952]." 329 N.W.2d at 854.

Note carefully when the trust was to terminate. As I shall point out later, the event triggering termination has a profound bearing on the time when the class of issue of Nina Carden would be closed. Under the terms of the trust, the termination-triggering event was "the death of all the persons and members of all the units ...." (Emphasis added.)

At the testator's death, Nina Carden (the testator's niece) had two children, Claire Griffen (age 16) and Nina Evans (age 12). (When Mabel created her inter-vivos trust in 1942, these children were ages 6 and 2, respectively.[1]) Nina Carden never

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[1] Under section 2(c) of the Uniform Act, the 90-year maximum period allowed for vesting begins to run in 1942, when Mabel's inter-vivos trust was created, not in 1952 when the testator, Clair, died and the residue of his estate poured over into Mabel's trust. (The rationale for this, as set forth in the Official Comment to section 2, is that if Mabel's trust had included a perpetuity saving clause, that clause would be geared to lives in being at the creation of the trust and would have governed the property subsequently poured over into the trust from the residue of Clair's estate.)

Like the Anderson case (see my memorandum of July 5, 1989), the facts of the Criss case closely fit the rationale of the 90-year period of the Uniform Act. As pointed out in Waggoner, "The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Period," 73 Cornell L. Rev. 157, 166 & footnote 30 (1988), the youngest measuring life under wait-and-see -- whether causal-relation lives are used or the Restatement (Second)'s list is used -- is likely to be the transferor's youngest descendant living at the transferor's death (or, in the Criss case, the youngest descendant of Nina Carden). In the approximation used

had any more children, but after the testator's death, her two children married and had children of their own -- Claire Griffen had two children, Amy and David; Nina Evans had four children, Timothy, Michael, Stephen, and Susan. Mabel died in 1978, after Nina Carden's six grandchildren were born.

Common-law Rule Against Perpetuities. Because eight of the nine $200 monthly income allotments went to individuals by name, none of these eight raised a perpetuity problem.

The third $200 monthly income allotment was to "the issue of Nina Carden, as one unit." A crucial point to be noted about this $200 monthly income allotment to "the issue of Nina Carden, as one unit" is that it raised a question that would need answering even if it raised no perpetuity problem at all -- e.g., even if the trust document had expressly required the trust to terminate 21 years after the testator's death or if the trust document had contained a perpetuity saving clause. The reason is that the trustee must know the identity of the trust's beneficiaries, to know amongst whom to divide the third $200 monthly income allotment.

Initially worth considering in this case are three interpretations of the $200 monthly income allotment "to the issue of Nina Carden, as one unit":

> Option (1): close the class as of the testator's death, as the court did in the actual Criss case (under this option, the class includes only Nina's two children, i.e., Claire Griffen and Nina Evans);
>
> Option (2): close the class as of Mabel's death (under this option, the class includes only Nina's two children, Claire Griffen and Nina Evans, and six grandchildren, Amy, David, Timothy, Michael, Stephen, and Susan);
>
> Option (3): allow the class to remain open indefinitely (under this option, the class not only includes Nina's two children and six grandchildren, but remains open -- in the nature of the old "fee tail" estate -- to take in

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by the Uniform Act to develop the 90-year period, the youngest measuring life, on average, was taken to be about 6 years old.

In the Criss case, the youngest measuring life would have been Nina Carden's 2-year-old child, Nina; the remaining life expectancy of a 2-year-old is 74.5 years, which (with the 21-year period added in) gives a maximum vesting period of 95.5 years (74.5 + 21 = 95.5), i.e., a period somewhat longer than allowed by the Uniform Act.

all afterborn issue, i.e., the grandchildren's children, their children's children, their children's children's children, and so on indefinitely until Nina's descending line completely dies out).

Because the lawyer who drafted Mabel's trust did not insert a perpetuity saving clause, the resolution of this question also had perpetuity overtones. Only Option (1) completely avoids a violation of the common-law Rule Against Perpetuities (common-law Rule). Under either Option (2) or Option (3), there would be a perpetuity violation. Option (2) would not cause a violation as to the $200 monthly income allotment "to the issue of Nina Carden, as one unit,"[2] but it would cause a violation as to the remainder interest taking effect at the death of the last surviving income beneficiary. Option (3) would cause a perpetuity violation as to both the $200 monthly income allotment "to the issue of Nina Carden" and the remainder interest taking effect at the death of the last surviving income beneficiary.

When the Criss case was decided, the jurisdiction involved, Nebraska, followed the common-law Rule Against Perpetuities, unmodified by statute. Nebraska did not then and does not now have a statute like the statute cited by Professor Dukeminier, Cal. Civ. Code § 715.5. When, shortly after Criss was decided, the Nebraska legislature enacted a perpetuity-reform measure, it chose the Uniform Act, not a statute like the California statute.

In any event, the Nebraska Supreme Court adopted Option (1), to avoid a violation of the common-law Rule.[3] In doing so, the court employed a legal principle derived from the common law -- the so-called constructional preference for validity. The constructional preference for validity is that if a document is fairly susceptible to more than one interpretation, one of which violates the common-law Rule and the other of which does not, the court should adopt the interpretation that does not violate the common-law Rule. The Nebraska court quoted from an article by Professor Casner, which said:

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[2] The class of issue would close (vest) at Mabel's death, and she is a life in being.

[3] As noted in the text above, only Option (1) completely avoids a Rule violation. Option (2), closing the class at Mabel's death, causes a Rule violation as to the remainder interest in corpus. Consequently, it may be expected that the Nebraska court would have adopted Option (1) even if the Criss case had not involved the somewhat unusual feature of Mabel having renounced her interest to take a forced share in Clair's estate.

> The fact that the rule against perpetuities will be violated if the class is allowed to increase in size until the period of distribution in a particular case undoubtedly may influence some courts to restrict the class to persons born when the instrument takes effect. The theory for such a view is that as between two possible constructions the transferor must have intended the one that will make his disposition valid.
>
> . . .

The Criss Case Under the Uniform Act. The implication of Professor Dukeminier's letter is that, under the Uniform Act, a California court would reject Options (1) and (2), choosing Option (3) instead. Only Option (3), of course, has the potential of raising any of the non-perpetuity questions that Professor Dukeminier predicts could lead to "much" further litigation in the Criss case. Under Options (1) and (2), the total make-up of the class would already have been determined with finality, and none of this group of issue, Nina Carden's two children and six grandchildren, was an adopted child, an illegitimate child, a stepchild who would have been adopted but for a legal barrier, a child adopted out of the family, or a child produced by means other than sexual intercourse.

Professor Dukeminier's letter bases his prediction that Option (3) would be chosen under the Uniform Act upon the following analysis:

> Second, USRAP abolishes the rule, incorporated in Cal. Civ. Code § 715.5, that an instrument shall be construed so as to avoid violating the Rule.

This statement reflects a misunderstanding. The Uniform Act does not abolish the constructional preference for validity. As noted above, the constructional preference for validity, applied by the Supreme Court of Nebraska in the Criss case, is a common-law rule, not a creation of the California legislature. Because it is a common-law rule and because there is nothing in the statutory language of the Uniform Act that is inconsistent with it, the common-law constructional preference for validity is continued under the Uniform Act; Part G of the Comment to § 1 of the Uniform Act explicitly so states (Exhibit A, attached).

The California statute cited by Professor Dukeminier -- Cal. Civ. Code § 715.5 -- is what he calls the "immediate" cy pres provision. In full, it states:

> § 715.5. Reformation. No interest in real or personal property is either void or voidable as in violation of Section 715.2 of this code if and to the extent that it can be reformed or construed within the

limits of that section to give effect to the general intent of the creator of the interest whenever that general intent can be ascertained. This section shall be liberally construed and applied to validate such interest to the fullest extent consistent with such ascertained intent.

The main thrust of this statute is reformation, not construction. The difference between reformation and construction is that reformation directs the court to alter unambiguous terms in the document to avoid a perpetuity violation, whereas construction directs the court to choose a reasonable interpretation of ambiguous terms in a document to avoid a perpetuity violation.

As noted, the main thrust of section 715.5 is reformation. Nevertheless, given the fact that the statutory language also includes the phrase "or construed," one can justifiably argue that the statute also codifies the common-law constructional preference for validity. In a state such as California, therefore, there is reason to elevate that constructional preference to the statutory language of the Uniform Act.

This procedure was followed in Florida, another state that prior to the enactment of the Uniform Act had codified the constructional preference for validity (but not as part of a broader "immediate" cy pres statute). To preserve that preference under Florida law, the Florida enactment of the Uniform Act added a provision that continues the previous Florida codification of the constructional preference for validity. See Fla. Stat. Ann. § 689.225(7).

Consequently, given the continued existence of the constructional preference for validity under the Uniform Act, a California court might well adopt Option (1), just as the Nebraska Supreme Court did in the actual Criss case. To be sure, the rejected construction under the common-law Rule would have resulted in automatic invalidity, whereas the rejected construction under the Uniform Act will not result in automatic invalidity; it will cause the interest's validity to be governed by the Uniform Act's wait-and-see element. Nevertheless, adopting the construction that confers initial validity -- Option (1) in the Criss case -- confers a very attractive benefit: It renders the interest invulnerable to any possible future reformation suit.[4] Thus, as Comment G to section 1 points out,

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[4] Under section 3 of the Uniform Act, only interests whose validity is governed by the wait-and-see element are vulnerable to reformation. Reformation is never necessary -- or permitted -- for dispositions that are initially valid under the common-law Rule.

courts can be expected to incline toward the construction that leads to initial validity, unless that construction is rather clearly contrary to the transferor's intention. And, certainly courts can be expected to incline in this direction if the constructional preference for validity is elevated to the statutory language of the Uniform Act, as it would be possible to do in California and other states that previous to enactment of the Uniform Act had codified that constructional preference.

I do not, however, rely exclusively on the constructional preference for validity for predicting that a California court would choose Option (1). In the Criss case, there are independent factors that indicate that neither Option (3) nor Option (2), for that matter, was in accord with Mabel's and Clair's intentions.

Recall that the other eight $200 monthly income allotments were to go to named individuals, all of whom presumably were adults when Mabel created her trust and when Clair died. Recall also that the trust was not to terminate until "the death of all the persons and members of all the units ...." (Emphasis added.) These two features of the trust invite us to focus on the discrepancy between the projected date of death of the last survivor of the eight named individuals and the projected date of death of the last survivor of Nina Carden's issue.

Option (1) seems more in accord with the likely intention of the parties because that discrepancy is by far the least under Option (1), under which the class of issue includes only Claire Griffen and Nina Evans.

Neither Option (2) nor (3) seems in accord with the parties' actual intention. Option (2), which brings Nina's Carden's six grandchildren into the class, increases that discrepancy by about 20 years or so.[5] Option (3) increases that discrepancy grotesquely.

Of the three options, Option (3) seems the least likely to be chosen by a court. (Remember, the drafting lawyer did not insert a perpetuity saving clause into Mabel's trust, so the terms of the trust itself provided no automatic cut off after a period of time.) For the court to choose Option (3), therefore,

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[5] Under Option (2), the projected time of death of the last grandchild living at Mabel's death is 97.5 years after the testator's death and 107.5 years after Mabel created her inter-vivos trust in 1942. The fact that Option (2) would delay the projected termination of the trust beyond the 90 years allowed by the Uniform Act, thus probably requiring a reformation suit later on, provides another reason why the court would be unlikely to choose Option (2).

the court would have to think that the parties themselves actually contemplated that layer upon layer of future generations of Nina Carden's issue could be added to the list of recipients of that one modest $200 monthly income allotment, deferring indefinitely the termination of the entire trust until no afterborn descendant of Nina Carden is still living (or in gestation), i.e., until Nina Carden's descending line completely dies out. Option (3) is therefore so unreasonable and so unlikely to have been the parties' actual intention that a court would surely would not adopt it, unless the actual terms of the trust expressly and unambiguously required it to be adopted, such as would have been the case if the trust itself had said "to the issue of Nina Carden whenever born and from time to time living" or words to that effect.

To think that the parties actually intended Option (3), one would have to think that they contemplated delaying the termination of the trust indefinitely, for the death of Nina Carden's last living descendant (whenever born) might not ever occur! If Nina Carden's descending line should completely die out at some time in the far distant future, it would certainly be likely to occur many, many decades after the death of the other named individuals who were the beneficiaries of the other eight $200 monthly income allotments. It stretches the imagination to think that the settlors' actual intention (not knowing that that intention could not be achieved) was to hold up the termination of the full trust just for the purpose of continuing to divide that one modest $200 monthly allotment from income among all of Nina Carden's afterborn descendants as long as any is alive.

Consequently, quite a strong, independent case can be made for the proposition that the actual intention of the settlors must have been not to adopt Option (3), which would include all afterborn issue in the $200 monthly income allotment "to the issue of Nina Carden, as one unit." In fact, this factor alone-- without the additional support provided by the constructional preference for validity -- supports the conclusion that the class should be closed under Option (1) or, at most, Option (2). Remember that only Option (3) has the potential of raising any of the non-perpetuity questions that Professor Dukeminier predicts could lead to "much" further litigation in the Criss case. Under Options (1) or (2), the total make-up of the class would already have been determined with finality, and none of this group of issue, Nina Carden's two children under Option (1), or two children and six grandchildren under Option (2), was an adopted child, an illegitimate child, a stepchild who would have been adopted but for a legal barrier, a child adopted out of the family, or a child produced by means other than sexual intercourse.

Summary. To me, there are persuasive reasons for thinking that a California court, operating under the Uniform Act, would (contrary to Professor Dukeminier's argument) be most likely to choose Option (1). The next most likely construction of the Criss trust is Option (2). The least likely construction of the Criss trust is Option (3), which is the one Professor Dukeminier predicts would be adopted by a California court under the Uniform Act and is the only one of the three possible constructions having the potential of raising any of the non-perpetuity questions Professor Dukeminier predicts would lead to "much" further litigation. The reasons favoring Option (1) are:

1. the constructional preference for validity, which supports only Option (1) and which continues under and could be codified as part of the Uniform Act; and

2. the gargantuan gap Option (3) would produce between the death of the last survivor of the eight named individuals and the death of the last survivor of Nina Carden's issue; this gap is of such a dimension as to make it very unlikely that Mabel and Clair were seeking to defer termination of the trust until Nina Carden's descending line entirely dies out; indeed, Option (2) would also produce a gap of sufficient size to make that Option also unlikely to reflect the settlor's true intention.

Each reason provides an independent basis for closing the class as of the testator's death, i.e., for choosing Option (1). Combined in mutual support of one another, they make for a very strong case for doing so.

. . .

The Status Questions Raised by Professor Dukeminier's Letter Are Most Unlikely to Generate Litigation under the Criss Trust. Let us turn now to Professor Dukeminier's claim that the perpetuity-saving features of the Uniform Act would boomerang because they would generate "much" further non-perpetuity litigation concerning the Criss trust. To reach this claim, one must assume, against reason, that the perpetuity-saving features of the Uniform Act would make a California court hearing the Criss case choose Option (3), holding that all afterborn issue were to be included. But, let us make this assumption, for the sake of analyzing Professor Dukeminier's claim regarding non-perpetuity litigation.

The key passages from Professor Dukeminier's letter of July 12 state:

> Few constructional questions produce as much litigation as who comes within a class of "issue." Will this class [of "issue of Nina Carden" under Option (3)] include legally (or equitably) adopted issue, illegitimate issue, stepchildren who would have been adopted but for a legal barrier, children adopted out of the family, children produced by means other than sexual intercourse? The Restatement (Second) of Property, Donative Transfers §§ 25.1 - 25-9 (Tent. Draft No. 8, 1985) contains a 151-page discussion of this topic, with notes citing a slew of cases.

In California, these non-perpetuity questions would in fact be unlikely to generate litigation. First, it is unlikely that the facts as they develop over the years would raise any of these questions. None of these questions would ever arise unless there actually is an adopted child (adopted in or out), an illegitimate child, etc., etc. With nearly half of the 90 years having already expired at the time of the Criss lawsuit,[6] and with six actual afterborn issue, there were no adopted children, illegitimate children, stepchildren who would have been adopted but for a legal barrier, children produced by means other than sexual intercourse, etc., etc.

Second, even if it should later turn out during the remaining half of the 90-year period that there is an adopted child or an illegitimate child, etc., the question of inclusion or exclusion of such a child might be covered by a definitions section or article in the Criss trust itself. Many lawyer-drawn trust documents do contain detailed definitions of who is and who is not included in the term "issue." Because the court did not reproduce the full text of the trust, Professor Dukeminier has no basis for implying that the Criss trust had no such provision or set of provisions.

But, for the sake of argument, let us proceed on the assumption that the trust terms themselves do not answer any or all of the questions raised by Professor Dukeminier. In that case, these questions would be covered by Cal. Civ. Code § 7005 or by one of the strong statutory rules of construction in Cal. Prob. Code § 6152, which control "unless otherwise provided in the will." The will in Criss does not otherwise provide, and so the statute would almost certainly resolve any such question without the need for it to be litigated. These California statutory provisions are set forth in Exhibit B, attached.

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[6] Remember that the 90-year period began to run in 1942 when Mabel created her trust, not in 1952 when Clair died. See supra note 1.

Professor Dukeminier's letter does not acknowledge the existence of these California statutory provisions, and refers instead to "the Restatement (Second) of Property, Donative Transfers §§ 25.1 - 25-9 (Tent. Draft No. 8, 1985)," saying that it "contains a 151-page discussion of this topic, with notes citing a slew of cases." These sections are attached as Exhibit C.

Professor Dukeminier describes the Restatement (Second)[7] as containing a "discussion" of the status questions he predicts would generate "much" further litigation in the Criss trust. The impression given is that these questions are so intractable that 151 pages of text are required to sort them out. An examination of the actual Restatement, however, reveals that the Introductory Note to these sections states that "these class gift terms according to ordinary language usage have normally accepted outer limits of inclusiveness." These "normally accepted outer limits of inclusiveness" are embodied in these sections, which, like the California statutes, adopt rules of construction on each of the questions raised by Professor Dukeminier, all of which are designed to prevail "in the absence of language or circumstances indicating a contrary intent."

The Restatement (Second) therefore contains more than a mere "discussion" of these questions; it lays down rules of construction designed to keep these questions from being litigated unless there is sufficient evidence from the language or circumstances indicating an individuated intent contrary to the presumptions contained in these rules of construction. In the Criss trust, in the absence of a set of definitional provisions, there appears to be no language indicating an intent contrary to any of the Restatement (Second)'s rules of construction, and the Criss opinion discloses no "circumstances" indicating a contrary intent, either. Thus, if the California statutory rules of construction had not existed or were found inapplicable for any reason, the Restatement (Second)'s rules of construction would go a long way toward eliminating litigation over the questions Professor Dukeminier predicts would be the source of "much" litigation.

Professor Dukeminier's characterization of the Restatement (Second) continues:

> The Restatement (Second) of Property, Donative Transfers §§ 25.1 - 25-9 (Tent. Draft No. 8, 1985)

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[7] Because the sections to which Professor Dukeminier refers have now been published in hard cover form as Volume 3 of the Restatement (Second) of Property (Donative Transfers) (1989), Tentative Draft No. 8 has now been replaced. My references will therefore be to the hard-cover form, not to the Tentative Draft.

> contains a 151-page discussion of this topic, with notes citing a slew of cases.

This statement suggests that all of these sections, together with a "151-page discussion," pertain to the following questions:

> Will this class [to the "issue" of Nina Carden under Option (3)] include legally (or equitably) adopted issue, illegitimate issue, stepchildren who would have been adopted but for a legal barrier, children adopted out of the family, children produced by means other than sexual intercourse?

But sections 25.1 through 25.9 do not all pertain to these questions, nor is there a "151-page discussion" of these questions. Many of these sections have nothing to do with the questions he raises. Section 25.1, which he cites, says that grandchildren and more remote descendants are presumptively excluded from a class gift to "children." This section, with Comments, Statutory Note, and Reporter's Note, takes up pages 9-24, and contains nothing at all that could possibly pertain to a class gift to "issue." Section 25.7, which he cites, merely says that a class gift to "children" of a designated person includes such person's descendants in the first generation, and thus duplicates the point made in section 25.1; section 25.7, with Comments, Statutory Note, and Reporter's Note, takes up pages 95-102. Section 25.8, which he cites, pertains to class gifts to "grandchildren," "brothers and sisters," "nephews and nieces," "cousins," and other similar terms. This section, with Comments, Statutory Note, and Reporter's Note, takes up pages 102-115, and contains nothing at all that could possibly pertain to a class gift to "issue." Section 25.9, which he cites, merely says that in a class gift to "issue" or "descendants," the rules in the previous sections apply to determine who is included in or excluded from the class. This section, with Comments, Statutory Note, and Reporter's Note, takes up pages 115-121, and contains nothing at all bearing on the questions raised by Professor Dukeminier, except to incorporate or refer to the previous sections by reference. To count this section in, therefore, is tantamount to a duplicate counting.

Of the sections cited by Professor Dukeminier, then, only sections 25.2 through 25.6 are really relevant to the questions Professor Dukeminier mentions. These sections, with Comments, Statutory Notes, and Reporter's Notes, take up pages 24-95, or substantially less than half the number of pages Professor Dukeminier states they take up. And, of course, not all of these 71 pages are truly devoted to "discussing" Professor Dukeminier's questions. As Exhibit C shows, the actual "black-letter" rules of all the sections cited and miscited by Professor Dukeminier, printed in rather large type, with Table of Contents and Introductory Note, only take up about 3 1/4 pages; reduced to the

sections that might actually be relevant to a trust "for the issue of Nina," these sections take up only about 1 1/2 pages.

. . .

In the final analysis, I suggest, the Criss case does not support Professor Dukeminier's argument that the wait-and-see/deferred-reformation form of perpetuity reform embraced by the Uniform Act will lead to more, not less, litigation.

One of the objectives of the Uniform Act is to limit perpetuity litigation to purposive cases by eliminating cases of the wasteful variety, such as Estate of Anderson, the recent Mississippi case discussed in my July 5 memorandum, in which the validity of a 25-year trust was litigated.

Like Anderson, most trusts, by far, will have terminated by their own terms far short of the expiration of the vesting period allowed by the Uniform Act, and will never need to be litigated. This limits perpetuity litigation to the purposive variety, which for the most part are those few cases in which the allowable vesting period has actually been exceeded and reformation has truly become necessary. An occasional purposive case can also arise where the constructional preference for validity plays a part in resolving an ambiguity that would have had to be resolved no matter what perpetuity law or perpetuity reform is in effect. As this memorandum indicates, Criss is a case of this sort.

The basic point of my memorandum of July 5 was to show that the Uniform Act achieves the objective of eliminating wasteful, nonpurposive perpetuity litigation, such as arose in Estate of Anderson. The validity of that basic point is undeniable. Although my July 5 memorandum used only Estate of Anderson and another recent case to demonstrate that point, the point can be endlessly demonstrated, with case after case after case.

EXHIBIT A

Part G of Comment to § 1 of USRAP

G. SUBSIDIARY COMMON-LAW DOCTRINES: WHETHER SUPERSEDED BY THIS ACT

As noted at the beginning of this Comment, the courts in interpreting the Common-law Rule developed several subsidiary doctrines. This Act does not supersede those subsidiary doctrines except to the extent the provisions of this Act conflict with them. As explained below, most of these common-law doctrines remain in full force or in force in modified form.

Constructional Preference for Validity. Professor Gray in his treatise on the Common-law Rule Against Perpetuities declared that a will or deed is to be construed without regard to the Rule, and then the Rule is to be "remorselessly" applied to the provisions so construed. J. Gray, The Rule Against Perpetuities § 629 (4th ed. 1942). Some courts may still adhere to this proposition. Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is that where an instrument is ambiguous—that is, where it is fairly susceptible to two or more constructions, one of which causes a Rule violation and the other of which does not—the construction that does not result in a Rule violation should be adopted. Cases supporting this view include Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978); Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930); Watson v. Goldthwaite, 184 N.E.2d 340, 343 (Mass.1962); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Drach v. Ely, 703 P.2d 746 (Kan.1985).

The constructional preference for validity is not superseded by this Act, but its role is likely to be different. The situation is likely to be that one of the constructions to which the ambiguous instrument is fairly susceptible would result in validity under Section 1(a)(1), 1(b)(1), or 1(c)(1), but the other construction does not necessarily result in invalidity; rather it results in the interest's validity being governed by Section 1(a)(2), 1(b)(2), or 1(c)(2). Nevertheless, even though the result of adopting the other construction is not as harsh as it is at common law, it is expected that the courts will incline toward the construction that validates the disposition under Section 1(a)(1), 1(b)(1), or 1(c)(1).

EXHIBIT B

California Statutory Provisions

Cal. Civ. Code:

§ 7005. Artificial insemination of wife; husband as natural father; donor not natural father

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

Cal. Prob. Code

§ 6152. **Half-bloods, adoptees and persons born out of wedlock; inclusion in class**

Applicable to estates of decedents who died on or after Jan. 1, 1985.

Unless otherwise provided in the will:

(a) Except as provided in subdivision (b), halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.

(b) In construing a devise by a testator who is not the natural parent, a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse. In construing a devise by a testator who is not the adoptive parent, a person adopted by the adoptive parent shall not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse.

(c) Subdivisions (a) and (b) also apply in determining:

(1) Persons who would be kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator under Section 6147.

(2) Persons to be included as issue of a deceased devisee under Section 6147.

(3) Persons who would be the testator's or other designated person's heirs under Section 6151.

EXHIBIT C

Restatement (Second) of Property (1989) Rules of Construction

Chapter Twenty-Five

PRIMARY MEANING OF CLASS GIFT TERM

Introductory Note

Section

Introductory Note: The class gift terms to which a primary meaning is assigned in this Chapter involve gifts other than gifts to heirs and the like. The class gift terms that will be examined in this Chapter are "children" (§§ 25.1–25.7), "grandchildren" (§ 25.8), "brothers" (§ 25.8), "sisters" (§ 25.8), "nephews" (§ 25.8), "nieces" (§ 25.8), "cousins" (§ 25.8), "issue" (§ 25.9), "descendants" (§ 25.9), and "family" (§ 25.10). These class gift terms according to ordinary language usage have normally accepted outer limits of inclusiveness. The language or circumstances may indicate an intent to include, within the class, persons beyond such outer limits of inclusiveness or an intent to narrow the normally accepted outer limits of inclusiveness.

§ 25.1 Gifts to "Children"—Exclusion of Grandchildren and More Remote Descendants

When the donor of property describes the beneficiaries thereof as "children" of a designated person, the primary meaning of such class gift term excludes descendants of such person more remote than those of the first generation. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

§ 25.2 Gifts to "Children"—Children Born Out of Wedlock

When the donor of property describes the beneficiaries thereof as the "children" of a designated person, the primary meaning of such class gift term includes a descendant in the first generation of such person who is born out of wedlock. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

§ 25.3 Gifts to "Children"—Child Conceived by Means Other Than Sexual Intercourse

When the donor of property describes the beneficiaries thereof as "children" of a designated person, the primary meaning of such class gift term includes a child conceived by means other than sexual intercourse who is recognized by the designated person as his or her child. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

§ 25.4 Gifts to "Children"—Adopted Children

When the donor of property describes the beneficiaries thereof as the "children" of a designated person, the primary meaning of such class gift term

(1) includes any child adopted by the designated person in an adoption proceeding, if such person is the donor, and

(2) if the designated person is other than the donor, includes

(a) any child adopted by the designated person in an adoption proceeding that he or she has raised, or

(b) any child adopted by the designated person in an adoption proceeding under circumstances that contemplate that the child will be raised by him or her.

It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

§ 25.5 Gifts to "Children"—Child Adopted by Another

When the donor of property describes the beneficiaries thereof as "children" of a designated person, the primary meaning of such class gift term excludes descendants of such person in the first generation who have been adopted by another, if such adoption removes the child from the broader family circle of the designated person. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

§ 25.6 Gifts to "Children"—Relatives by Affinity

When the donor of property describes the beneficiaries thereof as "children" of a designated person, the primary meaning of such class gift term excludes stepchildren, sons-in-law, and daughters-in-law of such person, and excludes other persons related to such person only by affinity. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

§ 25.7 Gifts to "Children"—Descendants in the First Generation

When the donor of property describes the beneficiaries thereof as "children" of a designated person, the primary meaning of such class gift term includes all descendants of such person in the first generation who have not been adopted out. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

§ 25.8 Gifts to "Grandchildren," "Brothers and Sisters," "Nephews and Nieces," "Cousins," and Other Similar Terms

(1) When the donor of property describes the beneficiaries thereof as

(a) "grandchildren" of a designated person; or

(b) "brothers and sisters" of a designated person; or

(c) "nephews and nieces" of a designated person; or

(d) "cousins" of a designated person; or

(e) some other group similarly described;

the primary meaning of such class gift term is determined by substituting, in place of the class gift term, the equivalent class gift term employing the word "children" and applying to the equivalent class gift term employing the word "children" the rules of §§ 25.1–25.7 to ascertain who is initially included and excluded. It is assumed in the absence of language or circumstances indicating a contrary intent that the donor adopts such primary meaning.

(2) The following are equivalent class gift terms employing the word "children":

(a) for "grandchildren of A"—"children of children of A";

(b) for "brothers and sisters of A"—"children of either or both of A's parents exclusive of A";

(c) for "nephews and nieces of A"—"children of brothers and sisters of A";

(d) for "cousins of A"—"children of A's uncles and aunts."

(3) Other groups similarly described to which the rule of this section applies include "uncles and aunts," "great-grandchildren," "grandnephews," and "grandnieces."

§ 25.9 Gifts to "Issue" or "Descendants"

When the donor of property describes the beneficiaries thereof as "issue" or "descendants" of a designated person, the primary meaning of such class gift term is determined by substituting in place of the class gift term the words "children" and "children of children" and "children of children of children," etc., of the designated person, and applying the rules of §§ 25.1–25.7 to ascertain who is initially included and excluded. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

EXHIBIT D

213 Neb. 379

In re Testamentary Trust of Clair C. CRISS, deceased.

UNITED BENEFIT LIFE INSURANCE COMPANY, a corporation, Appellant and Cross-Appellant,

v.

The OMAHA NATIONAL BANK, Trustee, Appellant and Cross-Appellee; Nina Carden et al., Appellees and Cross-Appellants; Creighton University, also known as Creighton Medical School, a corporation, et al., Appellees and Cross-Appellees.

No. 44062.

Supreme Court of Nebraska.

Jan. 28, 1983.

Trustee of testamentary trust instituted action for an order construing language of trust indenture. Contingent successor to remainder interest in corpus of trust and named income beneficiaries under indenture of trust appealed from determination of that court to the district court. Thereafter, contingency successor filed declaratory judgment action in district court based on same issues as those presented in county court proceeding. Cases were consolidated for trial. The District Court, Douglas County, D. Nick Caporale, J., affirmed decision of the county court, and appeal was taken. The Supreme Court, Hastings, J., held that: (1) class of named income beneficiaries closed as of date of death of testator; (2) trust assets at death of last income beneficiary were to continue in perpetual trust for benefit of charities, unless such condition created an unlawful restraint on alienation of stock of contingent successor; (3) continuity of stock ownership clause did not prevent stockholders of contingent successor from transferring their stock, and thus doctrine of restraint on alienation had no application; and (4) since renunciation by testator's widow was tantamount to her death and since no intention was found in will against acceleration, income beneficiaries should have begun receiving payments as of date of death of testator.

Affirmed.

1. **Wills ⇐706**

Action to construe testamentary trust indenture would be reviewed in the Supreme Court de novo on the record.

2. **Wills ⇐498**

Devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in absence of qualifying words showing a contrary intent.

3. **Wills ⇐524(1)**

In order to determine when a class should close under a testamentary disposition, it is necessary to try to ascertain the intent of the testator and, if legally possible, give effect to that intent, determined by viewing of the entire will.

4. **Wills ⇐481, 524(2)**

Generally speaking, a will speaks as of the date of death of the testator, and in the absence of anything in the will showing a contrary intention, the number of the class will be determined upon the death of the testator.

5. **Wills ⇐524(1)**

Whenever the increase in the period of postponement of the closing of the class would render invalid, under the applicable rule against perpetuities, either the disposition of income to the class or part or all of the ultimate disposition of the corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership.

6. **Wills ⇐524(2)**

In action brought by trustee for an order construing language of trust indenture, trial court did not err in closing the class of the issue of testator's widow as of the date of death of testator, in that intent of testator to close class could be inferred from savings clause.

7. **Wills ⇐853**

It is the general rule that in the absence of a controlling equity, or of an ex-

press or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner.

8. Wills ⇐440, 450, 456, 470(1)

A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will; in searching for this intention the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.

9. Wills ⇐440, 456

Clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator; if doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent.

10. Wills ⇐656

Continuity of ownership clause contained in will would be interpreted to mean that all transfers which come about as a result of someone's death were not to be considered for the purposes of this condition and testator intended that transfers made during five-year period after death of his widow and transfers made during a five-year period after his death, which came about as a result of death of someone, were not to be considered when determining whether the continuity of ownership condition had occurred or not.

11. Wills ⇐656

Where transfer by way of stockholders' agreement of 62.5% of stock issued by contingent successor to remainder interest in corpus of trust did occur within five-year period following death of testator, but was not occasioned by someone's death, it did not fit within exception and continuity of stock ownership had failed, and thus trust assets at death of last income beneficiary were to continue in perpetual trust for benefit of charities, unless such condition created an unlawful restraint on alienation of stock.

12. Wills ⇐649

Since continuity of stock ownership clause contained in will in no way prevented stockholders of contingent successor to remainder interest in corpus of trust from transferring their stock, doctrine of restraint on alienation had no application.

13. Wills ⇐801(1)

When a widow elects to take her forced or statutory share and renounce an interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will.

14. Wills ⇐802(4)

Since renunciation by testator's widow of her interest under the will was tantamount to her death, and since no intention was found in will against acceleration of succeeding life income interests, income beneficiaries should have begun receiving payments as of the date of death of testator.

15. Wills ⇐684.2(1)

Clear and literal meaning of language of will determining payment of income to beneficiaries placed an absolute limit of $200 per month of income which was to be given to each of them.

Syllabus by the Court

1. Trusts: Appeal and Error. An action to construe a trust indenture will be reviewed in this court de novo on the record.

2. Wills: Words and Phrases. A devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent.

3. Wills: Intent. In order to determine when a class should close under a testamentary disposition, it is necessary to

try to ascertain the intent of the testator and, if legally possible, give effect to that intent, determined by a viewing of the entire will.

4. Wills. Generally speaking, a will speaks as of the date of death of the testator, and in the absence of anything in the will showing a contrary intention, the number of the class will be determined upon the death of the testator.

5. Wills. Whenever the increase in the period of postponement of the closing of a class would render invalid, under the applicable rule against perpetuities, either the disposition of income to the class or part or all of the ultimate disposition of the corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership.

6. Wills: Estates. It is the general rule that in the absence of a controlling equity, or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner.

7. Wills: Intent. A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will. In searching for this intention the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.

8. Wills: Intent. A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent.

9. Wills: Estates: Property. One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation.

10. Wills: Estates. As a general rule, when an attempted prior interest fails under a will because the person to whom it is limited renounces it, succeeding interests are accelerated, with certain minor exceptions.

11. Wills: Estates. A testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will.

12. Wills: Estates. When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will.

Flavel A. Wright and Donald Evans of Cline, Williams, Wright, Johnson & Oldfather, Lincoln, for appellant United Benefit.

Joseph J. Vinardi and William A. Day, Jr., of Gross, Welch, Vinardi, Kauffman & Day, P.C., Omaha, for appellant Omaha National Bank.

John E. North and David L. Hefflinger of McGrath, North, O'Malley & Kratz, P.C., Omaha, for appellees Volunteers of America.

Barlow, Johnson, DeMars & Flodman, Lincoln, for appellees Nina Carden et al.

William Jay Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, Omaha, for appellee Creighton University.

Hird Stryker and Peter J. Vaughn of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., Omaha, for appellee Hattie B. Munroe Foundation.

Crosby, Guenzel, Davis, Kessner & Kuester, Lincoln, for appellee Leoila Chambers.

Ronald R. Volkmer of McGill, Koley, Parsonage & Lanphier, P.C., Omaha, guardian ad litem for Florence Home and Fontenelle Home.

Thomas R. Burke, Lyman L. Larsen, and Patricia A. Zieg of Kennedy, Holland, DeLacy & Svoboda, Omaha, and Frank J. Barrett, Omaha, for amicus curiae Mutual of Omaha.

KRIVOSHA, C.J., and BOSLAUGH, McCOWN, CLINTON, WHITE and HASTINGS, JJ.

HASTINGS, Justice.

The Omaha National Bank (ONB), as trustee of the testamentary trust of Clair C. Criss, deceased, instituted an action in the county court of Douglas County for an order construing the language of the trust indenture. ONB, United Benefit Life Insurance Company (United), a contingent successor to the remainder interest in the corpus of the trust, and "The issue of Nina Carden," named income beneficiaries under the indenture of trust, appealed from the determination of that court to the District Court for Douglas County. Thereafter, United filed a declaratory judgment action in the District Court based on the same issues as those presented in the county court proceeding. The cases were consolidated for trial in the District Court, which affirmed the decision of the county court and dismissed the declaratory judgment action as being duplicative of the county court proceeding.

We believe that it will be more helpful to an understanding of the nature of this litigation to set forth an outline of the pertinent facts, which are undisputed, before reciting the errors assigned and discussing the applicable law.

Clair C. Criss died on March 9, 1952, leaving surviving him his widow, Mabel L., but no lineal heirs. His will, which was admitted to probate approximately a month later, had been executed by him on January 16, 1942. By the third paragraph of that will he left to his wife all of his real estate, automobiles, household furniture and furnishings, and certain other items of personal property. All of the remainder of his estate, by the terms of the fourth paragraph of his will, he left to his wife, Mabel L. Criss, and ONB, as trustees. His wife was to be paid the net income from the trust, together with such amounts from the principal or corpus of the trust as ONB in its judgment deemed necessary. These payments were to be made to the decedent's wife "quarter annually for life, or until she, by written instrument filed with the Trustees, renounces her right to receive such income." The will went on to provide that "Upon the death of MABEL L. CRISS, the Trustee hereunder shall forthwith deliver all of the Trust Assets to The Omaha National Bank as Trustee under a certain Indenture of Trust between Mabel L. Criss and The Omaha National Bank, dated *15th* day of January, 1942, to be administered according to the original and unmodified terms of said Agreement, and upon such delivery this trust shall terminate."

Under article I of that indenture of trust Mabel L. Criss, during her lifetime, was to be paid from income the sum of $200 per month. Article II, section (a), provided that at the death of the donor, Mabel L. Criss, $200 per month from net income was to be paid to each of the following nine individuals or units: Nina G. Engler; Nina Carden; the issue of Nina Carden, as one unit; Mrs. Deane Criss; Minnie Smith and Stella McDonald, as one unit; Sally Mahoney; Margaret Kunce; Leolla Chambers; and Fannie and Leonard Cross, as one unit. Under article II, section (b), $5 per month was to be paid to each of the residents of the Florence Home for the Aged and the Fontenelle Boulevard Home. Under article II, section (c), the remaining income, up to a limit of $10,000 per year, was directed to be paid to Creighton Medical School, the Hattie B. Munroe Home, and the Volunteers of America.

Article III provides that upon the death of all nine of the individual or unit beneficiaries named in article II, section (a), the trust shall either terminate or continue in perpetuity, as the circumstances may dic-

tate. The specific pertinent language is as follows: "Upon the death of all the persons and members of all the units, either named or described by class in Section (a) of Article II, this trust shall forthwith terminate and the principal and all unremitted income . . . shall be . . . conveyed, and assigned to, and shall be the absolute property of the UNITED BENEFIT LIFE INSURANCE COMPANY, Omaha, Nebraska. The foregoing provisions of this Article III are upon condition that there shall have been a continuity of stock ownership of the United Benefit Life Insurance Company from the date of its organization to the date of such delivery of the trust assets to the said Company." Then follows the language that perhaps is the most critical in connection with this appeal: "In the event that more than *FIFTY* PER CENT of the capital stock of such company shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed. In the absence of such a transfer of Fifty Per Cent (50%) or more of such stock upon the conditions and within the time above stated, a continuity of ownership shall be conclusively presumed." Article III goes on to provide in part that "In the event of a failure of such condition relating to continuity of stock ownership, then upon the death of such last survivor of Section (a) of Article II hereof, this Trust shall continue in perpetuity for the purposes set out in Sections (b) [residents of Florence Home for the Aged and Fontenelle Boulevard Home] and (c) [Creighton Medical School, Hattie B. Munroe Home and the Volunteers of America] of Article II hereof, and all of the income after the payment of the amounts required by Section (b) shall annually be distributed to the institutions named in Section (c) of Article II."

United is a capital stock company with which Clair C. and Mabel L. Criss had had a close, lifetime association. At its inception, 20,000 shares of stock were issued. By November 11, 1952, as a result of amendments to its articles of incorporation, United had increased its stock issue to 100,000 outstanding shares. On November 11, 1952, 62,500 of those outstanding shares were transferred by way of a stockholders' agreement to Mutual of Omaha Insurance Company.

Following the admission of the will of Clair C. Criss to probate on April 12, 1952, Mabel L. Criss, on February 17, 1953, filed an election renouncing her interest under that will. According to the terms of the will, this removed her from the testamentary scheme of the will and the trust created thereunder, and, therefore, she no longer had any income interest in her husband's estate.

On January 10, 1955, ONB was appointed sole trustee for the trust created by the will of Clair C. Criss. As trustee, ONB retained the trust property and accumulated the income therefrom until April 4, 1978. At that time the trust assets were transferred to ONB as trustee under the trust indenture of January 15, 1942, previously mentioned above. This transfer occurred as a result of the death of Mabel L. Criss on March 19, 1978, changing the trust from that created under the will to that created by the indenture of trust dated January 15, 1942. ONB continues to hold these trust assets until it is determined which of the parties here involved is entitled to them.

Another critical decision involves the determination of the membership in the class consisting of "The issue of Nina Carden, considered as a unit," i.e., did the class close as of the date of death of Clair C. Criss on March 9, 1952, on the date that Mabel L. Criss filed her renunciation under the will on February 17, 1953, or on the date of death of Mabel L. Criss on March 19, 1978? Nina Carden, who is presently living, had two daughters: Claire Griffin, born on May 1, 1936, and who died on November 17, 1967, and Nina Evans, born on July 19, 1940, and who is still alive. To Claire were born Amy and David, on November 14, 1960, and August 2, 1962, respectively. Nina Evans has four living children, Timothy, twins Michael and Stephen, and Susan,

born on October 18, 1962, October 25, 1964, and September 8, 1970, respectively.

In response to the various pleadings filed in county court, that court made the following findings: (1) The condition of continuity of stock ownership in United must occur or fail, and therefore its interest, or that of Creighton, Munroe Home, and Volunteers, as remaindermen, vest, at the death of the last of the nine individual or unit life income beneficiaries under article II, section (a), of the trust indenture; (2) United was a contingent remainderman of article III of the trust indenture, the contingency being the continuity of stock ownership of 50 percent of United's stock, which continuity was destroyed upon the sale of 62.5 percent of United's stock to Mutual of Omaha in November of 1952; (3) Membership in the class of "The issue of Nina Carden" was determined and closed as of the date of death of Clair C. Criss, and subsequently born issue of Nina Carden are not members of that class, thus avoiding any violation of the rule against perpetuities; (4) The continuity of ownership requirement in the indenture of trust does not create an illegal restraint on the alienability of the stock of United; and (5) The nine individual and unit beneficiaries under article II, section (a), of the trust indenture are entitled to the income and increments thereon from the date of death of Clair C. Criss on March 9, 1952, or, in other words, that there should be acceleration of the successor trust to commence at the death of Clair C. Criss.

Upon hearing in the District Court, that court, as previously stated, without making specific findings, determined that the county court possessed jurisdiction to determine the issues presented to it by way of a request for construction of the will and trust indenture. Accordingly, it affirmed the findings and order of the county court, and dismissed the District Court action for declaratory judgment as being duplicative of the county court proceedings.

In its appeal to this court United generally quarrels with the findings and orders of both the county court and District Court, but sets forth the following specific assignments of error: (1) The District Court, rather than the county court, had jurisdiction to hear the declaratory judgment action and therefore the original District Court action should not have been dismissed; (2) The District Court erred in failing to consider the matter de novo on appeal and determine the issues independently of the findings made by the county court; (3) The court erred in closing the class described as "The issue of Nina Carden" on the date of death of Clair C. Criss, thereby excluding all grandchildren of Nina Carden as members of that class; (4) The court erred in refusing to apply the rule set forth in *Askey v. Askey*, 111 Neb. 406, 196 N.W. 891 (1923), and in closing the class of "The issue of Nina Carden" prior to the death of Mabel L. Criss; (5) The court erred in finding that the interest of United was a contingent and not a vested remainder under the rule described in Restatement of Property § 277 (1940); (6) The court erred in finding that the condition which must occur before any interest of Creighton, Munroe Home, and Volunteers would come into existence did not violate the rule against perpetuities; (7) The court erred in finding that the trust indenture did not unlawfully restrain alienation of United stock; (8) The court erred in determining that a lack of continuity of stock ownership occurred when 62.5 percent of United's stock was transferred to Mutual of Omaha on November 11, 1952, after the death of Clair C. Criss, but before Mabel L. Criss died.

The trustee, ONB, also appealed, objecting only to the order of the lower courts requiring acceleration of the successor trust as of the date of death of Clair C. Criss. Nina Carden and "The issue of Nina Carden" joined in this appeal, both as appellees and cross-appellants, objecting to the closing of the class as of the date of death of Clair C. Criss, thereby excluding all grandchildren of Nina Carden, and to the failure of the trial courts to determine that each required monthly distribution of income to the article II, section (a), income beneficiaries be in the amount of $1,800 per month, regardless of the number of such beneficiaries living at the time of each distribution,

rather than being limited to $200 per month to each of the nine individuals or unit members of the class still extant.

Except as noted, we shall attempt to deal with the assignments of error in the order in which they were presented.

JURISDICTION

We need waste no time with this assignment of error inasmuch as the appellant United concedes in its brief that "in any event, it would appear that in this consolidated action the question of the particular jurisdiction involved need not be decided."

DE NOVO REVIEW

[1] Little more attention need be given the second assignment of error. The written judgment order of the District Court recites that the cause came on for trial "upon the appeal *de novo* from the County Court of Douglas County . . . ." It is only necessary that we accept the word of the District Court at face value. Furthermore, this matter must be and will be reviewed de novo in this court. Neb.Rev.Stat. § 25–1925 (Reissue 1979); *In re Estate of Layton,* 212 Neb. 518, 323 N.W.2d 817 (1982). Therefore, any error in the method of review by the District Court which might have existed will be cured by our review here.

CLOSING OF THE CLASS OF "THE ISSUE OF NINA CARDEN"

Incorporated in the discussion under this heading are assignments of error numbered (3) and (4), i.e., that the court erred in closing the class on the date of death of Clair C. Criss and erred in refusing to apply the rule set forth in *Askey v. Askey, supra,* by not keeping the class open until the death of Mabel L. Criss.

The effect of closing the class of "The issue of Nina Carden" as of the date of death of Clair C. Criss was to exclude from the benefit of the article II, section (a), income provisions the six great-grandnieces and great-grandnephews of the decedent, born from 8 to 18 years following his death.

The word "issue" is a term of art. The term has been defined as including all lineal descendants. "This court in *Godden v. Long,* 104 Neb. 13, [175 N.W. 655], opinion written by Chief Justice Morrissey, held as follows: 'The term "issue," or "lawful issue," in its primary legal sense, means descendants or lineal descendants generally, and not merely children. * * * It is only when it is used in a special instrument, whose context shows that a narrower construction was intended, that its meaning will be limited.'

[2] "The rule in this state and other state and federal jurisdictions seems to be settled that a devise to 'issue' or 'issue of the body' will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent." *Wilkins v. Rowan,* 107 Neb. 180, 184, 185 N.W. 437, 439 (1921). However, to permit this class to remain open and allow in all of the lineal descendants of Nina Carden would violate the rule against perpetuities. This is so because it is entirely possible that additional lineal descendants of Nina Carden might be born later than 21 years after the death of all the "lives in being" which existed at the time of the death of Clair C. Criss. The interest of such descendants thus would not vest, by their birth, within the period permitted under the rule, creating a violation thereof.

[3] In order to determine when the class should close we must try to ascertain the intent of the testator and, if legally possible, give effect to that intent. This intent is to be determined by viewing the entire will. *Olson v. Sampson,* 208 Neb. 18, 302 N.W.2d 32 (1981).

Viewing the will and trust indenture as a whole, there is no express intent evident as to when this class should close. It is clear, however, that in the event a problem arose as to the enforceability of part of this estate plan, the testator nonetheless desired that his plan be effectuated as fully as possible. This intent is evidenced by article XII of the trust indenture: "If any provision of this agreement or the application of

such provision to any person or circumstances shall be held invalid, the validity of the remainder of the agreement and the applicability of such provision to other persons or circumstances shall not be affected thereby."

This being the only intent that can be ascertained from the actual wording of the will and trust indenture, the court must resort to general rules of construction to determine what the testator's intent would be if it had been expressed.

There are several Nebraska cases cited by the various parties touching upon some of the questions presented here. Perhaps the one most nearly in point is *Tiehen v. Hebenstreit*, 152 Neb. 753, 42 N.W.2d 802 (1950). That case involved the interpretation of a will not unlike that with which we are here concerned. In general terms, the will provided a gift of income from a testamentary trust to the two sons and daughter of testatrix. In the event of the death of either son before he had received a full one-third of the estate, the residue of his income interest was to be paid to his children. A principal question that had to be decided was whether or not the provisions of the will relating to the children of the two sons violated the rule against perpetuities. That is to say, it was possible that either of the two sons might beget additional children after the death of the testatrix, and if such afterborn children would come within the terms of the will, the rule as to vesting within a life in being plus 21 years would be violated.

[4] However, in determining when the class of children should close, this court stated: "'A will speaks as of the date of the death of the testator.' *Brandeis v. Brandeis*, [150 Neb. 222, 34 N.W.2d 160] *supra*.

. . . .

"This brings us then to the provisions of paragraph Fifth and the remainders given to 'the children * * * or the survivor of them' of George and John. The word 'children' as used here is a bequest or devise to a class. '"Since a will speaks from the date of the testator's death, the number of the class will, in the absence of anything in the will showing a contrary intention, be determined upon the death of the testator."' *Lacy v. Murdock*, 147 Neb. 242, 22 N.W.2d 713.

"As we said in *Lacy v. Murdock*, *supra*, we find nothing in the will which in any way defines, explains, interprets, or qualifies the word 'children.' Unexplained and given its ordinary meaning, it refers to the children of George and John living at the date of the death of the testatrix." *Id.* 152 Neb. at 761, 42 N.W.2d at 806. Construing the class of "children" to close as of the date of death of the testatrix, the court concluded that there was no violation of the rule against perpetuities.

In 51 Harv.L.Rev. 254, 291 (1937), Casner, *Class Gifts to Others Than to "Heirs" or "Next of Kin" Increase in the Class Membership*, we find the following language: "The fact that the rule against perpetuities will be violated if the class is allowed to increase in size until the period of distribution in a particular case undoubtedly may influence some courts to restrict the class to persons born when the instrument takes effect. The theory for such a view is that as between two possible constructions the transferor must have intended the one that will make his disposition valid."

[5] The Restatement of Property § 295 (1940) suggests that a class such as we have here should be held open to afterborn members "unless a contrary intent of the conveyor is found from additional language or circumstances . . . ." In discussing how such a contrary intent may be found or inferred from a disposition, Comment *s* to § 295 continues in part in language not dissimilar to that of Professor Casner: "Whenever the increase in the period of postponement thus made would render invalid, under the applicable rule against perpetuities, either the disposition of income to this class, or part or all of the ultimate disposition of corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership, otherwise made because of

the subject matter of the class gift (see § 243, Comment *o*). A 'contrary intent of the conveyor' is inferred, because postponements merely incident to periodic distributions of income are not an indication of the conveyor's intent to have the class increase meanwhile in membership, sufficiently clear to require the resolution of the ambiguities of the conveyance in a manner invalidating a substantial part of its dispositions." *Id.* at 1603.

[6] Such a view gains added support in this case when taken in light of the savings clause found in article XII of the trust indenture set out verbatim above. This clause manifests the testator's intent that in case a problem of partial invalidity arose under his will and the trust indenture, his estate plan should nonetheless be effectuated as fully as possible. In order to accomplish this plan as the testator intended, this class must be closed so as to avoid problems with the rule against perpetuities. The intent of the testator to close this class may be inferred from the savings clause set forth above, from the reasoning contained in the Restatement, *supra*, and from the rules laid down in *Tiehen v. Hebenstreit*, 152 Neb. 753, 42 N.W.2d 802 (1950). The decision of the lower courts to close the class of "The issue of Nina Carden" as of the date of death of the testator was correct.

[7] United urges, however, that we should apply the rule set forth in *Askey v. Askey*, 111 Neb. 406, 196 N.W. 891 (1923). In that case the testator left his property for the support of his widow until her remarriage or death, and upon her death, to his grandchildren. The widow elected to take under the laws of descent rather than under the will. The controversy was then between those grandchildren born before the widow's election and those born afterwards. In that case the court concluded, in effect, that it was the intention of the testator that the class consisting of his grandchildren shall not close until the death of his widow. However, a portion of the opinion reads as follows: "It is the general rule that *in the absence of a controlling equity, or of an express or implied provision in the will to the contrary*, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner." (Emphasis supplied.) *Id.* at 409, 196 N.W. at 892. We would further note that no problem relating to the rule against perpetuities was present in *Askey*, and, accordingly, no "express or implied provision in the will to the contrary" intervened.

THE COURT ERRED IN FINDING THAT THE INTEREST OF UNITED WAS A CONTINGENT AND NOT A VESTED REMAINDER AND IN FINDING THAT THE CONDITION NECESSARY TO ACTIVATE THE INTERESTS OF CREIGHTON, MUNROE HOME, AND VOLUNTEERS DID NOT VIOLATE THE RULE AGAINST PERPETUITIES.

Combined under this heading are assignments of error numbered (5) and (6).

Having determined the issues concerning the article II, section (a), income beneficiaries in this case, we now turn to the interests of the remaindermen. Although we have previously set forth the terms of article III of the trust indenture relating to the vesting of the remainder interests, it perhaps would be useful to do so again. Article III reads in its entirety: "Upon the death of all the persons and members of all the units, either named or described by class in Section (a) of Article II, this trust shall forthwith terminate and the principal and all unremitted income and reserve shall be forthwith delivered, conveyed, and assigned to, and shall be the absolute property of the UNITED BENEFIT LIFE INSURANCE COMPANY, Omaha, Nebraska. The foregoing provisions of this Article III are upon condition that there shall have been a continuity of stock ownership of the United Benefit Life Insurance Company from the date of its organization to the date of such delivery of the trust assets to the said Company. In the event that more than *FIFTY* PER CENT of the capital stock of such company

shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed. In the absence of such a transfer of Fifty Per Cent (50%) or more of such stock upon the conditions and within the time above stated, a continuity of ownership shall be conclusively presumed.

"In the event of a failure of such condition relating to continuity of stock ownership, then upon the death of such last survivor of Section (a) of Article II hereof, this Trust shall continue in perpetuity for the purposes set out in Sections (b) and (c) of Article II hereof, and all of the income after the payment of the amounts required by Section (b) shall annually be distributed to the institutions named in Section (c) of Article II. In the event, one or more of the institutions and the alternate, if any named therefor, in said Section (c) shall, in the opinion of the Trustee, cease to exist or to perform the work now done by them, the remaining institutions named in said Section (c) shall receive all of the income that otherwise would have been distributable among the three institutions. In the event all of the said named institutions in Section (c) shall, in the opinion of the Trustee, cease to exist or to perform the work now done by them, the Trustee shall annually distribute said income to such charitable, educational, health or welfare institutions as it, in its exclusive discretion, may select and deem most deserving."

Clearly, this provision creates a condition (continuity of stock ownership) which is to determine who will receive the remainder in this case. Before deciding whether or not this condition has been met, we first need to discuss the interests of the parties.

United contends that this bequest creates in it a vested remainder subject to complete defeasance. United further argues that because its interest is vested, the remainder interests of the charities are barred as an executory interest that might not rest within the lives in being existing at the date of Clair C. Criss' death plus 21 years.

As we stated earlier, the class of "The issue of Nina Carden" closed as to members born after the death of the decedent. This makes all the income beneficiaries of article II, section (a), "lives in being" at the time of the death of the testator for purposes of this estate plan. At the death of the last of these article II, section (a), income beneficiaries, one group of the potential remaindermen will take the residue of this trust. This being so, the question of whether United's interest is vested or not, or whether the charities are executory or contingent, becomes irrelevant. The interest of United or of the charities must vest by possession at the death of the last income beneficiary, a "life in being." Since the intent of one of these parties must vest by possession within this period, there is no violation of the rule against perpetuities. The only real question remaining is which of these two interests is to receive this remainder in light of the continuity of ownership condition.

CONTINUITY OF STOCK OWNERSHIP

This comprises the eighth and last specific assignment of error of United. However, we will consider it ahead of the seventh assignment because, logically, it should be discussed before the question of whether such requirement in the trust indenture constitutes an unlawful restraint on alienation of stock.

[8] There has been a great deal of argument and briefing devoted to the meaning of the clause regarding the 50 percent transfer of stock in the trust indenture. "In the event that more than *FIFTY* PER CENT of the capital stock of such company shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed." This clause is ambiguous on its face as to when a transfer of 50 percent of this capital stock will mean the condition has failed or not. Being ambiguous on its face, the clause suffers from a patent ambi-

guity. When faced with such a problem, we have stated: "'A patent ambiguity must be removed by interpretation according to legal principles and the intention of the testator must be found in the will. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. * * * The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.'" *Gretchen Swanson Family Foundation, Inc. v. Johnson,* 193 Neb. 641, 643–44, 228 N.W.2d 608, 610 (1975).

[9] We have also stated with regard to the construction of ambiguous terms: "A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent." (Syllabus of the court.) *In re Estate of Creighton,* 91 Neb. 654, 136 N.W. 1001 (1912).

"When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be so construed, if reasonably practicable, as to harmonize with the plain provisions of the will." *Marsh v. Marsh,* 92 Neb. 189, 195, 137 N.W. 1122, 1124 (1912).

[10] In light of the above-cited authority, it seems we must determine the intent of the testator as contained within the four corners of this will and construe its provisions so as to harmonize them with this intent and with each other. In determining the intent of the testator with regard to the continuity of ownership clause, certain ideas seem clear. This transfer of the trust assets is certainly to occur on the death of the last article II, section (a), income beneficiary. At that time, this trust property will become the property of United, or it will be placed in perpetual trust for certain charitable institutions. What determines who shall receive this remainder is whether there shall have been a continuity of ownership of 50 percent of the stock of United from the time of its creation until such time when this remainder is delivered to the remainderman or perpetual trust. Stock transfers occasioned by death are excepted from this condition for purposes of changes in ownership. These ideas are unambiguously stated in this will. The question remains: Stock transfers as a result of whose death occurring at what time are not to be considered?

This clause simply states "subject to a change of ownership other than that occasioned by death." The plain meaning of this phrase indicates all transfers which come about as a result of someone's death are not to be considered for the purposes of this condition. This idea is then limited by the language "within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss." The word "any," as used here, would indicate that more than one 5-year period is contemplated. By contemplating more than one 5-year period, the testator must have intended this to mean that transfers made during a 5-year period after the death of Mabel L. and transfers made during a 5-year period after the death of Clair C., which came about as a result of the death of someone, are not to be considered when determining whether the continuity of ownership condition has occurred or not. To construe this ambiguous phrase in this way, on the one hand, gives a meaning to the terms used therein, while at the same time making it consistent with the other manifestations of the testator's intent. This interpretation is consistent with the idea that some stock transfers are excepted and that there be continuity in ownership of 50 percent of this stock. To construe this language in this fashion keeps the phrase from violating any of the other manifestations of the testator's intent, and it is therefore adopted by this court.

[11] Was there a transfer of 50 percent or more of the stock in question which has not occurred due to someone's death during a 5-year period following the death of Clair C. and Mabel L. Criss? The record indicates that 62.5 percent of the stock issued by United was transferred by way of a stockholders' agreement on November 11, 1952. While this transfer did occur within a 5-year period following the death of Clair C. Criss, it was not occasioned by someone's death. This transfer came about by reason of an agreement of United's stockholders. This transfer does not fit within the exception stated above. Therefore, the continuity of stock ownership has failed. The trust assets at the death of the last article II, section (a), income beneficiary are to continue in perpetual trust for the benefit of the article II, sections (b) and (c), charities, to be administered according to article III, paragraph 2, of the indenture of trust incorporated into the will of Clair C. Criss, unless such condition created an unlawful restraint on the alienation of United's stock.

RESTRAINT ON ALIENATION

There is no evidence of any illegal restraint on the alienability of this stock due to this clause. At best, the possibility that United would in fact become the remainderman in this case would only create some economic incentive encouraging stockholders to retain their stock. The general rule with regard to improper restraints on alienation is: "One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. This is because conditions which restrict alienation are repugnant to the very estate the testator has created." *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 389, 183 N.W.2d 485, 489 (1971).

[12] The continuity of stock ownership clause in no way prevents the stockholders of United from transferring their stock. This doctrine has no application in this case.

ACCELERATION OF INCOME INTERESTS

This is the sole assignment of error raised by the trustee, ONB. It presents the question as to what was the effect of the renunciation by Mabel L. Criss of her interest under the will. Does this renunciation cause the succeeding life income interests to be accelerated? ONB contends that acceleration is inappropriate in this case.

It seems to be agreed that the general rule regarding renunciation in cases such as this calls for an acceleration of any succeeding interests, as stated in the Restatement of Property § 231 (1936): "When an attempted prior interest fails because the person to whom it is limited renounces it, succeeding interests are accelerated except when (a) the terms and circumstances of the limitation manifest a contrary intent (see §§ 232 and 233); or (b) the person renouncing such attempted prior interest effectively claims an interest in derogation of the dispositions sought to be made and thereby causes (i) the application of the attempted prior interest to the satisfaction of the renouncer's new claim; or (ii) the failure of the entire disposition; or (iii) the sequestration of the attempted prior interest in accordance with the rule stated in § 234(a)." Comment *d* at 964 to that section reads as follows: "Normally renunciation is not manifested until a date subsequent to the time when the creating instrument becomes operative. When, however, such renunciation is manifested, the resulting ineffectiveness operates, for all purposes material in this Chapter, as an ineffectiveness in the inception. This is often described as a case in which the renunciation 'relates back' to the time when the creating instrument became operative."

[13] The trustee points to exceptions to this rule, arguing that acceleration is inappropriate here. These exceptions are embodied in the Restatement of Property §§ 232 and 233 (1936). Section 232 simply states that succeeding interests should not be accelerated if there is an affirmatively manifested intent that acceleration should not occur in the case of a renunciation. In

the present case no such affirmatively expressed intent can be gleaned from this instrument. It has been held by this court that a testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will. *In re Estate of Stieber*, 139 Neb. 36, 296 N.W. 336 (1941). When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will. "When the widow elected to take against the will, the provisions as to her life interest must necessarily be treated as if she had terminated her life estate by death." *McCollum v. McCollum*, 108 Neb. 82, 84, 187 N.W. 783 (1922). Although the holding in *Askey v. Askey*, 111 Neb. 406, 196 N.W. 891 (1923), might seem to contradict such language, such is not the case. Relying upon the further holding in *McCollum, supra*, that the renunciation of the will by the widow will not be allowed to break the testamentary plan further than is absolutely necessary, the *Askey* court simply concluded that, in its opinion, it was not the intention of the testator that "the time of distribution should be accelerated by the happening of some event other than her death, which might terminate her life estate." *Id.* at 410, 196 N.W. at 893.

[14] In light of the foregoing propositions of law, we may assume that Clair C. Criss knew that his wife might renounce under the will. If in such event he intended Mabel L. to be treated as other than predeceasing him, or that these income interests should not be accelerated, the testator would have so stated. To the contrary, the only intention that can be found in this will is that payment of these income interests is to begin at Mabel L.'s death. Having concluded that her renunciation was tantamount to her death, and finding no intention in the will against acceleration, these income beneficiaries should have begun receiving payments as of the date of death of Clair C. Criss.

The Restatement § 233, *supra*, states that when a prior interest fails because it is renounced, any succeeding interest subject to an unfulfilled condition precedent shall not accelerate until such condition is fulfilled. In this case the only condition precedent to the interests of the income beneficiaries is the death of Mabel L. Criss. Having indulged the presumption the renunciation is tantamount to death, the only condition precedent to the interests of the income beneficiaries is satisfied. Therefore, this section does not preclude acceleration in this case.

Such a result is not only consistent under the general propositions of law set out in the Restatement but also with several prior holdings of this court. See *Hauschild v. Hauschild*, 176 Neb. 319, 126 N.W.2d 192 (1964); *In re Estate of Stieber, supra*. The interests of the life income beneficiaries and charities set forth in article II, sections (a), (b), and (c), of the trust indenture are therefore accelerated to take effect at the death of Clair C. Criss on March 9, 1952, as set out in the orders of the county court and the District Court.

"CUMULATION" OF ARTICLE II, SECTION (a), BENEFICIARIES' INTERESTS

For want of a better term, we have applied this heading to the remaining claimed error raised in the cross-appeal of "The issue of Nina Carden." Although we have determined that this class does not consist of any of the grandchildren of Nina Carden, the concept argued would apply to all article II, section (a), beneficiaries.

It is contended that not only are those beneficiaries entitled to a $200-per-month payment from the time of the death of Clair C. Criss but also, under certain circumstances, to additional income as well. Under the theory proffered, the total bequest of income to article II, section (a), beneficiaries, $1,800 per month, is to be divided among those beneficiaries $200 per month to each of the nine individuals or units. When one unit or individual would cease to exist, the remaining existing units

or individuals would divide that no longer existing unit's or individual's share. For example, if only five of the nine original beneficiaries set out in article II, section (a), remained today, they would split the $1,800 between them equally each month, thus receiving $360 each per month.

This argument has no support under the plain terms of the trust indenture. The language which determines the payment of income to article II, section (a), beneficiaries reads as follows: "The fractional interest distributable to each of the above named individuals or units shall be determined on the date of each distribution by the number of the above named individuals or units, or survivors of units who are living on such date. If one member of a unit above described shall be deceased, the surviving member or members *of such unit* shall take the share of the deceased member. The payments hereunder shall, however, be limited to the rate of TWO HUNDRED DOLLARS ($200) per month to each individual or unit. Such monthly payments shall not be cumulative until the payments are commenced under Section (b) hereof." (Emphasis supplied.)

[15] When determining the meaning of language used in a will the court must examine the entire will, consider each of its provisions, and give the words used their generally accepted literal and grammatical meaning. *Olson v. Sampson,* 208 Neb. 18, 302 N.W.2d 32 (1981). The clear and literal meaning of the above-quoted language places an absolute limit of $200 per month on the income which is to be given to each of the article II, section (a), beneficiaries.

From a de novo review of the record as indicated by the foregoing findings, we determine that the judgment of the District Court, affirming the order of the county court, was correct, and it is affirmed.

AFFIRMED.

CLINTON and CAPORALE, JJ., not participating.

213 Neb. 484

STATE of Nebraska ex rel. Paul L. DOUGLAS, Attorney General, Appellee,

v.

Joy SPORHASE et al., Appellants.

No. 43206.

Supreme Court of Nebraska.

Feb. 11, 1983.

State brought suit to enjoin transportation of Nebraska ground water into Colorado without permit. The District Court, Chase County, Jack H. Hendrix, J., issued injunction and defendants appealed. The Supreme Court, 208 Neb. 703, 305 N.W.2d 614, affirmed, and appeal was taken. Following remand, 102 S.Ct. 3456, 73 L.Ed.2d 1254, the Supreme Court, White, J., held that remainder of act governing conservation and benefits for use of ground water would remain viable statute after unconstitutional reciprocity provision was stricken.

Judgment of severance.

1. Statutes ⇐64(1)

Whether unconstitutional clause in statute may be severed from remainder is dependent upon whether workable plan remains absent invalid portions, whether valid portions of act can be enforced independently, whether invalid portions constitute such inducement to valid parts that valid parts would not have passed without invalid parts, whether severance will do violence to intent of legislature and whether declaration of separability is included in act, indicating that legislature would have enacted bill absent invalid portion.

2. Statutes ⇐64(2)

Since striking of unconstitutional provision prohibiting transfer of water to nonreciprocating states would not weaken or

REPORT

TO: JAMES V. QUILLINAN
IRWIN D. GOLDRING
STERLING L. ROSS, JR.
VALERIE J. MERRITT
MICHAEL V. VOLLMER
CHARLES A. COLLIER, JR.
THE EXECUTIVE COMMITTEE IN GENERAL

FROM: WILLIAM V. SCHMIDT

DATE: July 7, 1989

RE: LRC MEMORANDUM 89-53
(UNIFORM STATUTORY RULE AGAINST PERPETUITIES--
Tentative Recommendation)

Study Team #1 held a conference call on July 6, 1989. Michael G. Desmarais, Lynn P. Hart, Richard S. Kinyon, Sterling L. Ross, Jr., Michael V. Vollmer, and William V. Schmidt participated. Michael G. Desmarais was unable to participate in the entire conference call.

COLLECTIVE OPINION

We should state at the outset that no member of the team had read all of the materials pertaining to this subject which included: (1) a Tentative Recommendation of approximately 80 pages; (2) a Report by Charles A. Collier, Jr. with three attachments including a law review article by Professor Waggoner; (3) Memorandum 89-53 which was a law review article

by Professor Dukeminier and several letters of recommendation from law professors; and (4) the First Supplement which included an eleven page letter by Professor Jesse Dukeminier and a fifty page law review article by Professor Bloom, as well as the Second Supplement, Third Supplement and Fourth Supplement to the Memorandum. Some of us had read more of the material than others. The Fifth Supplement arrived after our conference call.

None of us have completely made up our minds and each of us is willing to (and in some cases would like to) receive additional input before we make a final decision.

We are impressed that Charles Collier and Professor Edward C. Halbach, Jr. as well as the American College of Probate Counsel and the American Bar Association has recommended the adoption of this Uniform Act. We are also impressed by the fact that Professor Dukeminier and other professors oppose the adoption of the Act in California. Also, as a general matter, we find little or no litigation involving the rule against perpetuities in our practices. As a result, we do not believe that the rule against perpetuities is a big problem in California.

We also would like to point out that this is the first time that we have had an opportunity to study or review this subject, and in view of the complexity of the subject of the

matter and the number of pages presented to us together with the opposing academic arguments, we do not feel that we can make a meaningful recommendation at this time. However, we are certainly willing to keep an open mind.

INDIVIDUAL OPINIONS

Richard Kinyon felt that the act may be premature in California and that we should put the burden on the proponents of the bill to justify the need for change in California law.

Terry Ross basically feels the same way as Dick Kinyon. He feels that the argument of uniformity among the states is not a particularly strong one because many Uniform Laws are not uniformly adopted among the states of the United States.

Lynn Hart feels that we need more time and more information before we can give meaningful input.

Michael Vollmer was strongly in favor of the act of the beginning of our conference call and still favors the adoption of the act. He stated as we concluded our call that he wanted to make sure that the Uniform Act allowed for reformation at or near the beginning of the ninety year period as well as at or near the end of the period. If so, he continues to support the adoption of the act.

William V. Schmidt has mixed emotions. He generally supports the act because of its simplicity, hopeful uniformity and those distinguished persons who support it. However, he

feels that Professor Dukeminier makes several good points in opposition to the act and he would very much like to hear Charles Collier or Ed Halbach, or both respond to the letter of Professor Dukeminier.

POINTS OF DISCUSSION

Michael Vollmer states that California law already includes a sixty year period and the extension from sixty to ninety is not something that he feels is that objectionable. He basically feels the new act is a great idea.

Many members of our team thought that if there is to be litigation validating or invalidating an interest under the rule against perpetuities, the sooner the litigation and its resulting final decision, the better for everyone concerned, unless there was a statue of limitations which prevented an attack against the validity of an interest after its period of time had run.

Lynn Hart expressed the concern that under the ninety year wait and see theory of the proposed act it would be extremely difficult to ascertain the transferor's intention for purposes for reformation after the passage of ninety years. She agreed with Dick Kinyon that its better to resolve the question of the validity or invalidity of the interest at the beginning and then reform the instrument if the interest is found to be invalid.

Terry Ross stated that present California law seemed fine to him and he is an advocate of the theory "If it ain't broke, don't fix it." Terry says that he is from Missouri and he wants to be shown and convinced that this would improve California law.

Our study team discussed how we would draw savings clauses if the new law were passed. Three of us agreed without opposition from the other two that we would probably use language which would say that our trusts would terminate either (1) twenty-one years after specified lives in being or (2) at the expiration of ninety years from the creation of the interest, whichever occurred last.

From our superficial study it seems to us that simplicity would only result if the present rule against perpetuities was completely abolished in favor of a flat ninety year period of time, or if savings clauses would be written to terminate an irrevocable trust only on the expiration of ninety years after the date of its creation. However, we do not feel that California lawyers, in drawing their savings clauses, will confine themselves only to the ninety year period when they have both periods available to them. Thus, the existing complexity with its alleged practical difficulties of administation would seemingly remain and the alleged simplicity of the Uniform Act is seemingly diminished.

SUMMARY

It is fair to say that all five members of the team presently have an open mind and agree that they could change their minds with additional input and information. However, in my opinion, the present position of Kinyon and Ross opposes the adoption of the act and the opinion of Hart was initially slightly in favor of the act and at the end of the conference slightly opposed to the act. The opinion of Vollmer was strongly in favor of the act subject to the question pertaining to the applicability of early reformation under the Uniform Act. I am slightly in favor of the act and would be more strongly in favor of the act but for some of the points made by Professor Dukeminier in his letter. Thus, our team is split in its opinion and needs more time and information before it feels it can make a meaningful recommendation.

Respectfully submitted,

STUDY TEAM NO. 1

By: _____
William V. Schmidt
Captain

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DAVID E. LICH
KENNETH G. PETRULIS

September 25, 1989

John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite d-2
Palo Alto, CA 94303-4739

Re: Memorandum 89-53, Study #L-3013
Uniform Statutory Rule Against Perpetuities

Dear Mr. DeMoully:

I am writing on behalf of the Legislative Committee of the Probate, Trust & Estate Planning section of the Beverly Hills Bar Association. We have reviewed the above memo and supplements.

We agree with the commentators who find the flat 90 year period both unreasonable and unworkable. The present system of allowing reform of an offending instrument works, but can be improved upon.

As both Charles Collier and the opponents of URAP note, good practitioners avoid the problem by drafting against it. We recommend to the Commission that it not enact URAP, but, instead, a savings clause as follows:

> "Perpetuities Savings Clause: Unless terminated earlier by the provisions of the instrument, all trusts which otherwise would violate the rule against perpetuities shall terminate twenty-one (21) years after the death of the last to die of the trust beneficiaries living at the time when the period of the Rule Against Perpetuities began to run or 21 years after that date if no beneficiary was then living. Upon termination the principal and undistributed income of the trust shall be distributed outright to the than-living beneficiaries of the trust in the same proportion that the beneficiaries are entitled to receive income when the trust terminates. If, at the time of termination the rights to income are not fixed by the terms of the trust, distribution shall be made , by right of representation, to the persons who are then entitled or authorized to receive trust payments."

Just as California has enacted savings clauses for estate tax

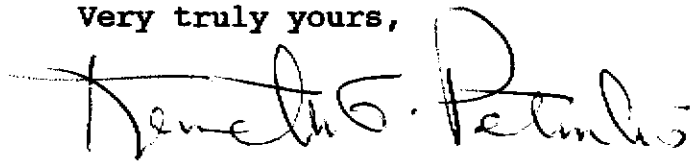
provisions, such a savings clause, which is almost universally used by good drafters, can reform the vast majority of instruments which run afoul of the RAP. Since this is only a savings clause, those who desire a different termination can always draft around it. This, after all, is what we do when we want to distribute an estate contrary to the rules of intestate succession.

This solution, as opposed to the URAP, preserves the existing body of law, while at the same time removing all but a small number of cases from the threat of litigation. Those limited cases, including, primarily, legal estates, as opposed to trusts, can also benefit if the present cy pres provisions are amended to include a direction to the court to insert a savings clause into the offending instrument, if that will cure the problem.

At the present time Illinois has a statutory savings provision which, from all indications, has worked well.

These proposals would retain the existing body of law and at the same time avoid court involvement for virtually all trusts. Neither would they have the liabilities of the flat 90 year period which others have commented on. Furthermore, the savings clause would place a 21 year limit, under part (b), on fanciful gifts such as the "gift to my dog Trixie and her progeny."

Very truly yours,



Kenneth G. Petrulis
BHBA P,T & E Section
Legislative Committee

KGP:ar

cc: Legislative Committee

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KENNETH G. PETRULIS

September 26, 1989

Jesse Dukeminier
Professor of Law
University of California at Los Angeles
School of Law
405 Hilgard Avenue
Los Angeles, CA 90024-1476

Re: Perpetuities

Dear Prof. Dukeminier:

Thank you indeed for your letter and materials on the Rule Against Perpetuities and Cy Pres Doctrine. In particular, we considered your objections to a Statutory Savings Clause and it's potential effect on homemade wills and other poorly drawn instruments. We acknowledge that, where the gifts are to living persons of a definable class, the savings clause will likely merely reform such gifts to make them effective. The problems those gifts present, with respect to determining membership in the class, will remain. However, this will be true whether there is a savings statute or not. The cy pres statutes are still available to solve these problems. Moreover, the fanciful types of gifts, such as "my dog Trixie," are solved by providing that, where there is no living beneficiary, the trust shall terminate after 21 years.

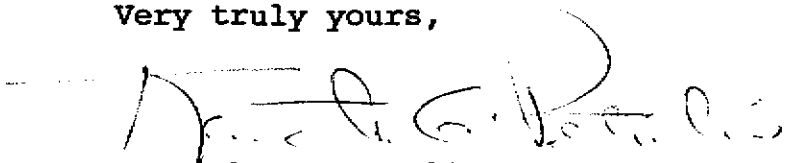
In either event, the settlor's intent will be carried out, but only for a period of time. The public's interest, as expressed by the Rule Against Perpetuities, will likewise be given effect to terminate the trust within a specified period of time.

We know that this does not permit the use of cy pres at an early time, to give immediate solution. We feel, however, that whatever statutory reform is proposed should not increase the amount of Court involvement. An immediate cy pres statute would do this. The Statutory Savings Clause, in fact, does give an immediate result, since it specifies who will receive the principal at the termination of the trust, and does not leave that determination to a later date.

While proposing this savings clause we, at the same time, would support the inclusion of a savings clause in the cy pres statute and, of course, support retention and/or any reforms that you would suggest to the cy pres laws and have made clear our opposition to the Uniform Rule Against Perpetuities.

Thank you again for your colloquoy on these matter.

Very truly yours,



Kenneth G. Petrulis

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cc: Legislative Committee

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LAWRENCE W. WAGGONER
Lewis M. Simes Professor of Law

May 27, 1989

Mr. Stan Ulrich
California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303

Re: Uniform Statutory Rule Against Perpetuities

Dear Stan:

Per our telephone conversation of Thursday, I'm enclosing the letters from prominent academics in support of the Uniform Statutory Rule Against Perpetuities (Uniform Act) and other endorsements of the Uniform Act.

Although you already have a copy of my article in the Cornell Law Review, I'm enclosing another one, which updates the enactments to date -- Connecticut, Florida, Michigan, Minnesota, Nevada, Oregon (passed by both houses of the Oregon legislature and sent to the governor for signature), and South Carolina. I also want to draw your attention to footnotes 4 and 21, which are especially relevant to current California law on perpetuities. See also the enclosed letter from Professor Mary Louise Fellows, which gives further advantages of the Uniform Act as compared to the "immediate cy pres" approach.

A point we did not get around to discussing Thursday is the exclusion of commercial transactions from the Rule (§ 4(1)). For the reasons explained in the Comment to Section 4, this is an extremely desirable step. The period of the Rule Against Perpetuities is an inappropriate measure for the validity of commercial transactions. As the Comment to section 4 notes, however, the exclusion of commercial transactions does leave the common-law rules on unreasonable restraints on alienation as the only control on those certain types of commerical transactions that restrain the alienability of property or provide a disincentive to improve the property. I speak principally of options in gross and leases to commence in the future.

As the Comment to Section 4 notes, the Drafting Committee

drafted a set of statutory provisions to limit the duration of these particular types of commercial transactions. I'm enclosing a copy of those statutory provisions, in case you would want to recommend their inclusion. As you will see, they can either be adopted as a freestanding Act or set of sections, or as an addition to section 4 of the Uniform Act. These provisions are superior to using the rule against perpetuities itself as the control on options, etc. Under the common-law Rule, an option in gross that could be outstanding for more than a life in being plus 21 years is invalid from its inception; under the wait-and-see version of the Rule, they would be valid for 90 years. Invalidating such options, etc., from their inception is unnecessarily harsh and allowing them to endure for 90 years is too lenient. The 30 or 40 year limit seems the better solution. Please give me a call if you want to discuss them further.

I hope you will send Professor Ed Halbach, at Berkeley, a notice of the July 13 hearing. He has taken an interest in perpetuity reform and, as his enclosed letter indicates, supports the adoption of the Uniform Act. He may wish to communicate further with the Commission, either by letter or in person.

Sincerely,

Larry Waggoner

Encl.

The provisions on options in gross, etc., as an addition to section 4 of USRAP:

Section 4. EXCLUSIONS FROM STATUTORY RULE AGAINST PERPETUITIES; TIME LIMIT ON OPTIONS IN GROSS AND CERTAIN OTHER INTERESTS IN LAND[; HONORARY TRUSTS].

(a) EXCLUSIONS. Section 1 (statutory rule against perpetuities) does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty of support, or (viii) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest, power of appointment, or

arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State.

(b) OPTIONS IN GROSS, ETC. An option in gross with respect to an interest in land or minerals or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land or minerals becomes invalid if it is not exercised within [30] [40] years after its creation.

(c) LEASES TO COMMENCE IN THE FUTURE. A lease to commence at a time certain or upon the happening of a future event becomes invalid if its term does not actually commence in possession within [30] [40] years after its execution.

(d) NONVESTED EASEMENTS. A nonvested easement in gross becomes invalid if it does not vest within [30] [40] years after its creation.

[Optional provision for states that do not have a "reverter statute."]

[(e) POSSIBILITIES OF REVERTER, ETC. A possibility of reverter, a right of entry, or an executory interest preceded by a fee simple determinable or a fee simple subject to an executory limitation becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the possibility of reverter, right of entry, or executory interest does not vest in possession within [30] [40] years after its creation.]

[Optional provision for validating and limiting the duration of so-called honorary trusts.]

[(e) [(f)]. HONORARY TRUSTS. A trust for the care of a specific domestic or pet animal, for a noncharitable corporation or unincorporated society, or for a lawful noncharitable purpose may be performed by the trustee for 21 years, whether or not there is a beneficiary who can seek the trust's enforcement or termination and whether or not the terms of the trust contemplate a longer duration.]

As the Comment to Section 4 of the Uniform Statutory Rule Against Perpetuities indicated, the Drafting Committee was concerned that certain types of commercial transactions potentially restrict the alienability of property. The Drafting Committee drafted a statute that addresses this problem, which could be added as a free standing Act accompanying USRAP. (The following Act has not been submitted to or approved by the Uniform Law Commissioners.)

AN ACT TO IMPOSE A TIME LIMIT
ON OPTIONS IN GROSS AND CERTAIN OTHER
INTERESTS IN LAND OR MINERALS[; HONORARY TRUSTS]

Section 1. OPTIONS IN GROSS, ETC. An option in gross with respect to an interest in land or minerals or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land or minerals becomes invalid if it is not exercised within [30] [40] years after its creation.

Section 2. LEASES TO COMMENCE IN THE FUTURE. A lease to commence at a time certain or upon the happening of a future event becomes invalid if its term does not actually commence in possession within [30] [40] years after its execution.

Section 3. NONVESTED EASEMENTS. A nonvested easement in gross becomes invalid if it does not vest within [30] [40] years after its creation.

[Optional provision for states that do not have a "reverter statute."]

[Section 4. POSSIBILITIES OF REVERTER, ETC. A possibility of reverter, a right of entry, or an executory interest preceded by a fee simple determinable or a fee simple subject to an executory limitation becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the possibility of reverter, right of entry, or executory interest does not vest in possession within [30] [40] years after its creation.]

[Optional provision for validating and limiting the duration of so-called honorary trusts.]

[Section 4 [5]. HONORARY TRUSTS. A trust for the care of a specific domestic or pet animal, for a noncharitable corporation or unincorporated society, or for a lawful noncharitable purpose may be performed by the trustee for 21 years, whether or not there is a beneficiary who can seek the trust's enforcement or termination and whether or not the terms of the trust contemplate a longer duration.]